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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 JURISDICTIONCOMMENTS OF THE
AMERICAN CHEMISTRY COUNCIL

The American Chemistry Council (the Council) represents the leading companies engaged in the business of chemistry, which is a \$460 billion enterprise and a key element of the nation's economy. The business of chemistry is America's #1 exporter, with more than \$80 billion in exports in 2000. Council members represent more than 90% of the productive capacity of basic industrial chemicals in the United States.

Although chemicals are transported by various modes, in many instances they must move by rail due to product characteristics, distance, customer preference, shipment size, and other factors. The chemical industry therefore depends on railroads for the safe and efficient delivery of a wide array of raw materials and finished products. Each year, about 150 million tons of chemicals and allied products are shipped by rail, providing railroads with \$5 billion in freight revenue. The Council's members also invest directly in the nation's rail infrastructure by maintaining their own tank car fleets (with an estimated replacement value of \$7 billion) and other specialized facilities and equipment.

Safety is of paramount concern to both the rail and chemical industries. Consistent and reliable service is also vital to the Council's members, who must meet the needs of their customers in extremely competitive domestic, North American and overseas markets.

Congress has charged the Surface Transportation Board (the Board) with determining whether rail rates are "just and reasonable" and deciding other shipper-carrier disputes. Because the Council believes that arbitration is an appropriate way to resolve issues in the Board's jurisdiction, we appreciate the opportunity to comment in this proceeding.

As currently structured, the Board's arbitration process (49 C.F.R. Part 1108) has not been useful to Council members and other captive rail shippers. The Board proposes to enhance its existing arbitration process by:

- Updating the agency's roster of qualified arbitrators; and
- Amending Part 1111 to encourage parties to consider using arbitration.

These two changes, while commendable, will not significantly affect how parties choose to resolve cases subject to the Board's jurisdiction.

In addition to updating the roster and encouraging arbitration, the Board asks "whether binding arbitration should be legislatively prescribed for small rail rate disputes and, if so, how such a requirement would work best." The Council has carefully assessed the pros and cons of arbitration in resolving disputes within the Board's jurisdiction. We have also consulted with other organizations representing captive rail shippers, in order to identify and understand the concerns of those industries. The Council's views follow:

- As the Board notes, "A bill has been recently introduced by Senators Rockefeller, Dorgan, and Burns that would make 'final-offer' arbitration available for all rail rate disputes. See S.1103, 107th Cong., 1st Sess. § 303 (2001)." The Council strongly supports S. 1103 – specifically including its arbitration provisions, which build on the Board's existing alternative dispute resolution procedures.
- Why limit arbitration to "small" rail rate disputes? If arbitration is appropriate because the Board's "standard rate guidelines would be too costly or infeasible," there is absolutely no reason to restrict arbitration based on the size of the shipper or the traffic volume at issue. Further, devoting the Board's scarce resources to administering such limits would undermine the efficiency inherent in arbitration.
- Arbitration must be at the captive shipper's option. By statute, the Board is the sole forum for resolving disputes between rail carriers and captive shippers. When they reach the Board, such parties are not likely to agree on whether or not to use arbitration. Some shippers need arbitration precisely because the Board's procedures are indeed "too costly or infeasible." Other shippers, however, prefer the Board's Constrained Market Pricing (Stand-Alone Cost) methodology. But in neither situation should the carrier, which set the rate or terms of service at issue, be allowed to veto the captive shipper's choice between two alternative procedures.
- Discovery must be available in arbitration, without unduly delaying the process. The shipper knows only its own traffic, while the carrier maintains a wealth of highly relevant data.
- It is essential that arbitration be conducted on a final-offer basis and that arbitration awards be conclusive. These two factors are necessary if the arbitration process is to give both parties the incentive to reach a private

settlement. "Final-offer" arbitration is important because neither side holds an undue procedural advantage. "De novo" review by the Board (or substantive review by a court) should be avoided, because it would add time and expense, thus defeating the very purpose of having arbitration as an alternative.

Our views are based in part on the positive experience of our members with arbitration of non-transportation issues. We also refer the Board to the Canada Transportation Act, which grants rail customers the right to invoke final-offer arbitration in disputes with their carriers.

The Canadian Chemical Producers Association, which represents the business of chemistry in Canada, advises the Council that final-offer arbitration successfully resolves shipper-railroad disputes. Canada's 60-day arbitration timeline also promotes settlement. The cost of arbitration is split between the parties and discovery is allowed. (A distinct 30-day process was added recently. That new process, which is limited to controversies involving less than C\$750,000 in freight charges and does not provide discovery or hearing, has not been used to date.) According to the 2001 report of the Canada Transportation Act Review panel, 23 final-offer arbitrations have been initiated since that process was adopted in 1988. Most of those arbitrations have been filed since 1996, and more than half have reached settlement. The Canada Transportation Agency maintains a list of arbitrators and annually summarizes the number of cases (most have involved forest products, coal and grain). The decisions of the arbitrators, however, remain confidential and are not subject to review by the agency.

In conclusion, the American Chemistry Council does not believe that the Board will be able to significantly increase the use of arbitration in rail-related disputes merely by updating the roster of arbitrators and encouraging the parties to consider arbitration. Therefore the Council urges the Board to recommend to Congress the enactment of the arbitration provision in § 303 of S. 1103. Indeed, the Council urges the Board to recommend to Congress the enactment of every provision in S. 1103.

Respectfully submitted,



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