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BEFORE THE  
SURFACE TRANSPORTATION BOARD



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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

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COMMENTS OF  
THE DOW CHEMICAL COMPANY

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**I. Introduction**

The Dow Chemical Company ("Dow") respectfully submits these Comments in response to the inquiry of the Surface Transportation Board ("STB" or "Board") into issues related to requiring, through legislation, binding arbitration of small rail rate disputes, which was served in the above-captioned proceeding on September 20, 2001.<sup>1</sup> Dow has been a long-time proponent of arbitrating disputes within the Board's jurisdiction and welcomes this opportunity to present its views in a proceeding specifically directed at the arbitration issue.

Dow supports legislative efforts to require binding arbitration of small rail rate disputes through legislation. Although Dow believes that the Board has the authority to

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<sup>1</sup> On October 9, 2001, the National Industrial Transportation League petitioned the Board to broaden this proceeding to include arbitration of all types of disputes subject to Board jurisdiction. The Board stated that it would not preclude parties from commenting on this broader scope, but it declined to formally broaden the scope of this proceeding in a decision served on October 26, 2001. Although Dow supports arbitration on a broader scope, these comments are focused only on small rate disputes.

implement mandatory arbitration procedures for such disputes today, legislation will eliminate any doubts that could lead to burdensome and costly judicial challenges that otherwise could discourage shippers from taking advantage of the procedures. As explained further in these Comments, however, Dow is concerned that the Board's proposal is too narrow and will deprive many shippers of the benefits of arbitration. Dow urges the Board to support necessary legislative changes that would impose mandatory, binding arbitration, at either party's option, of small rail rate disputes in a stream-lined and cost-effective manner.

## **II. Identity and Interest of Dow.**

Dow, headquartered in Midland, Michigan, is one of the world's largest manufacturers of chemicals, plastic materials, hydrocarbons, and numerous specialty products. Dow, including its subsidiaries and affiliates, operates numerous production facilities throughout the continental United States. The largest of these facilities are located near Freeport, Texas; Plaquemine, Louisiana; Taft, Louisiana; and Seadrift, Texas. The Freeport facility is among the largest in the world.

Dow relies extensively upon rail transportation to move products to, from, and between its U.S. and other North American facilities. Rail is a cost-effective mode for transporting large volumes of Dow's chemical and plastic commodities long distances over land. In addition, Dow relies heavily upon rail transportation for the safe movement of hazardous or dangerous chemicals.

## **III. Mandatory Arbitration is Necessary to Bring the Benefits of Rate Regulation to All Captive Shippers.**

The current process for resolving rail rate disputes requires a shipper to bring a complaint before the Board under procedures that are extremely complex, require enormous amounts of discovery, take a year or more to complete (not including appeals), and often costs over a million dollars to pursue. The only shippers who can afford to file

a rate complaint tend to ship a single commodity (e.g., coal) in unit-trains over a single route on a regular basis. Most rail movements, however, do not have these characteristics. As a consequence, the vast majority of captive shippers lack adequate protection against unreasonable rates.

If implemented properly, arbitration can extend the existing statutory protections against unreasonable rail rates to many more shippers by reducing the time and expense of a rate case. This requires proper identification of those shippers who do not benefit from existing procedures for determining reasonable rates and the adoption of procedures that allow for a swift and inexpensive determination of a reasonable rate.

**A. The Board's Proposal Would Limit Arbitration to an Unduly Narrow Group of Shippers.**

The Board has correctly identified the threshold issue to be the identification of those shippers that should qualify for mandatory arbitration of their rail rate disputes. For that purpose, the Board proposes two factors based on market dominance and a proposed definition of a "small rate dispute." While Dow accepts the market dominance factor, it objects to the proposed definition of a "small rate dispute" as unduly restrictive.

The first standard proposed by the Board is akin to the existing market dominance test. Dow does not object to this requirement. It is reasonable to conclude that the same jurisdictional standards should apply to all rate cases, whether before the Board or an arbitrator. Thus, as a threshold matter, Dow agrees that a shipper must demonstrate that the challenged rate exceeds 180% of variable costs and that it lacks adequate inter- or intra-modal competitive alternatives for the traffic at issue before it can arbitrate the reasonableness of the rate.

The second standard proposed by the Board, however, causes Dow great concern. The Board proposes that, in order to be eligible for mandatory arbitration, a shipper must neither originate nor receive more than a certain number of cars per year *via the railroad involved*. The Board then offers a figure of 200- to 500-carloads-per-year as a starting

number for discussion. Dow submits that the basic premise of looking at the total number of cars originated or received by the railroad involved is flawed.

Rather, the Board should look at the total number of cars originated or received by the shipper via the railroad involved *over the individual traffic lane* (e.g. Origin-Destination pair) covered by the challenged rate. Shippers must challenge the reasonableness of individual rates, which are set for specific commodities over specific routes. The economics of pursuing a rate case thus are based upon the amount of a commodity that a shipper tenders over a particular route, not over an entire rail system. As a consequence, even large shippers who tender substantial amounts of traffic via a single railroad are economically precluded from pursuing a rate case, since a shipper must challenge the reasonableness of each commodity rate between each origin-destination pair.

Dow offers data on its own traffic as an example. Dow tenders approximately 95,000 rail cars per year from its major U.S. production facilities. Its four largest facilities at Freeport, Texas; Plaquemine, Louisiana; Taft, Louisiana; and Seadrift, Texas generate over 24,000, 21,000, 15,000 and 12,000 rail cars per year, respectively, and account for 75% of Dow's total rail traffic. There is no intra-modal competition because all four facilities are captive to the Union Pacific Railroad and there is only limited inter-modal competition. Dow's traffic, therefore, very likely would satisfy the market dominance jurisdictional threshold.

In 2000, Dow shipped approximately 98,550 carloads by rail in the continental U.S.<sup>2</sup> This traffic was spread over 3164 different traffic lanes. A detailed break-out of 2000 data reveals the following:

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<sup>2</sup> In 2001, Dow acquired Union Carbide Corporation ("UCC"). This data reflects both Dow and UCC rail traffic. The UCC portion of the data, however, represents Dow's best estimates of actual carloads per traffic lane based on information Dow obtained after acquiring UCC.

| <u>#Carloads per Lane</u> | <u>#Lanes</u> | <u>#Total Railcars</u> |
|---------------------------|---------------|------------------------|
| 1-10                      | 1905          | 6,868                  |
| 11-50                     | 842           | 20,412                 |
| 51-100                    | 213           | 14,812                 |
| >100                      | 204           | 56,458                 |

Over 93% of these traffic lanes handled 100 carloads or less during the year and accounted for nearly 43% of the total number of carloads. Because this data reflects only origin-destination pairs and is not further delineated by commodity, the number of traffic lanes handling fewer than 100 carloads in 2000 actually is greater than this chart reflects. In most cases, Dow's annual traffic volumes over a traffic lane, by commodity, must well-exceed 100 carloads before a rate case becomes even marginally economical under current Board procedures.

For each traffic lane over which Dow believes its rail rate for a commodity is unreasonable, it must bring separate rate complaints. The amount of traffic moving over each lane, however, hardly justifies the time and expense required to prosecute so many complaints under the current procedures. This is true even for most traffic lanes with more than 100 shipments per year. Furthermore, Dow's traffic patterns change frequently, as reflected by a 25-35% annual change in traffic lanes. Therefore, by the time the Board issues a decision, traffic no longer will move over many of these lanes, thus limiting the benefits of a successful rate challenge through future rate prescription.

Although the cost to Dow of paying an unreasonable rate over any individual traffic lane may not be significant, the cumulative impact of paying an unreasonable rate over a large number of these traffic lanes is enormous. Despite these unequivocal facts, the Board's proposal to define eligibility for arbitration based on total shipments via the railroad involved would deny Dow the benefits of arbitration, since Dow ships well over 500 carloads a year on any single rail carrier.

The only reason given by the Board for excluding large volume shippers is a summary conclusion that such shippers have sufficient traffic to exercise leverage against

a rail carrier. But the Board fails to explain how volume alone bestows leverage.<sup>3</sup> Although the Board does not say so, it appears to presume that large volumes automatically mean that a shipper can exercise leverage through product and geographic competition, two factors that the Board no longer considers in full-blown rate cases. It is illogical for the Board to re-inject product and geographic competition into arbitrated rate cases, which are supposed to be more streamlined and less onerous than full-blown rate cases.

It also is improper for the Board to presume the existence of effective product and geographic competition based solely on the total volume of a shipper's traffic over a single rail carrier. In Dow's case, approximately 75% of its rail traffic originates at four facilities that are captive to the *same* railroad. In fact, only 10% of Dow's traffic originates at facilities with competitive rail options. There is very little leverage in these facts. Once a shipper proves a lack of market dominance, that should be *prima facie* evidence that the shipper lacks leverage against a rail carrier, regardless of the total volume of traffic the shipper originates or receives via the railroad involved.

Dow urges the Board to recommend a definition of "small rate dispute" based upon a single test that applies two alternative factors. The first factor would permit arbitration of rate disputes for traffic volumes of less than 100 carloads of a commodity per year over the traffic lane in question. Alternatively, the second factor would permit arbitration of rate disputes where the annual freight bill under the challenged rate is less than \$250,000. A shipper would need to satisfy only one of these requirements. These alternatives would capture both low volume, high value commodity movements and low value commodity movements at higher volumes. More importantly, these factors reflect the same factors applied by shippers to determine the economics of a rate case.

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<sup>3</sup> Although higher volumes may reduce rates, that does not mean that the lower rate is "reasonable" for the volumes tendered.

## **B. Arbitration Procedures Must Be Efficient and Cost-Effective.**

Arbitration in and of itself is not beneficial unless it is conducted in a way that reduces the time and expense of a full-blown rate case. Dow supports the concept of Final Offer Arbitration and suggests procedures to ensure a streamlined, timely, and cost-effective approach.

First and foremost, arbitration of small rate disputes must be mandatory at the option of either party. Although arbitration has become much more common in other industries as a method for quickly resolving commercial disputes, it is not prevalent for rail transportation, primarily because rail carriers know that lengthy and costly proceedings before the Board and the courts will discourage most shippers from challenging unreasonably high rates. Thus, there is a clear lack of incentive for carriers to arbitrate. From a shipper's perspective, however, arbitration would make existing statutory and regulatory protections more widely available because it is more affordable and less time-consuming. Both of these factors are major obstacles that shippers must overcome today in order to obtain relief through rate cases.

Dow believes that the Canadian system of Final Offer Arbitration ("FOA") is a good model upon which to base a U.S. system. Canadian Transportation Act §§ 161-169. Under the Canadian system, a shipper who is dissatisfied with a rate charged or proposed to be charged by a rail carrier may submit the matter for FOA by a single arbitrator or, if the carrier agrees, by a panel of three arbitrators. Each party sets forth its final offer to the other and the arbitrator must choose one or the other. The parties must exchange all information that they intend to submit to the arbitrator and they may direct interrogatories to each other. The arbitrator also may request additional information on her own initiative. Depending upon the dollar amount of the freight charges at issue, the arbitration must be completed within either 30 or 60 days. The decision of the arbitrator is final and binding.

The Canadian system could be adopted, with certain modifications, to address the concerns of U.S. shippers. For example, in order to maximize efficiency and reduce costs, there should be a single arbitrator. The parties either must mutually agree on the arbitrator or one could be selected at random from a list of arbitrators maintained by the Board. The cost of the arbitrator should be split equally between the parties.

The arbitration process must be completed within ninety days of the initial demand for arbitration, subject to extension only by mutual agreement of the parties. To meet this schedule, there must be limited discovery and firm deadlines with consequences for failing to meet them.

In order to expedite the discovery process, Dow proposes that there be mandatory disclosure rules for specified types of information that must be exchanged by both parties within a specified period of time. Such information, at a minimum, should address the market dominance factors of intra- and inter-modal competition and variable costs. Failure to produce this information would result in an irrebuttable presumption against the non-disclosing party on the issues to which that information is relevant. The parties should be required to exchange all evidence they intend to submit to the arbitrator in advance of their formal submission. The arbitrator also may request additional information if she desires.

The parties should make simultaneous written submissions to the arbitrator who should issue a final and binding decision by Day 90. The arbitrator must choose the offer of one of the parties. That decision may be appealed to the Board only on the same basis as any arbitration conducted under the Federal Arbitration Act, 9 U.S.C. §§ 10-11 (*i.e.* arbitrator bias). The arbitration process should allow for reparations and a rate prescription extending for two years from the decision.

The FOA procedures are simple, cost-effective, and expeditious. Moreover, because the arbitrator must decide only between the offers of the shipper and the carrier, both parties have a strong incentive to be reasonable in their approach.

#### IV. Conclusion

For the foregoing reasons, Dow supports legislative efforts to establish mandatory arbitration for small rail rate disputes. Dow, however, urges the Board to recognize that "small rate disputes" involve more than just "small shippers." Ignorance of this fact will deny the benefits of arbitration to a large class of small rate disputes, which in turn will continue to deprive those shippers of the benefit of existing statutory and regulatory protections against unreasonable rates. This will leave large volume shippers with disperse traffic patterns without any economically viable remedy for unreasonable rates before the STB or in arbitration. In addition, Dow supports Canadian style Final Offer Arbitration of rail disputes.

Respectfully submitted,



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