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**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

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**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**

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**OPENING COMMENTS OF PPL GENERATION, LLC**

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**Dated: November 21, 2001**

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At issue in this proceeding are several issues, ranging from simple to complex. The issues presented are (1) the Board’s request for an updated list of qualified arbitrators; (2) the Board’s call for a statement in rail complaints concerning the complainant’s consideration of arbitration; (3) whether arbitration might assist shippers for whom alternative rate reasonableness remedies are impracticable or prohibitively expensive; and (4) other relevant issues.

PPL Generation, LLC (“PPL”) has participated in many ICC and STB rate cases and rulemaking proceedings (formerly as Pennsylvania Power & Light Company). PPL welcomes the opportunity to comment on the issues presented, but has no comments on the arbitrators’ list. The Board’s rules allow this list to be augmented at any time.

**I. REQUIRED STATEMENT IN RAIL COMPLAINTS**

The Board’s call for a statement concerning arbitration in rail complaints serves a useful function and should be adopted.

**II. ARBITRATION IN RATE CASES**

PPL has followed the problem of the effective processing of smaller and non-coal rate disputes for many years, participating actively in Ex Parte No. 347 (Sub-No. 2), Rate

Guidelines – Non-Coal Proceedings. As PPL has pointed out in the past, any focus on “small shippers” is improper, because even large shippers can have relatively small rate disputes with railroads. Where market dominance exists, the Act requires rail rates to be reasonable regardless of whether the amount of captive traffic is large or small. Making rate relief impracticable, prohibitively expensive or ineffective for any shipper produces an unacceptable deprivation of statutory rights.

Of course, litigation costs that may be bearable when excessive rail rates on millions of tons of coal per year are at stake may be prohibitive to a captive shipper paying excessive rail rates on smaller volumes. The rates may be just as unlawful in the latter instance as in the former. However, so long as the costs of invoking statutory remedies exceed the benefit of the available relief, there will be no constraint on the railroads’ abuse of their market power. Competitive remedies, by definition, do not exist, and regulatory remedies are ineffective.

It is important to note that any assessment of the effectiveness of regulatory remedies must take into account not just the volume of freight but also the costs of litigation and the extent of the unlawfulness of the rail rates. A large captive shipper paying rates on millions of tons of coal shipped between a single origin and destination may be deprived of an effective remedy because the rate is only slightly above maximum lawful levels, making corrective action too costly. A large captive shipper paying rates that are double or triple maximum lawful levels may have no effective remedy if the freight in question involves multiple origins, destinations, or both, and thus entails highly costly litigation.<sup>1</sup> And a small shipper may be unable to seek regulatory recourse even if

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<sup>1</sup> In such cases, multiple stand-alone railroads or a large and complex stand-alone railroad system would have to be developed under Constrained Market Pricing principles to cover all routings and locations.

only a single origin/destination pair and blatantly excessive rates are involved, because all rate relief is extremely expensive under current procedures.

The railroads, of course, are aware of the high costs of litigation, and have devoted extensive efforts to maintaining or increasing those high litigation costs. They reason (correctly) that high costs deter shippers from pursuing their statutory remedies, and reduce the benefits of any rate cases that are nevertheless filed. The result amounts to deregulation of many rates on captive traffic, contrary to the Act and the clear intent of Congress.

When the Board recently moved to make market dominance determinations less onerous for shippers by eliminating consideration of product and geographic competition, the railroads attacked the Board's decisions in court. See also the railroads' challenges to simpler remedies in the proceedings leading up to the ICC's decision in Ex Parte No. 347 (Sub-No. 1),<sup>2</sup> and the recent attempt by BNSF and UP to make the stand-alone cost remedy more costly and less effective in their July 5, 2001 Joint Motion for Limited Consolidation in STB Docket No. 42056, et al. The railroads' successful campaign to prevent challenges to the reasonableness of bottleneck rates also drives up the complexity and cost of rate litigation, foreclosing shipper recourse to regulatory remedies.

In Rate Guidelines – Non-Coal Proceedings, 1 S.T.B. 1004, 1014-18 (1996), the Board tested the simplified stand-alone cost methodology the AAR offered as a constraint for use in smaller rate cases and found that it was no constraint at all. Rates producing revenue-to-variable cost ratios of 5000% would have been deemed reasonable under the

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<sup>2</sup> Coal Rate Guidelines – Nationwide, 1 I.C.C.2d 520 (1985), aff'd, Consolidated Rail Corp. v. United States, 812 F.2d 1444 (3d Cir. 1987).

railroads' approach, even though r/vc ratios far lower than that should be recognized as powerful evidence of unreasonableness.

Other examples could be cited, but the point is clear. There are many shippers – not just small volume shippers – for whom the rights the Act provides are difficult or impossible to invoke due to the excessive cost of litigating rate cases. Where no effective regulatory remedy exists, the potential value of the alternative remedy of arbitration is clear.

In its September 20, 2001 Decision, the Board raised the question of how to differentiate shippers who might need arbitration from those who have adequate remedies under existing laws and regulations. The Board suggested, “for purposes of promoting discussion on this issue,” basing this determination on whether the shipper ships no more than 500 cars per year via a single railroad. It was evidently the Board’s view that a relatively low threshold is needed because “higher-volume rail customers . . . may be able to exert greater pricing leverage.” Decision at 4.

There are two problems with this standard. First, there is no basis for a presumption that larger shippers are less captive than smaller shippers. The ICC and Board have often found that large shippers are captive under quantitative and qualitative market dominance standards, and that they have been charged unlawfully high rail rates. Conversely, smaller rail shippers may have competitive alternatives that give them greater “pricing leverage” than larger shippers.

In any event, the Board appears to contemplate a requirement that any shipper pursuing remedies through arbitration must demonstrate market dominance. If such a showing will be a prerequisite to relief in an arbitration proceeding, there should be no

presumptions (particularly irrational presumptions) as to market dominance that would bar shippers from even invoking arbitral remedies.

The second problem with the Board's proposed "500 carload via a single railroad" standard is that it is inconsistent with the statute's own threshold test for the requirement of reasonable rail rates. The Act's market dominance test deregulates rates only where there is "effective competition from other rail carriers or modes of transportation for the transportation to which a rate applies." 49 U.S.C. § 10707. This standard supports the point that captivity is not a function of volume shipped; it is a function of effective competition, and effective competition is competition that constrains rates.

As previously explained, the Board's real focus should be on arbitration as an alternative form of recourse for shippers whose statutory remedies are more theoretical than real. And if, in this proceeding, the Board's focus is to be limited, it should, at a minimum, encompass small cases rather than small shippers.

Such a standard would give shippers operating between multiple origins and destinations a means of challenging excessive rail rates, regardless of the "size" of the shipper, which is irrelevant anyway. For too long, such shippers have lacked any effective remedy.

As the Board explained in Rate Guidelines – Non-Coal Proceedings, supra:

However, whether using an SAC analysis or CMP's alternative top-down approach (both of which are highly data-intensive), a CMP presentation can be quite expensive and thus not feasible when the amount of money at issue is not great enough to justify the expense. Accordingly, the ICC instituted this rulemaking in 1986 to search for simpler, less expensive procedures for assessing rate reasonableness in small cases.

1 S.T.B. at 1008, emphasis added, footnote omitted. As the Board's September 20 Decision acknowledges, the methodology adopted in Rate Guidelines – Non-Coal Proceedings has fallen short of meeting the Board's goal, and has never been used. Arbitration may help fill this regulatory gap.

The next issue raised in the Board's September 20 Decision is "the form that binding arbitration should take, and the extent of the arbitrator's authority." Decision at 3. The Board asks about standards and about the reviewability of the arbitrator's decision.

In PPL's view, it makes no sense to require arbitration to be based on the same standards that apply to rate cases litigated under Constrained Market Pricing or under the Ex Parte No. 347 (Sub-No. 2) standards. Those tests have proved to be too burdensome and expensive for use in small rate cases, and imposing them in arbitration proceedings would build into the process a Catch-22, defeating the purpose for which arbitration is being considered. On the other hand, it makes no sense to allow an arbitrator to impose a rate below the threshold of STB jurisdiction, no matter how strong the shipper's case.

The issue of standards is tied to the issue of review. If arbitral decisions are to be subject to little or no review, clear standards may be more important. If, however, arbitral decisions may be appealed to the Board, there is less need to impose standards upon parties and arbitrators. Review proceedings will lead to a body of case law that will guide parties and arbitrators.

Of course, just as it makes no sense to subject parties to an arbitration to the burdens and costs of a full-blown stand-alone cost case or litigation under the standards of Ex Parte No. 347 Sub-No. 2, it also makes no sense to apply those standards in an

appeal from an arbitral decision. In keeping with the goal of giving the disenfranchised some remedy, any review of arbitral decisions should be "light-handed." The Board might even consider levels of scrutiny that vary with the outcome.

If the applicable standards of review are suitably relaxed, PPL would support review of arbitral decisions by the STB, at least at the outset. Board review would enhance uniformity and avoid the steep "learning curve" that might apply in the courts. As for the discretion of the arbitrator, PPL would favor final-offer arbitration along the lines used in Canada. As the Board's September 20 Decision notes, such arbitration tends to narrow parties' differences.

### III. OTHER ISSUES

Although the Board's September 20 Decision focused on rate cases, the Board's October 26 Decision broadened this proceeding to permit comments about the potential value of arbitration as to other issues. PPL welcomes this expansion.

In its October 26 Decision, the Board indicated that it chose to emphasize arbitration for small rate cases because of Congressional concerns about such cases and "because we have processes available to resolve other types of disputes and they are being used." The Board's often-expressed preference for private sector solutions to disputes and Congressional policy favoring arbitration suggest that arbitration should be favored, not disfavored. Presumably, this is the reason the Board proposes to require a statement concerning arbitration in Complaints.

PPL understands that there is a difference between encouraging voluntary arbitration and recommending amendments to the Act to permit mandatory arbitration. However, where the Board has processes available to resolve disputes but those processes

are not being used, because the costs are too high or the benefits too limited or uncertain, mandatory arbitration may be preferable to leaving shippers remediless. However, arbitration procedures must conform to the parties' needs.

Large rate cases, including coal rate cases, of the type that have been successfully litigated before the ICC and the Board illustrate the potential problems. These cases cannot be litigated quickly because of the need for extensive discovery of the railroad defendant and for extensive analysis of data by expert witnesses. Discovery in recent coal rate cases has not been free of controversy. An arbitrarily restrictive timetable for litigation would reduce, if not eliminate, the shipper's chances of success under the fact-intensive stand-alone cost test, and increase the railroad's incentive to delay or restrict its discovery responses.

Arbitration of smaller rate disputes under standards other than the stand-alone test or the Ex Parte No. 347 (Sub-No. 2) methodology should require less time, but some discovery may still be necessary, along with some use of expert witnesses. Unrealistic procedures, like excessively burdensome or costly standards, can transform arbitration from a viable alternative to a sham remedy. To prevent this outcome, PPL recommends that the choice of whether to arbitrate be left to the complainant in a rail dispute.

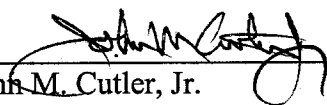
In addition, some issues are more amenable to resolution through arbitration than others. Rulemaking proceedings cannot be "outsourced," and multi-party adjudications may also be poor candidates for arbitration. Arbitrators may also have difficulty deciding where the public interest lies, as opposed to deciding which of two parties has the better case in a bilateral dispute over settled law.

These reservations aside, there are numerous types of disputes that could be resolved through arbitration. For example, arbitration over service issues that are not so severe as to justify a petition for temporary access relief under 49 C.F.R. Part 1147, Temporary Relief for Service Emergencies, could be highly beneficial to shippers. PPL expects numerous other examples to be identified by other parties to this proceeding. PPL reserves the right to address these suggestions in its reply comments, but urges the Board not to limit arbitration to small rate cases when it makes its report to Congress.

#### IV. CONCLUSION

The problem of statutory rights without effective administrative remedies is serious, and it includes but is not limited to small rate cases. In view of increasing consolidation in the railroad industry, which has reduced effective rail-to-rail competition, arbitration can help level the playing field for disputes between shippers and carriers. The Board should urge Congress to provide an arbitration option, along the lines set forth above, for such disputes.

Respectfully submitted,

  
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