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BEFORE THE
SURFACE TRANSPORTATION BOARD

STB EX PARTE NO. 586



ARBITRATION - VARIOUS MATTERS RELATING TO ITS USE
AS AN EFFECTIVE MEANS OF RESOLVING DISPUTES
THAT ARE SUBJECT TO THE BOARD'S JURISDICTION

INITIAL COMMENTS OF THE
ASSOCIATION OF AMERICAN RAILROADS

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Dated: November 21, 2001

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**INITIAL COMMENTS OF THE
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The Association of American Railroads (“AAR”) hereby submits these initial comments on behalf of itself and its individual members in response to the Board’s September 20, 2001 Decision (“*September 20 Decision*”) initiating this proceeding. AAR’s comments address the issues related to the merits of legislation that would require binding arbitration of small rail rate disputes. AAR understands that the Board intends through this proceeding to build a record on that subject that it will provide to Congress. *September 20 Decision* at 3.

AAR applauds the Board for exploring whether additional measures are appropriate to encourage the consensual, private resolution of rail/shipper rate disputes that involve relatively small amounts of money. Recognizing the value of negotiated resolutions, AAR’s member railroads maintain an active dialogue with their customers on a range of commercial matters designed to prevent disputes from arising, and work to resolve them informally when they do. AAR’s members thus have supported previous Board initiatives to enhance that dialogue and they continue to pursue individual efforts to promote rail/shipper

discussions. In addition, AAR supported the adoption by the Board in Ex Parte No. 560 of the voluntary arbitration rules set forth at 49 CFR Part 1108 and the Board's implementation in Ex Parte No. 55 (Sub No. 83) of the voluntary alternative dispute resolution rules set forth at 49 CFR Part 1109.¹ And AAR recognizes the principle, embodied in 49 U.S.C. § 10701(d)(3), of developing and applying simplified, less expensive standards for resolving small rate disputes.²

However, for the reasons described in more detail in Section I of these comments, AAR does not believe that legislation prescribing mandatory arbitration of small rate disputes is an appropriate response to those who are calling for yet additional measures to address small shipper rate disputes. The various existing measures for the voluntary resolution of disputes, and the simplified rate standards already in place, have not yet been used and thus consideration of any statutory change is premature. Further, because mandatory arbitration is coercive by nature, a statute requiring arbitration would not constitute or foster private dispute resolution any more than the current statute providing for resolution through Board procedures. Claimed expense savings for parties may prove illusory as well since arbitration can be just as costly as litigation. Indeed, mandatory arbitration conducted under ICCTA standards would merely be an inferior substitute for adjudicatory proceedings before the Board, an expert body established in part to conduct such proceedings.

¹ See *Arbitration of Certain Disputes Subject to the Statutory Jurisdiction of the STB*, STB Ex Parte No. 560 (STB served Sept. 2, 1997) (adopting Part 1108 rules); *Use of Alternative Dispute Resolution Procedures*, 8 I.C.C.2d 657 (1992) (adopting Part 1109 rules).

² See *Rate Guidelines – Non-Coal Proceedings*, 1 S.T.B. 1004, 1008 (1996), *pet. for review dismissed as unripe sub nom. Association of American Railroads v. STB*, 143 F.3d 942 (D.C. Cir. 1998) (establishing rate guidelines in response to the “search for simpler, less expensive procedures for assessing rate reasonableness in small cases.”) As the Board is aware, AAR advocates a different methodology than that adopted by the Board in the cited proceeding. AAR continues, however, to support the goal of simplified standards for small rate cases.

As discussed in Section II of these Comments, mandatory arbitration conducted in the *absence* of substantive ratemaking standards would, in AAR's view, be far worse than the current regime. Results would not be grounded in the standards and policies of ICCTA. Further, consistency and predictability -- the hallmarks of sound administrative decisionmaking by an expert agency -- would be sacrificed, with no offsetting benefits.

AAR thus proposes in Section III of these Comments that, if the Board determines that any further steps are needed to address small shipper concerns, it adopt a mediation procedure tailored to encourage the private settlement of disputes, similar to procedures utilized by many federal courts. Mandatory, non-binding mediation undertaken under the auspices of knowledgeable Board staff would facilitate the private dispute resolutions that the Board seeks to promote and can be designed to achieve cost and time benefits for all parties. Such a mediation procedure would not appear to require any statutory change.

I. The Board's Preference for Efficient Private Sector Dispute Resolution Does Not Support a Mandatory Arbitration Procedure

AAR shares the Board's desire to encourage "private-sector resolutions of disputes outside of [the Board's] formal process where possible." *September 20 Decision* at 1. AAR thus supports the Board's proposal to add a requirement to the 49 CFR Part 1111 formal complaint procedures that, in those cases potentially arbitrable under Part 1108, the complainant represent that it has considered seeking voluntary arbitration but decided against it or could not obtain the agreement of all parties to the dispute. AAR agrees that such a rule would serve as a useful reminder to the parties of the availability of the Part 1108 procedures, which, to AAR's knowledge, have not been employed to date. The adequacy of those procedures with respect to small rate cases should be tested before any statutory change is considered, and the proposed rule may facilitate the use of the Part 1108 procedures.

It is not clear to AAR, however, why the preference for private sector dispute resolution should have led to a consideration of whether mandatory arbitration should be legislatively prescribed for small rate disputes. Several considerations, in fact, suggest that a statutory requirement of binding arbitration for small rate disputes would not constitute sound public policy.

First, as a threshold matter, AAR is not aware that either the *binding* standards developed for “simpler, less expensive” adjudication of small rate cases in Ex Parte No. 347 (Sub No. 2) or the *voluntary* dispute resolution procedures of Part 1108, which were designed “to save costs and reduce litigation burdens on parties to disputes that might otherwise have been brought to the Board,”³ have been used, much less that shippers have found them to be unsatisfactory. Likewise, AAR does not believe that the Part 1109 alternative dispute resolution rules have been invoked to date. In the absence of any experience with the existing mechanisms for resolving small rate disputes, and recognizing too that the Board already maintains a Rail Consumer Assistance Program prominently displayed on its website, AAR submits that it is premature to suggest that new mechanisms are needed to assist small shippers wishing to pursue rate disputes. This is particularly true regarding a mechanism, such as mandatory arbitration, that might require a fundamental change to the current statute and the sacrifice of critical benefits associated with administrative adjudication of disputes.⁴ Indeed, the fact that existing procedures designed to address small disputes have not been employed by small shippers suggests that the

³ See *Arbitration of Certain Disputes Subject to the Statutory Jurisdiction of the Surface Transportation Board*, Ex Parte No. 560 at 2.

⁴ The current rail transportation policy forcefully supports the proposition that government should not seek to invent a solution for nonexistent problems. AAR notes in particular the policy “to minimize the need for Federal regulatory control over the rail transportation system. . . .” 49 U.S.C. §10101(2).

purported problem that gave rise to the Board's proposal may be illusory. Inaction before the agency seems an implausible basis for congressional imposition of mandatory arbitration.

Second, mandatory arbitration of small rate disputes should not be legislatively prescribed because it is, by its nature, coercive and therefore would not foster the private sector dispute resolution that the Board seeks to promote. Voluntary arbitration is consensual and thus can promote private dispute resolution, but mandatory arbitration is no more likely to foster *private* resolution than are existing formal Board procedures for resolving disputes.

It bears note in this connection that the vast majority of arbitrations, including those contemplated in parts 1108 and 1109 of the Board's Rules of Practice, are undertaken as a result of a voluntary decision of the parties, not as a consequence of legislative mandate. Even where parties become bound to arbitrate a dispute, the *source* of that binding commitment is almost always a voluntary agreement to arbitrate, as is typically the case with commercial contracts subject to arbitration. The railroad industry's agreement with NGFA, referenced in the *September 20 Decision*, is an example of an obligation to arbitrate that came into being only because the parties voluntarily agreed to impose this obligation on themselves. Similarly, AAR has entered an agreement with the National Mining Association that provides for a voluntary dispute resolution process.

By contrast, a statutory requirement that parties arbitrate small rate disputes would not be consensual in any sense. It would differ from administrative adjudication only to the extent that the *compulsory process* for dispute resolution would be conducted in a private setting, rather than as a public proceeding. In effect, one set of mandatory procedures would be replaced with another, inferior set.

Third, in fashioning a binding arbitration procedure, a threshold determination would have to be made as to whether the arbitration process would entail application of substantive ICCTA standards, adherence to precedent and observance of the core protections governing administrative adjudication, or whether the process would allow the arbitrator to render a decision unfettered by statutory standards and regulatory principles. If the former route were chosen -- and for reasons described in the next section AAR submits that the "no standards" alternative is unacceptable -- such a regime would not necessarily offer any time or expense advantage over the current framework for adjudication before the Board. In fact, to the extent that ICCTA standards are to govern any arbitration of a small rate dispute (as they should), then the party that loses the arbitration should in fairness have the right to appeal that decision to the Board to ensure consistency and accuracy in the interpretation of the statute. In this scenario, however, time and expense would actually increase as parties would in effect be forced to expend additional resources and effort litigating their dispute twice -- once before the arbitrator and then a second time before the Board on appeal.⁵

Fourth, even if no right of appeal were provided, mandatory arbitration might not yield savings of time and money. Litigating a case before an arbitrator does not necessarily entail any less effort and expense than litigation before the Board. Attorneys (and possibly experts) would still be retained, discovery undertaken, and evidence and argument prepared and

⁵ Any such appeal would, presumably, be based on the same standards for appeal to the Board set forth in the Part 1108 rules, namely, that the award either exceeds the Board's jurisdiction or "does not take its essence from the Interstate Commerce Act." 49 C.F.R. § 1108.11(c). AAR presumes that an appeal of an arbitral decision might also be taken to an appropriate federal court under the standards for review set forth in the Federal Arbitration Act, 9 U.S.C. § 10, and that review of any Board decision on an appeal of an arbitral decision could be pursued in a federal appellate court under the terms of the Hobbs Act, 28 U.S.C. §§ 2321, 2342.

(Continued ...)

presented. In other words, while an arbitration may be conducted with somewhat less formality, it is still an adversarial proceeding and the parties must bear similar burdens to those that they would bear in a formal proceeding before the Board. The expense savings that some might envision could, accordingly, be illusory. In fact, studies comparing the costs of arbitration and litigation have shown that arbitration is not necessarily less costly or time-consuming than litigation.⁶

Fifth, it could be difficult to find a sufficient number of arbitrators with expertise in rail transportation and without longstanding ties to rail or shipper interests. Due to the relatively small size of the railroad industry and the rail commerce bar, there is not a large supply of individuals with expertise in rail transportation matters, much less the technical issues that are posed in rail rate disputes. Further, the majority of those with expertise are closely associated with either rail or shipper interests. Accordingly, AAR questions whether there is a sufficient number of impartial arbitrators with the requisite expertise to effectively arbitrate rate disputes. On the other hand, such expertise obviously resides at the Board. It is thus not clear to AAR what advantage would accrue from replacing this administrative agency expertise with arbitrators who are unlikely to bring the same depth of knowledge and experience to the

These various opportunities for Board review and appeal further underscore that an arbitration approach would not necessarily save parties time or expense.

⁶ See Michael Z. Green, *Debunking the Myth of Employer Advantage From Using Mandatory Arbitration for Discrimination Claims*, 31 Rutgers L.J. 399, 401, 421-422 (Winter 2000) (noting that, "despite purported cost benefits from using alternative dispute resolution ("ADR"), arbitration can be just as expensive as litigation if not more costly.") Citing numerous sources, this article notes that there is no definitive study demonstrating that arbitration is any more cost effective than litigation and discusses empirical and anecdotal evidence to the contrary.

proceeding.⁷ As the Supreme Court has recognized, "One of the purposes which led to the creation of [expert administrative agencies] is to have decisions based on evidential facts under the particular statute made by experienced officials with an adequate appreciation of the complexities of the subject which is entrusted to their administration." *See Beth Israel Hospital v. National Labor Relations Board*, 437 U.S. 483, 504 (1978), quoting *Republic Aviation Corp. v. National Labor Relations Board*, 324 U.S. 793, 800 (1945); *Pejepscot Indus. Park, Inc. v. Maine Central R.R. Co.*, 215 F.3d 195, 205-206 (1st Cir. 2000) (recognizing that expert agencies such as the STB were established to address matters raising technical and complex regulatory issues).

II. Mandatory Arbitration Unfettered by ICCTA and Governing Regulatory Principles Would Undermine the Existing Statute and Lead to Inconsistent and Unpredictable Results

AAR recognizes that one of the Board's apparent objectives in addressing mandatory arbitration is to solicit views on a process that is more "practical" and less expensive than administrative adjudication.⁸ Thus, one model of arbitration on which the Board has solicited comment is "final offer" type arbitration, a form of arbitration that would *not* entail the application of fixed regulatory standards to the dispute or, presumably, a meaningful right to

⁷ Arbitration conducted under ICCTA standards would, in all likelihood, call for the arbitrator to make detailed cost calculations, among other complex technical determinations. There can be no serious dispute that the Board and its expert staff are better suited to make such determinations than private arbitrators.

⁸ *See September 20 Decision* at 3 (noting that the Board continues "to hear from smaller rail customers . . . that our formal procedures are still impractical for the limited amounts of traffic that they ship, and that they are thus effectively precluded from obtaining relief from what they consider to be unreasonably high rail rates.").

Board review.⁹ Rather than adhering to the Part 1108 model, which requires that the Arbitrator be "guided by the Interstate Commerce Act and by STB and ICC precedent,"¹⁰ this contemplated form of arbitration apparently would be conducted without reference to external substantive standards such as the regulatory standards imposed by ICCTA. AAR believes that such arbitration would be contrary to sound policy for reasons in addition to those discussed above and would potentially undermine existing provisions of ICCTA.¹¹

First, cases involving small shippers would be decided without clear standards. In particular, there would be no nexus in an individual case between the arbitrator's decision and the provisions of national rail transportation policy or other relevant statutory standards embodied in ICCTA. This result would undermine existing statutory provisions, particularly the requirement that, in determining the reasonableness of a rate, the Board shall "recogniz[e] the policy . . . that rail carriers shall earn adequate revenues. . . ." 49 U.S.C. § 10701(d)(2).¹² Standardless arbitration would be inconsistent with one of the key purposes underlying the creation of an administrative body such as the Board, namely the creation of a set of informative

⁹ The legislative measure noted in the *September 20 Decision*, S. 1103, the Railroad Competition Act of 2001, contemplates this form of arbitration.

¹⁰ 49 C.F.R. § 1108.3.

¹¹ In the *September 20 Decision*, the Board notes at page 5 that "'final offer' – also known as 'baseball-style' – arbitration is available for rail rate disputes in Canada." In joint comments being filed in this proceeding, Canadian National Railway Company and Canadian Pacific Railway Company, two Canadian railroads which are AAR members, discuss in detail the flaws associated with final offer arbitration as it has been implemented in Canada. AAR concurs in the views of CN and CP on this issue.

¹² Standardless arbitration of all rate disputes, large and small, as NIT League advocates, would exacerbate this problem and effectively override the congressional determination that railroads should have the opportunity to earn adequate revenues. AAR is unequivocally opposed to NIT League's proposal.

precedents based on the application of fixed statutory standards to disputes that arise in an industry that Congress has chosen to regulate. The predictability borne of the uniform application of standards -- an important factor influencing business decisions by railroads and shippers -- would be sacrificed.

Second, the lack of fixed decisionmaking standards, coupled with the sacrifice of Board expertise, would virtually assure a lack of consistency in results. Whether a party wins or loses a proceeding should not depend on the vagaries of a particular arbitrator's view of the merits of a dispute but rather on the consistent application of relevant principles and precedents to the facts at hand. The Supreme Court has thus observed that resort to administrative agencies with special competence in the issues relating to a particular industry will secure the benefits of "[u]niformity and consistency in the regulation of business entrusted to a particular agency . . .¹³ Board decisionmaking can -- and was designed to -- achieve these very benefits, which would be sacrificed under any system that would allow for the application of random, non-uniform decisions to small shipper rate disputes.¹⁴

¹³ *Far East Conference, et al. v. United States*, 342 U.S. 570, 574 (1952). See also *United States v. Western Pacific R.R. Co.*, 352 U.S. 59, 64 (1956); *DeBruce Grain, Inc. v. Union Pacific R.R. Co.*, 149 F.3d 787, 789 (8th Cir. 1998); *Union Pacific R.R. Co. v. FMC Corp.*, 2000 WL 134010 (E.D. Pa. Feb. 3, 2000) at *2 (each observing that Congress entrusted specialized regulatory matters to administrative agencies, such as the STB and its predecessor, to promote "uniformity" and consistency).

¹⁴ See, e.g., Kenneth Culp Davis and Richard J. Pierce, *Administrative Law Treatise*, Vol. I at § 2.8 (1994) (noting that one of the benefits of expert agency adjudication is "superior results in terms of accuracy and consistency."); Stein, Mitchell, et al., *Administrative Law*, Volume I at § 1.01[2] (observing that among the justifications of modern administrative process is that "the unique expertise that administrative agencies have in their allotted fields makes them best qualified to anticipate and prevent or minimize potentially adverse economic consequences.").

III. Mandatory, Non-Binding Mediation is a Feasible Means of Fostering Private Sector Dispute Resolution

As discussed above, mandatory arbitration of small rate cases would not accomplish the Board's goal of encouraging private resolution of disputes, would not necessarily save litigants time or expense and suffers from other serious flaws. Given these drawbacks of mandatory arbitration, AAR proposes a different approach for the Board's consideration. Specifically, to the extent that the Board is persuaded that any new procedures are needed at all -- and for the reasons stated above, AAR is not persuaded that new procedures should be adopted unless and until existing procedures for addressing small rate cases have been tried and found to be unsatisfactory by small shippers -- those new procedures should take the form of mandatory, non-binding mediation. Mediation overseen by Board staff would be consistent with the approach taken by federal courts to assist parties in reaching negotiated settlements and would be consistent with the Board's objective of encouraging consensual resolutions. It also would allow parties to benefit from the expertise of a dedicated corps of Board officials who, under AAR's proposal, could be assigned to mediate disputes in a manner that would allow them to bring ICCTA principles to bear on disputes in a cost-effective and efficient manner. Moreover, the Board could adopt a mediation program without obtaining new statutory authority, since such a program would not supplant Board decisionmaking, but, like the Part 1108 rules, would provide an alternative to formal Board procedures.

Mandatory mediation of small rate disputes would not necessarily result in the resolution of all such disputes, but at a minimum it would assure that any shipper dissatisfaction with rates on small movements came to a railroad's attention. AAR does not agree with allegations that its members sometimes overlook the interests of small shippers, but mandatory mediation would resolve any shipper concern in that regard, whether or not there is a basis for it.

A. Non-Binding Mediation is Widely Recognized as an Effective Means of Encouraging Dispute Resolution

In considering precedents for establishing an efficient means of assisting parties to rate disputes to reach a negotiated resolution, the Board need look no farther than the numerous federal district courts which have established mediation programs as an alternative to litigation. For example, in May 2001, the U.S. District Court for the District of Columbia adopted rules establishing a United States District Court Mediation Program that was "designed to give litigants an opportunity to discuss settlement of their claims with the help of a trained, neutral third party." See D.D.C. Local Civil Rule 84, copy attached. The cited rule states, in relevant part, as follows:

Mediation, while not appropriate in all cases, can benefit many litigants. It can, for example, lead to resolutions more quickly, with less expense and with results that are more satisfying to the litigants than those that result from judicial disposition of a claim.

The D.C. District Court's Mediation Program is offered on a *pro bono* basis. It is described in the Court's rules as a "flexible, non-binding, confidential process in which a neutral lawyer facilitates settlement negotiations." See D.D.C. Local Rule 84.2. The mediator thus probes the strengths and weaknesses of each party's position, identifies key issues, offers (where appropriate) an evaluation of the merits of the case and seeks to expand the scope of traditional settlement discussions. The mediation process is handled by qualified, trained attorneys and the process is conducted subject to requirements for confidentiality. See D.D.C. Local Rules 84.3, 84.9. The process is informal and, apart from the required submission of mediation statements by each party, the procedures are flexible. See D.D.C. Local Rule 84.6, 84.7. In appropriate cases, the Court can require litigants to participate in mediation after giving them an opportunity,

by means of a show cause order, to explain why mediation would not be appropriate. *See* D.D.C. Local Rule 84.4.

Numerous other federal district courts, as well as United States Courts of Appeals including the D.C. Circuit, maintain similar mediation programs, and the local rules of many courts encourage, or in some instances require, mediation of certain categories of cases.¹⁵ According to a study of alternative dispute resolution in the federal courts, "Mediation has emerged as the primary ADR process in the federal district courts," with over one half of the courts offering or requiring mediation, far more than offer arbitration.¹⁶ For example, the local rules of the Middle District of North Carolina provide for automatic selection of certain categories of cases for mediation, as well as for selection of cases by the Court or by stipulation of the parties. *See* M.D.N.C. Local Rule 83.10.

These federal court dispute resolution programs, as well as those of various federal agencies, are specifically authorized by the Alternative Dispute Resolution Act of 1998 ("ADR Act"), 28 U.S.C. § 651, *et seq.*, a statute designed to encourage voluntary dispute resolution. The Congressional policy findings set forth in that statute state that certain forms of alternative dispute resolution, "including mediation, early neutral evaluation, minitrials, and *voluntary* arbitration" may have the potential to reduce court backlogs. *See* ADR Act, 28 U.S.C. § 651 (Note) (emphasis added). Consistent with this policy expression, the ADR Act does *not* establish a mandatory arbitration procedure; to the contrary, it provides that arbitration may be used by courts with respect to civil actions "when the parties consent." 28 U.S.C. § 654(a).

¹⁵ *See, e.g.*, April 4, 1998 Order of the U.S. Court of Appeals for the District of Columbia Circuit establishing an Appellate Mediation Program.

¹⁶ *See* Federal Judicial Center and CPR Institute for Dispute Resolution, *ADR Settlement in the Federal District Courts* (1996) at 4.

The Board should be guided by similar principles in fashioning any new alternative dispute mechanisms. It should also recognize that the U.S. Department of Transportation has adopted an Interim Statement of Policy on Alternative Dispute Resolution that is based on the "consensual" approach to dispute resolution embodied in the ADR Act. *See* 65 Fed. Reg. 69121 (Nov. 15, 2000). *See also* <http://www.dot.gov//adr/>. DOT's Policy Statement makes clear that various methods of dispute resolution, including mediation, are available to resolve a range of disputes, including contract disputes and bid protests, that might otherwise be the subject of more formal adjudication before the Department or one of its subsidiary agencies. The Federal Aviation Administration, for example, has set up an Office of Dispute Resolution for Acquisition, the services of which are available with the concurrence of the parties, and other DOT agencies have similarly employed voluntary mediation and other consensual means to resolve disputes. *See* 65 Fed. Reg. at 69125. In none of these cases, however, are parties required to engage in binding arbitration. While it appears that the Board is not technically subject to DOT's dispute resolution policy and programs, it is clear that applying mandatory arbitration procedures to Board proceedings would mark a significant departure from the approach adopted by the Department of which the Board is a part.

The Board should also consider that other federal agencies have established programs that provide mediation and other voluntary dispute resolution services to parties with respect to adjudicated disputes that are analogous to the types of rate disputes that arise before the Board. For example, the Federal Energy Regulatory Commission ("FERC") maintains a Dispute Resolution Service ("DRS") office that provides ADR information to litigants, as well

as mediation services, in rate cases.¹⁷ Among other services, the DRS team helps the parties identify third party neutrals from within or outside FERC and provides other assistance toward the end of reaching consensual resolution of disputes. The DRS services are available on a voluntary basis at the request of the parties or in situations where the agency believes that alternative dispute resolution may be appropriate.

AAR submits that the Board should model any alternative procedure that it might recommend for small rate dispute cases on these types of mediation programs. Mediation is the best means of attaining the goal that AAR believes the Board is seeking in this proceeding, efficient and negotiated resolutions of small rate disputes that, in the absence of such alternative procedures, might be too expensive or time-consuming to litigate.

B. Proposed Procedures for Non-Binding Mediation

In this section of its comments, AAR offers its views concerning the procedures that the Board should adopt to best facilitate non-binding mediation of small rate disputes.

As an initial matter, a shipper in a small rate case who satisfies the criteria of quantitative and qualitative market dominance should be entitled to request non-binding mediation as a matter of right.¹⁸ It might do so either by filing a formal complaint under Board procedures, coupled with a request for mediation (which would serve to hold any formal proceeding in abeyance pending completion of the mediation), or by filing a request for mediation with the Board with respect to a dispute as to which no complaint has been filed. The filing of a request in this latter circumstance would not stop the relevant limitations period from running. The

¹⁷ See <http://www.ferc.gov/legal/drs/drs.htm>

¹⁸ As contemplated in the Board's September 20 Decision, a shipper invoking mediation would retain its current burden of demonstrating that it is paying more than 180% of variable costs and that it has no readily available intermodal or intramodal competitive alternatives.

request for mediation should specify the relevant facts and nature of dispute in sufficient detail to frame the issues requiring mediation, and the shipper should be required to serve a copy on the defendant railroad in the manner specified in the Board's rules. The Board should not impose any filing fees with respect to requests for mediation filed with it.

The mediation triggered by the filing of the request for mediation should be presided over by an STB staff official drawn from a group of STB officials specifically designated to preside over such mediations. Such staff officials would be precluded from participating in any subsequent adjudication before the agency that might follow in the event the mediation does not resolve the dispute.

In seeking to resolve the dispute, the mediator would recognize substantive rate reasonableness standards that draw their essence from ICCTA, including the standard that the resolution of the dispute must take account of the carrier's need to earn adequate revenues. The mediator would offer views to the parties as to the merits of their case and the likelihood of success based on Board precedents and policies in formally adjudicated cases.

The precise procedure that would be used to facilitate the mediation would be up to the mediator, who might for example require the parties to offer written statements as to their positions and/or conduct joint and separate meetings with each party. The procedures used, however, would be designed to avoid imposing significant resource burdens on either party and would in all events be informal. The entire process, including any written submissions to the mediator, would be private and confidential.

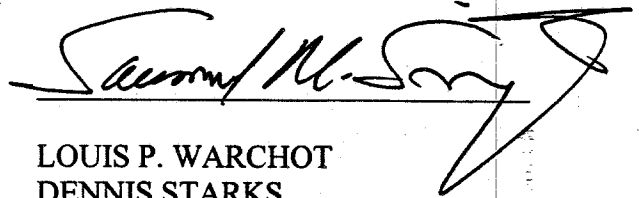
Further, the Board might consider adopting measures designed to ease the cost and time commitment for small shippers associated with any mediation. For example, any meetings between the parties related to the mediation, or any meetings between the small shipper

and the mediator, would take place at a geographic location convenient to the shipper, so that expense incurred in travelling to a distant site (Washington, DC) would not deter small shippers from initiating mediations.

CONCLUSION

For the above stated reasons, AAR urges the Board to incorporate views consistent with the above in any submission it makes to Congress as a consequence of this proceeding.

Respectfully submitted,



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Dated: November 21, 2001

ATTACHMENT

U.S. DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

LOCAL CIVIL RULE 84

LCvR 84. MEDIATION—PURPOSE AND SCOPE OF RULES

(a) These rules govern the administration of the United States District Court Mediation Program. The Mediation Program was designed to give litigants an opportunity to discuss settlement of their claims with the help of a trained, neutral third party. Mediation, while not appropriate in all cases, can benefit many litigants. It can, for example, lead to resolutions more quickly, with less expense and with results that are more satisfying to the litigants than those that result from judicial disposition of a claim. The Court makes mediation services available to litigants on a pro bono basis.

(b) These rules apply only to mediation proceedings that are formally conducted through the United States District Court's Mediation Program. Nothing in these rules shall preclude litigants from independently retaining a private mediator or other ADR professional to facilitate negotiations in their case.

[Effective May 17, 2001.]

LCvR 84.1 ADMINISTRATION OF MEDIATION PROGRAM

(a) The United States District Court Mediation Program is administered by the Office of the Circuit Executive for the United States Courts for the District of Columbia Circuit. The mediation staff consists of a Director and Deputy Director of Dispute Resolution, who are responsible for assigning cases to qualified volunteer mediators and providing parties with the proper notification and instructions. They also oversee volunteer training, monitor the progress of mediated cases, collect pertinent statistical information and serve as a resource for program mediators as they work on cases.

(b) The Director and Deputy Director of Dispute Resolution may be reached at the following address and phone numbers:

Office of the Circuit Executive
E. Barrett Prettyman United States Courthouse
333 Constitution Avenue N.W.
Washington D.C. 20001
(202) 216-7350
fax: (202) 273-0331

The Court encourages litigants and counsel to contact these officials to secure general information about the Mediation Program, to discuss the suitability of mediation for a particular case, or to raise any concerns they may have about the operation of the Program.

[Effective May 17, 2001.]

LCvR 84.2 DESCRIPTION OF THE MEDIATION PROCESS

(a) **Description.** Mediation is a flexible, non-binding, confidential process in which a neutral lawyer-mediator facilitates settlement negotiations. The mediator improves communication across party lines, helps parties articulate their interests and understand those

of their opponent, probes the strengths and weaknesses of each party's legal position, helps identify key legal and factual issues, identifies common interests and areas of agreement and helps generate options for a mutually agreeable resolution of the dispute. If appropriate, the mediator may provide an evaluation of the merits of the case. A hallmark of mediation is its capacity to expand traditional settlement discussion and broaden resolution options, often by exploring litigant needs and interests that may be independent of the legal issues in controversy.

(b) **Limits on Role of Mediator.** The mediator has no authority to render a decision or to dictate a settlement.

[Effective May 17, 2001.]

LCvR 84.3 MEDIATORS

(a) **Panel.** The Court shall maintain a panel of mediators serving in the Mediation Program. Mediators will be selected from time to time by the Court from applications submitted by lawyers willing to serve on a volunteer basis. The Director and Deputy Director of Dispute Resolution may also serve as mediators.

(b) **Qualifications and Training.** Each lawyer serving as a mediator in the Court's Mediation Program shall be a member of the bar of this Court and shall successfully complete training as required by the Court. Additional minimum requirements for serving on the Court's panel of mediators, which the Court may modify in individual circumstances, are as follows:

(1) Mediators shall have been admitted to the practice of law for at least ten years and shall be knowledgeable about civil litigation in federal court.

(2) Mediators shall have strong mediation process skills and the temperament and training to listen well, facilitate communication across party lines and assist the parties with settlement negotiations.

(c) **Mediator Immunity.** All lawyers serving as mediators in the Court's Mediation Program are performing quasi-judicial functions and shall be entitled to absolute quasi-judicial immunity for acts performed within the scope of their official duties.

(d) **Complaints Against Mediators.** Complaints against a mediator or concerns about a mediator's performance shall be brought to the attention of the Director of Dispute Resolution. The parties shall not bring such complaints to the attention of the assigned judge.

[Effective May 17, 2001.]

LCvR 84.4 REFERRAL TO MEDIATION

(a) **Method of Referral.** District judges may refer civil cases to mediation, subject to the availability of qualified mediators:

(1) by encouraging litigants to submit to mediation voluntarily and entering a consent order referring the case to the Circuit Executive's Office, or

(2) by requiring litigants to participate after giving them an opportunity, in response to an order to show cause, to explain why mediation would not be appropriate in their case.

Cross Reference

Local Civil Rule 16.3 requires counsel to meet, within fifteen days after defendant enters an appearance in a case, to discuss whether mediation might be appropriate and to submit their views to the court within ten days after the meeting. Counsel must also indicate whether they discussed mediation with their clients before filing their report.

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(b) Timing of Referral. Cases may be referred to mediation, with the consent of the assigned judge, at any point during the course of the litigation.

Cross Reference

Local Rule 16.3 requires counsel to discuss the question of timing. Litigants may refer to the Court's brochure, "Mediation in the United States District Court for the District of Columbia," for a discussion of timing considerations.

(c) Pro Se Cases. Cases in which one of the parties is proceeding pro se are generally considered ineligible for mediation, unless the pro se party is represented by counsel for the purposes of mediation.

(d) Magistrate Judges Consent Cases. In cases in which the parties have consented to jurisdiction by a magistrate judge under 28 U.S.C. s 636(c), the magistrate judge shall have the same authority to refer cases to the Mediation Program as do district judges under Local Rule 84.1(b) above.

(e) Bankruptcy Proceedings. Mediation is also available to litigants in bankruptcy proceedings.

[Effective May 17, 2001.]

LCvR 84.5 APPOINTMENT OF MEDIATOR

(a) Appointment by Circuit Executive. After entry of an order referring a case to mediation, the mediation staff will appoint from the Court's panel a mediator who is available during the appropriate period and who has confirmed, following such inquiry as may be appropriate, that no personal or professional conflict precludes his/her participation as mediator. The Circuit Executive's Office will notify the parties of the appointment.

(b) Objections to Appointment. Litigants who object to the appointment of a particular mediator for any reason shall make their concerns known to the Director of Dispute Resolution, who will make every reasonable effort to substitute a new mediator who is acceptable to all parties. Such concerns may be brought to the Director's attention at any point during the course of the mediation.

[Effective May 17, 2001.]

LCvR 84.6 MEDIATION STATEMENTS

(a) Content and Timing. No later than seven days prior to the first mediation session, each party shall submit directly to the mediator a confidential mediation statement. The mediation statement shall not exceed ten pages and shall outline the underlying facts of the dispute, the key legal issues in the case, possible areas of agreement and options for settlement, and the settlement history of the dispute, if any. The mediation statement shall also identify, by name and title or status:

(1) the person(s) with decision-making authority, who, in addition to counsel, will attend the mediation as representative(s) of the party; and

(2) persons connected with either party (including insurer representatives) whose presence might substantially improve the utility of the mediation or the prospects for settlement.

(b) Confidential Nature of Statement. Mediation statements shall not be filed with the Court or served upon other parties to the lawsuit.

[Effective May 17, 2001.]

LCvR 84.7 THE MEDIATION PROCESS

(a) **Scheduling.** Promptly after being appointed to a case, the mediator shall fix the date and time of the first mediation session, which shall be held within three weeks of the date of the mediator's appointment.

(b) **Discretion of Mediator.** The mediation shall be informal. Mediators shall have discretion to structure the mediation so as to maximize prospects for settling all or part of the case.

(c) **Joint and Separate Meetings.** The mediator typically begins with a joint mediation session, to be attended by all counsel and parties. S/he may hold separate, private caucuses with each side or each lawyer or, if the parties agree, with the clients only. The mediator may choose to conduct any joint session or private caucus by telephone or e-mail.

(d) **Completion of Process.**

(1) The mediation ends when one of the following events occurs: -

(A) the parties settle the dispute;

(B) the mediator and the parties conclude that further discussion would be fruitless;
or

(C) the *mediation deadline*—a date established in the assigned judge's order of referral—is reached.

(2) If a settlement is reached, counsel shall notify the Court by filing a stipulation of dismissal or other appropriate document.

(3) Mediators shall notify the Court of the outcome of a mediation by promptly completing a Mediator Evaluation Form and returning it to the Circuit Executive's Office.

(e) **Extension of Mediation Deadline.** The assigned judge may alter or extend the mediation deadline sua sponte or at the parties' request.

(f) **Agreements to Be Reduced to Writing.** Agreements reached during mediation shall not bind the parties unless they are reduced to writing and signed by counsel and the parties. In cases involving government or corporate parties, an authorized representative of the governmental or corporate entity may sign.

[Effective May 17, 2001.]

LCvR 84.8 ATTENDANCE REQUIREMENTS

(a) **In General.** The Court requires counsel and parties with settlement authority to attend mediation sessions.

(b) **Corporation or Other Entity.** A party other than a natural person (e.g., a corporation or an association) satisfies this attendance requirement if it sends a representative (other than outside counsel) who possesses authority to settle, or if it makes such a person immediately available to the mediator by telephone.

(c) **Government Entities.** A party that is a government or governmental agency, in addition to counsel, shall send a representative with settlement authority or, alternatively, a representative who is knowledgeable about the facts of the case and will play a major role in submitting a recommendation to the person or body with decision-making authority.

(d) **Exception.** Notwithstanding (b) or (c) above, mediators may require the presence of or participation by telephone of the ultimate governmental or corporate decision-maker, or

other appropriate senior manager, if they conclude, with the concurrence of the Director of Dispute Resolution, that such participation is advisable.

[Effective May 17, 2001.]

LCvR 84.9 CONFIDENTIALITY**(a) Confidential Treatment.**

(1) The Court hereby prohibits the mediator, all counsel and parties and any other persons attending the mediation from disclosing any written or oral communications made in connection with or during any mediation session.

(2) There shall be no communication between the mediator and the assigned judge regarding a case that has been referred to mediation. Disputes and complaints of any kind, the resolution of which may require the disclosure of information acquired through a mediation, shall not be heard by the assigned judge but shall be brought to the attention of the Compliance Judge as outlined in Local Rule 84.10 below.

(3) Information acquired through mediation shall not be used for any purpose, including impeachment, in any pending or future proceeding in this or any other court or forum. Mediators shall not respond to subpoenas or requests for such information or disclose such information voluntarily. Mediators who are served with a subpoena or otherwise asked for information about any mediation in which they have participated shall immediately inform the Director of Dispute Resolution of the request.

(b) Confidentiality Agreement. The mediator may ask the parties and all persons attending the mediation to sign a confidentiality agreement on a form provided by the Court, but the confidentiality requirements of this section apply regardless of whether a confidentiality agreement is signed.

(c) Exceptions.

(1) Nothing in this rule shall be construed to prohibit disclosures to persons not directly participating in a mediation (such as corporate or government officials) whose possession of mediation-related information counsel believe to be necessary to further the progress of the talks in the case; or to help the institution respond to the mediation program generally. Persons not attending a mediation who are given information on this "need to know" basis shall also be bound by this rule regarding confidentiality.

(2) This rule shall not be construed to prohibit parties from entering written agreements resolving some or all of the case or from entering and filing procedural or factual stipulations based on suggestions or agreements made in connection with a mediation.

(3) Information which is obtained through discovery or other means outside the mediation process shall not be rendered inadmissible or non-discoverable because it is used or presented in mediation.

(4) This rule does not preclude a report to or an inquiry by the Compliance Judge pursuant to Local Rule 84.10 below regarding a possible violation of these rules.

(5) Nothing in this rule shall be construed to prohibit the mediator, counsel or litigants from discussing, with the Court's ADR staff, the progress of a mediation or the specific facts and ideas discussed in the course of mediated negotiations. Such communications are encouraged to permit the staff to monitor the quality of the mediation services being provided.

(6) This rule does not preclude dissemination of information about the types of cases going through the Mediation Program or about overall program results. Generic information about the program and cases entering mediation is available, and reports are

generated for analysis and evaluation. Individual cases that have been resolved through mediation may be publicly identified, discussed or brought to the Court's attention if the parties consent to such a disclosure.

[Effective May 17, 2001.]

LCvR 84.10 DISPUTE RESOLUTION COMPLIANCE JUDGE

The Court has designated a district judge to serve as the Dispute Resolution Compliance Judge. Complaints alleging a material violation of these mediation local rules or of a judicial order referring a case to mediation must be made to the Director of Dispute Resolution, who may then refer them to the Compliance Judge for appropriate action. If the Compliance Judge believes judicial intervention is necessary, s/he will so inform the parties and will ask them to address the matter. The Compliance Judge will have the authority to impose sanctions as s/he deems appropriate. *Litigants and mediators may not bring compliance issues directly to the attention of the Compliance Judge or to the attention of the judge who is assigned to the lawsuit.*

[Effective May 17, 2001.]