

COPY

BEFORE THE SURFACE TRANSPORTATION BOARD

COMMENTS

of

MONTANA WHEAT & BARLEY COMMITTEE
COLORADO WHEAT ADMINISTRATIVE COMMITTEE
IDAHO BARLEY COMMISSION
IDAHO WHEAT COMMISSION
KANSAS WHEAT COMMISSION
OREGON GRAINS COMMISSION
NEBRASKA WHEAT BOARD
SOUTH DAKOTA WHEAT COMMISSION
WASHINGTON BARLEY COMMISSION



STB Ex Parte No. 586

**Arbitration – Various Matter Relating to its Use as an Effective
Means of Resolving Disputes that are Subject to the Board's Jurisdiction**
November 23, 2001

The above listed parties, referred to as the Wheat, Barley & Grains Commissions, herewith submit their comments on Notice in the above-styled proceeding issued by STB on September 18, 2001

BACKGROUND

The Wheat, Barley & Grains Commissions are pleased to submit these comments as the Board explores Arbitration and hope the Board will look at these issues in light of the need for pro-competitive changes to national federal railroad policy. The most pressing question and the heart of this Ex Parte proceeding is what is best to address the public interest. In our mind, every rail customer, the public, needs a competitive rail transportation system that provides fairly priced, safe and reliable service. The needs also require increased use of free and competitive marketplace instruments to facilitate resolutions of difference between carriers and captive rail customers. The Board to 'protect' the railroad industry has created a oligopolistic system that has resulted in a rail system fraught with service problems, customer suffering, and rate discriminatory practices by dominant rail carriers. The reality, due to an overly consolidated rail industry, is the railroad industry is characterized by lack of competition among the nation's railroads; whole states and complete industries are captive to a single railroad; and there has been thousands of cases of market abuse testified to at various STB hearings in the last several years. Monopolistic railroad behavior has resulted in both pricing and service abuses. The captive rail customers have been unable to receive freedom of competitive choice or adequate regulatory oversight to protect them from monopolistic abuse. Final offer arbitration may serve to mitigate some of these adverse effects of a highly concentrated rail industry.

ENTERED
Office of the Secretary

NOV 27 2001

Part of
Public Record

The Wheat and Barley Commissions herewith respond to the Board's call for comments on the potential for utilizing arbitration as way of resolving difference between railroads and their customers.

THE BOARDS CURRENT ARBITRATION PROCESS DOES NOT PROVIDE ALTERNATIVE DISPUTE RESOLUTION

In this Ex Parte call issued by the Board, it seeks to update its list of arbitrators available for duty in the Boards arbitration process. Since we are advised such a list does not currently exist, it is appropriate that such a list be made under 49 CFR 1108.6(a).

In the Notice of Ex Parte, the Board suggests that a limit of carloads of carloads should be "not so low that the resulting customers group would be low enough to exclude higher-volume rail customers who may be able to exert greater pricing leverage" over rail carriers. What degree of pricing leverage does the number of carloads by a captive rail customer who is totally captive to a single rail carrier have over a smaller shipper who is likewise captive? The answer is none. A captive shipper large or small does not and cannot exert pricing leverage over a market dominant monopoly railroad. Large areas of the farm belt are now completely captive to a single railroad. Areas of Colorado, South Dakota, Nebraska, Idaho, Montana, North Dakota, Eastern Washington, Wyoming and large portions of Kansas are now captive to a single rail carrier. Bulk commodities cannot move efficiently via alternative modes of transportation. The volumes are too large, and the distances too far. After years of rail merger after rail merger with no federal regulatory resolve to reestablish competition whole regions, whole states and whole industries have been left completely captive to a single railroad. Recently a reporter from the eastern part of the U.S. commented to me, "You guys out in the prairies chose to live out there in an area that is captive to a single railroad." The real answer of course, is that in the early part of the history of the west, for the first 100 years of the existence of commerce on the prairies, the prairies had rail-to-rail competition. It was only when the ICC/STB embarked upon their 'never saw a merger they didn't like' theory of ever-increasing rail size, that virtually all rail customers in the central and northern plains became captive to a single railroad. There are small and large shippers, but size doesn't dictate the degree of captivity. It is access and choice that breaks this cycle. Arbitration for large captive rail customers is just as important as arbitration for small captive rail customers.

If the ability to have access to arbitration is to be made a tool for captive rail customers to seek market based solutions and focus on the STB's stated goal of favoring private-sector resolutions of disputes outside of our formal process where possible, then basing the right upon number of shipments does not make much sense. Large volume shippers who are served by a single carrier are captive. They are just as captive as small captive shippers. One way to differentiate that may prove to be appropriate would be

to differentiate not based upon the size of the shipper but to require different standards of proof based upon the size of the rail customer. Different costing standards may be one of the more appropriate remedy requirements.

True balanced negotiation rarely takes place in situations where the rail customer is captive or is at a size and resource disadvantage to the large and powerful railroads that exist today. If a rail customer is singly served, has no economically realistic modal alternatives, or is so small that the option of a formal rate relief proceeding is not realistic, there is little that customer can do to negotiate a fair rate and service contract if the railroad is not interested in providing one. It is for this reason that so many rail customers have been urging the Board to set policies that would promote competition among railroads—to provide that balanced playing field that allows for private sector negotiated resolutions. The Board has extensive records with regards to the rail customer community's desire for policy changes that would increase the ability of a rail customer to choose among rail carriers. However, in the absence of true freedom of choice, the Board should provide policies that would balance the economic power at the negotiation table

Without increased competitive options for rail customers, the availability of *voluntary* arbitration is not likely to produce a resolution in a situation where a railroad that has a virtual monopoly over a customer and cannot come to a voluntary agreement in the marketplace. If the railroad won't voluntarily negotiate in the marketplace, why would it voluntarily submit itself to arbitration of this dispute?

The STB dismisses the idea of setting the criteria based upon the size of shipment revenues involved. If the criterion is set at dollar amount for the shipment in question and then different standards can be applied alleviating the potential concern over large rail customer needs vs small customer. In reality, the size of the rail customer's shipments has little to do with their ability to hold sway over a monopoly railroad. Furthermore, if a rail customer is so very large that it can 'hold sway' over a monopoly railroad, then they don't need arbitration in the negotiation arsenal. I have not run across such a rail customer so large that it can dictate rates and service demands to a monopoly railroad.

Such standards might include the following:

- In cases involving \$1 million or less, such rules shall provide for the selection of a single arbitrator by the parties, or if the parties cannot agree, selection of a neutral arbitrator by the Secretary of Transportation from the roster established at the STB.
- In cases involving more than \$1 million, unless the parties otherwise agree, such rules shall provide for the selection of a panel of three arbitrators, one chosen by each of the involved parties and a third chosen by the two arbitrators so named. If the two arbitrators cannot agree on a third arbitrator, the Secretary of Transportation shall choose the third arbitrator.

- The rules established by the Secretary shall provide for the compensation of the arbitrator(s) and procedures (including discovery at the discretion of the arbitrator or panel) for an expedited decision.
- In the case of disputes in which the reasonableness of a rate or charge is in issue, the arbitration shall be final offer arbitration, except that no rate shall be prescribed that does not equal or exceed 180% or revenue-variable cost as established in 10707 (d).
- In the case of disputes where the reasonableness of a specific rate or charge is alleged to have damaged the initiating party by no more than \$500,000 a year for each year compensation is sought, the arbitrator shall consider rates for similar movements for similar commodities in circumstances where such rates or charges are subject to "effective competition" as defined under section 10707 (a).
- It should be established that an arbitration decision shall be issued no more than 120 days from the selection of the arbitrator in disputes involving \$1 million or less, and no more than 180 days from the selection of the arbitrator(s) in disputes involving more than \$1 million.
- It should direct that relief may be granted in the form of monetary damages as available under title 49, or specific performance of statutory obligations (including the prescription of reasonable rates) for a period not to exceed two years from the date of the arbitration decision, or both.
- Lastly it should be established that the resulting arbitration decision can only be upheld or vacated consistent with federal arbitration standards in Title 9, sections 9 and 10 of the United States Code.

The effect of looking at rates for similar movements for similar commodities that are subject to effective competition would bring the rates and service charges that are levied on captive shippers more in line with reasonable rate standards.

It is interesting to note that the "differential" pricing practiced by monopolies is completely different from differential pricing practiced by competitive industries. Railroads do not practice differential pricing like non-monopoly industries. Every other industry practices differential pricing but it is based upon consumer demand not market dominance. UPS for example practices differential pricing based upon how fast the consumer wants delivery...the quicker the more it costs. UPS also charges the same price to ship 500 miles in CA as it does in Montana or Colorado or New York. WalMart charges less for larger quantities than for smaller quantities. The railroads charge higher prices to those rail customers that are captive than to those who have choices. In other words, the railroad's form of differential pricing is based upon how captive a rail customer is rather than the demand for the service. Only in the monopoly railroad industry are the rates based upon charging those who don't have alternatives higher than the charges assessed on those who have competition.

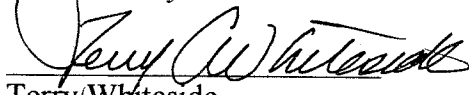
To make arbitration work, a call for arbitration must not be legally predicated upon the number of shipments made by a shipper but rather whether a rail customer has access to only a single railroad. That is the one sure method this Board has to ascertain whether a shipper's request for arbitration is necessary and appropriate. If one thinks about it, one can conclude that if the arbitration request was available to all rail size of rail customers, including those who have rail-to-rail competition, a request from a shipper who has competition would not make much economic sense and would open that shipper up to a possibility that they might suffer from a ruling that would not be beneficial to the shipper. A shipper with real competition, would not be able to benefit from arbitration. Arbitration limits on a size or number of cars thus does not portend a jurisdiction of increased eligibility. The Board has recently indicated that it is has

nearly a record number of cases it is working on, and increased effective arbitration would be a pro-active method of resolution. The Board continues to repeatedly reinforce its commitment to private-sector resolutions of disputes outside its formal process where possible.

Do small rail customers need access to arbitration? Absolutely. Whether legislation is required or not is a matter of legislative policy. However, the STB can be a pro-active regulator by moving to support legislation on FOA arbitration and by significantly retooling of the Board's existing arbitration to make it a more usable tool.

Your Wheat, Barley & Grains Commissions do believe that legislation will be required to provide pro-active balance to the mandates of the Board as it pertains to all matters of rail policy, including arbitration. They further believe that effective FOA arbitration that can be called only by the rail customer will provide an important usable tool in establishing reasonable rates and service for captive agricultural rail customers. Your Wheat, Barley & Grains Commissions further support the comments made by the Alliance for Rail Competition in this proceeding.

Submitted by:



Terry Whiteside,
Registered Practitioner
3203 Third Avenue North, Suite 301
Billings, Montana 59101
Phone: (406) 245-5132
Email: twhitesd@wtp.net

11/21/01
Date:

For:

MONTANA WHEAT & BARLEY COMMITTEE
COLORADO WHEAT ADMINISTRATIVE COMMITTEE
IDAHO BARLEY COMMISSION
IDAHO WHEAT COMMISSION
OREGON GRAINS COMMISSION

KANSAS WHEAT COMMISSION
NEBRASKA WHEAT BOARD
SOUTH DAKOTA WHEAT COMMISSION
WASHINGTON BARLEY COMMISSION