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BEFORE THE
SURFACE TRANSPORTATION BOARD

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***

COMMENTS

submitted by

THE NATIONAL INDUSTRIAL TRANSPORTATION LEAGUE



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Dated: November 23, 2001

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The National Industrial Transportation League ("League") respectfully submits its Comments in this proceeding, in response to the Board's notice of inquiry served September 20, 2001. The League believes that the Board is entirely correct to "encourage parties to resolve disputes, where possible, in a private, informal and less costly and burdensome way than the formal complaint process permits," through the use of arbitration of disputes that are subject to the Board's jurisdiction. See, Ex Parte No. 586 Decision served September 20, 2001, p. 2. The League compliments the Board in attempting to assist Congress by providing a record on issues related to requiring, through legislation, arbitration of certain disputes that are within the Board's purview. The League strongly favors legislative change that would permit arbitration of small rate disputes, at either party's option, and in these Comments it sets forth its views on a number of issues raised by such a proposal. In addition, as set forth in more detail in these Comments, the League believes that such legislative change should also permit the use of mandatory arbitration, at either party's option, for a broad array of disputes between shippers and rail carriers that are subject to the Board's jurisdiction.

I. IDENTITY AND INTEREST OF THE NATIONAL INDUSTRIAL TRANSPORTATION LEAGUE

The National Industrial Transportation League is an organization of shippers that conduct industrial and/or commercial enterprises throughout the United States and internationally. The League is the oldest and largest nationwide organization representing shippers of all sizes of commodities. The League has approximately 600 separate company members, ranging from smaller shippers to some of the largest shippers in the country. The members of the League utilize all modes of transportation to move their goods in interstate, intrastate, and international commerce. Substantial volumes of commodities are shipped by League members via rail.

II. THE LEAGUE STRONGLY FAVORS LEGISLATIVE CHANGE THAT WOULD PERMIT THE USE OF MANDATORY ARBITRATION TO RESOLVE A VARIETY OF DISPUTES BETWEEN SHIPPERS AND RAIL CARRIERS UNDER THE STATUTE

The League commends the Board for initiating this proceeding, and agrees with the Board that parties should be permitted to resolve disputes in a private, informal and less costly and burdensome manner than the Board's formal complaint process permits. Decision, p. 2. The League thus strongly favors legislative change that would permit the use of mandatory arbitration to resolve disputes between shippers and rail carriers under the statute. Arbitration, the League believes, could be a sound method of reducing the time and expense necessary to resolve disputes that may come before the Board, or that may lie unresolved because of the time and expense of pursuing a formal dispute resolution process before the agency. The League commends the Board for properly and appropriately utilizing its offices to compile a record in this proceeding that might assist the Congress in evaluating whether legislative changes might be considered that would require through legislation, the arbitration of certain disputes subject to the Board's jurisdiction.

The League believes that the use of mandatory arbitration to adjudicate rights given to shippers under the ICC Termination Act of 1995 would be consistent with the broadly-deregulatory thrust of both that statute and the Staggers Rail Act of 1980, by permitting the use of private, rather than direct governmental, mechanisms for the resolution of commercial disputes between shippers and rail carriers. Instead of the Board acting both as a policymaking agency for the rail industry as a whole, and as an adjudicatory body to decide individual rail-shipper disputes, a legislative change that would permit the widespread use of arbitration would permit the agency to focus on the development and administration of proper policies and general procedures to govern the rail industry, and would "privatize" the resolution of specific disputes between individual shippers and rail carriers. Such a division of responsibility would permit the Board to focus its attention and resources on questions of national importance, and on procedures of national applicability. At the same time, such a division of responsibility would leave the resolution of specific disputes to a private adjudicatory process that would be more economical and efficient than any federal agency, by its nature, could hope to achieve.

Moreover, the use of arbitration to resolve a wide variety of disputes between shippers and rail carriers would be consistent with the growth in the use of arbitration to resolve commercial disputes in the nation as a whole. Arbitration is now widely used between companies to resolve numerous kinds of business disputes. Its growth itself has proven it an effective means of resolving commercial disputes quickly, cheaply, and fairly. It can, and should, be applied to disputes in the rail industry.

While the use of arbitration has grown in the rail industry, its use is still very limited, particularly in disputes between shippers and rail carriers. This is due in part to historical reasons, namely, the existence of the Board and its predecessor, the Interstate Commerce

Commission, as the “proper” body to resolve disputes between shippers and rail carriers. The limited use of arbitration in resolving shipper-carrier disputes is, the League believes, also due to the fact that, use of arbitration has required the agreement of both the shipper and the rail carrier, an agreement that has been difficult in practice to obtain. The League believes that legislative change that would permit the use of mandatory arbitration at either party’s request for small rate cases and for a wide variety of other disputes, would provide a strong policy signal that arbitration is an acceptable and indeed favored means of resolving specific disputes between shippers and rail carriers, and would remove a key impediment to its use to date.

III. THE LEAGUE FAVORS LEGISLATIVE CHANGE THAT WOULD PERMIT MANDATORY ARBITRATION, AT EITHER PARTY’S REQUEST, OF SMALL RATE DISPUTES

The League favors legislative change that would permit mandatory arbitration, at either party’s request, of small rate disputes. The Board’s September 20 decision in this proceeding sets forth a variety of issues that would need to be addressed by any legislation that would establish a binding arbitration process for small rate cases. Set forth below are the League’s views on the issues that are presented in the Board’s September 20 decision, as well as other issues that the League believes need to be addressed in any legislation establishing a mandatory arbitration process for small rate cases.

A. Jurisdiction Over Rail Rates Subject to Arbitration

Under the statute, the Board has jurisdiction over a “rate” charged by a “rail carrier,” defined in the statute as “a person providing common carrier railroad transportation for compensation.” 49 U.S.C. § 10102(5) and (7). Under Section 11101 and regulations published thereunder, a “rail carrier” is obligated to provide in writing a common carrier rate to any shipper upon the request of that shipper, and must provide transportation or service in accordance with

that rate upon reasonable request. 49 U.S.C. §11101(a)-(b) and (e). Under Section 10701 of the statute, if the Board determines that a rail carrier has “market dominance” over the transportation to which a particular rate applies, the rate established by the rail carrier must be “reasonable.” 49 U.S.C. § 10701(d)(1). Thus, under the statute, the Board has jurisdiction to prescribe a maximum reasonable common carrier rate, provided that it finds that there is an “absence of effective competition from other carriers or modes of transportation to which a rate applies.” 49 U.S.C. § 10707(a).

The League believes that the jurisdictional scheme currently applicable to rate proceedings before the Board is appropriate for the arbitration of small rate disputes. Specifically, a shipper should be able to request a common carrier rate of any rail carrier as required by the current statute and the Board’s procedures. That common carrier rate should be subject to challenge by the shipper through mandatory arbitration, subject to the qualification rules and arbitration procedures discussed in subsections B and C below. Thus, the League agrees with the Board that existing “market dominance” requirements -- requiring the shipper to prove that there is a lack of effective inter- and intra-modal competition,¹ and that the complained-of rate equals or exceeds 180 percent of the variable cost of the movement – are appropriate for small rate cases subject to arbitration. See September 20, 2001 decision, slip op. at 4.

¹ In this connection, the League strongly believes that the Board was correct in its December 21, 1998 decision in which it ruled that product and geographic competition should not be considered in the determination of market dominance. *Market Dominance Determinations – Product and Geographic Competition*, decision served December 21, 1998, *petition for reconsideration denied*, decision served July 2, 1999, *affirmed in part and remanded in part*, *Association of American Railroads v. Surface Transportation Board*, 237 F.3d 676 (D.C. Cir. 2001), *further decision upon remand*, served April 6, 2001, *appeal pending*, *Association of American Railroads v. Surface Transportation Board*, No. 01-1213 (D.C. Circuit). The use of such factors would be particularly inappropriate in the determination of market dominance in small rate cases.

The statutory scheme set forth above does not, however, apply to rates that have been exempted by the agency from the requirements of the Act. Under Section 10502 of the act, the Board may exempt a person, a class of persons or a transaction or service from the requirements of the Act, including requirements as to rate reasonableness, if it makes certain findings. Over the years, the Board has in fact exempted a variety of rail transportation service from the requirements of the statute. However, under Section 10502(d), the Board may revoke an exemption, to the extent it specifies, when it finds that application of a provision of the act is necessary to carry out the transportation policy of Section 10101. 49 U.S.C. § 10502(d).

The League believes that shippers of exempt commodities are doubly disadvantaged in seeking relief before the Board with respect to rates applicable to their movement, because not only must they expend the time and money to bring a rate case, but must separately petition the Board to revoke an exemption with respect to their individual movement. The League believes that any legislation that would permit mandatory arbitration of small rate cases should also provide that the arbitrator should have the authority to revoke an exemption, but only with respect to the movement at issue, provided that the arbitrator finds that the requirements of the act for revocation of the exemption have been met with respect to that movement. Such authority would permit all relevant and related questions to be adjudicated at one time, by a single decider of fact. While the standards for revocation of an exemption are not identical to those for determining market dominance and rate reasonableness, there are clear overlaps between the two, both as a matter of law and as a matter of presentation of evidence. Under 49 U.S.C. §10502(d), the Board may revoke an exemption "when it finds that application in whole or in part of a provision [of the statute] is necessary to carry out the transportation policy of section 10101" Under Section 10101 of the statute, it is the policy of the U.S. Government

“to maintain reasonable rates where there is an absence of effective competition.” Thus, the issues of market dominance (*i.e.*, the lack of effective competition, see 49 U.S.C. § 10707(a)) and rate reasonableness intersect, at least in part, with the issue of whether the application of the statute is necessary to carry out the rail transportation policy of the act with respect to a particular movement. It makes little sense for a shipper of an exempted commodity to first apply to the Board for revocation of the exemption with respect to its movement, and then apply to an arbitrator to decide his small rate dispute. Both issues should be presented at one time, to the arbitrator.

Finally, the League believes that rates established through a private contract should not be subject to arbitration, unless the contract otherwise provides for it.

B. Determination of a “Small Rate Case”

In its September 20 decision, the Board requested comments as to how to identify those small shippers that should qualify for mandatory arbitration of their rail rate disputes. The Board indicated that, “to launch a dialogue on this issue,” it expressed its initial belief that eligibility for arbitration “should not be derived from the size of the shipper’s own business, but rather from the limited amount of its rail traffic.” September 20 Decision, slip op. at 4. The Board indicated that “arbitration should be limited to those shippers . . . who neither originate nor receive more than a certain number of cars per year via the railroad involved,” and suggested that a proper carload figure might be in the 200- to 500- carload per year range. Thus, the Board’s proposed test would focus on the total amount of the shipper’s traffic “on the particular railroad(s) involved.” *Id.*

The League agrees with the Board that eligibility for arbitration should not be derived from the size of the shipper's own business, but rather from the amount of its rail traffic. Shippers with substantial businesses may nevertheless be captive to a particular rail carrier for a discrete portion of its transportation needs, and should not be restricted from utilizing arbitration because of the size of their overall business.

However, the League strongly disagrees with the Board's assessment that a proper test would focus on the total amount of a shipper's traffic on a single railroad. Such a test would render an arbitration remedy virtually useless, and would prevent the use of arbitration in instances where it would clearly be appropriate. For example, a shipper might have a single manufacturing plant that is served by one carrier, and all of the output of the plant must be shipped-via rail. However, the output of the plant might be transported to numerous customers in a variety of locations. All of the plant's transportation would then be captive to the originating rail carrier, but because of the dispersed nature of the movements and the low amount of traffic on any one movement, a rate challenge under the Board's procedures would likely not be practical.² Yet, under the Board's proposal, such a shipper would not be able to utilize arbitration, since its total traffic on the railroad would exceed the 200- to 500-carload per year "threshold" limit.

² There are numerous reasons why a rate challenge under the Board's existing procedures may not be practical in the circumstances described. The Board's bottleneck rules prevent the challenge in many instances of "dense" traffic from a large manufacturing facility over an originating or terminating carrier's "bottleneck." Yet, the Board's Stand-Alone Cost procedures effectively require a relatively high traffic density over a specified route (and concomitant high payments to the carrier) in order to compensate for the high cost of developing SAC evidence over that route. SAC procedures for a "network" calculation of maximum rates for geographically-dispersed movements are extraordinarily complex and expensive. Finally, the cost and uncertainty inherent in the Board's "small case" guidelines have, as the Board itself has admitted in this proceeding, see October 26 Decision, slip op. at 1, rendered those procedures fundamentally ineffective.

The example points up another flaw in the Board's reasoning. The Board has chosen the "total railroad" threshold because it appears to believe that a shipper with a certain amount of traffic on a single carrier has commercial "leverage," whose strength depends upon the amount of traffic that it has in which a particular railroad can participate. September 20 Decision, slip op. at 4. But this is simply erroneous. Leverage does not depend upon the total amount of traffic transported over the line of particular carrier, but rather upon the choices (or lack thereof) that a shipper may have to use that carrier. A shipper with a significant amount of traffic on one rail carrier may have little leverage vis-à-vis that carrier, if the shipper has few if any options to transport that traffic over the lines of another rail carrier, or via truck. Even a shipper with several large, geographically dispersed facilities may have little leverage, if most of these plants are located on the lines of a single carrier. And with only two carriers in the western United States and two in the East as a result of the mergers of the past eight years, the likelihood that a shipper will have more than one facility on the lines of a single carrier is significant.

Moreover, even if a shipper has some "competitive" movements and some "captive" movements on a single railroad, it is generally not the case that the shipper is able to "leverage" the competitive movements to obtain more favorable rates for the non-competitive movements. If the "captive" movements outnumber the "competitive" movements, any leverage works the other way: the rail carrier is able to capture the competitive movements by threatening to increase its rates on the captive movements even above the levels that it has previously charged. Even when the shipper's "competitive" movements outnumber the "captive" movements, the rail carrier will typically be able to segment the total traffic, bidding the competitive traffic at levels dictated by the market, and charging the captive traffic at levels that reflect its monopoly position. Indeed, in such a case, the carrier has no economic incentive to do otherwise. Thus,

even in that case, a shipper has in reality little or no "leverage," when some or all of its movements are captive.

The League believes that the proper approach to determine a "small rate case" that should be subject to arbitration is to focus on *origin-destination pairs*. The extent of a carrier's market power is determined by the options that a shipper has, or that it lacks, between a single origin and a single destination. The Board's market dominance procedures as well as its rate reasonableness jurisdiction is defined on an origin-to-destination basis. Most importantly, the value of a case to a shipper is determined by examining the rate charged to a shipper between a specified origin and a specified destination, multiplied by the number of carloads transported in a period of time between that origin and destination. Thus, whether or not a shipper has a cost-effective remedy under the statute against the exercise of railroad market power will be determined on an origin to destination basis, and a shipper's ability to practically exercise the rights granted under the statute should be likewise determined on that basis.

There remains the question as to what is the proper measure for determining a "small rate case," assuming that the amount of traffic between an origin and a destination is used to determine a shipper's eligibility for arbitration. The League believes that a movement over a specified origin to destination pair should be eligible for arbitration if the movement would meet either a carload test or a freight revenue test over an annual period. Use of a carload test alone would eliminate from arbitration movements in which there were a relatively high number of cars transported, but at a relatively low per-carload rate (such as in the case of small movements of heavy-loading, low-value commodities). Use of a revenue test alone would eliminate from arbitration movements in which there were a relatively low volume of cars, but moving at high revenue per car (such as certain high-value chemicals or similar products).

C. Arbitration Procedures for Small Rate Cases

The League believes that certain procedures should govern the conduct of an arbitration of a small rate case. The League suggests that arbitration should be permitted to be filed up to 120 days before the expiration of a contract. Such a procedure would permit a shipper whose contract is ending to determine what is a maximum reasonable rate for the movement prior to the end of the contract, and thus avoid having to pay a higher rate for a short period of time after the end of the contract, with the necessity for reparations if the rate proposed by the carrier is found to exceed a maximum reasonable rate.

The League believes that economy and efficiency support the notion of the use of a single arbitrator chosen from a roster kept by the agency (unless otherwise agreed to by the parties), selected within 15 days of the filing of an arbitration demand. Procedures would need to be developed to insure the impartiality of the arbitrator.

There should be strict time limits on the arbitrator's decision: the League suggests that no more than 90 days be permitted for the conduct of the arbitration, including the arbitrator's decision, from the time that the arbitrator is chosen, unless the parties mutually agree to an extension. Thus, in the normal case, the total time for obtaining a decision would be no more than 105 days from the filing of demand, allowing 15 days for the selection of the arbitrator and 90 days for the conduct of the arbitration itself.

The arbitrator should have the authority to order expedited discovery of key information, such as the existence of intra- and inter-modal competition, and information pertaining to the calculation of the variable cost of the movement. Parties should be able to access the Carload Waybill Sample automatically, even before the arbitration, by simply signing a confidentiality

agreement in which they affirm that their use of the sample is related to potential arbitration and in which they promise not to utilize the sample for any other purposes.

The parties should split the cost of the arbitrator.

D. Authority of the Arbitrator in Small Rate Cases

The League believes that the Board has properly identified “baseball-style” arbitration as appropriate for use in small rail rate disputes. As the Board has noted, this form of arbitration tends to bring the positions of the parties together as “[they] work to narrow their differences at the outset of the process and each strives to present the figure that would be more likely to be the one selected by the arbitrator.” *Id.* at 6. After the arbitrator finds that the carrier has market dominance and after the exchange of information through discovery, each party would be required to submit its “final offer,” supported with arguments and evidence. The arbitrator would select the more reasonable rate, based on his or her analysis of the evidence. The arbitrator’s decision should be effective as of the date of the arbitration demand.

The League does not believe that the legislation should establish rigid standards for what a “reasonable” rail rate might be, except of course, that a “reasonable” rate would need to exceed the statutory jurisdictional threshold. Rather, the parties should have the ability to present facts appropriate to the circumstances. While parties may wish to present evidence consistent with the Board’s very general guidelines in Ex Parte 347 (Sub-No. 2), they should not be required to do so, and could present other evidence that they believe is relevant to the issue of reasonableness. However, parties should be precluded from presenting evidence on “Stand Alone Cost,” since such evidence would be inconsistent with the entire purpose of arbitration as a cost-effective, timely method of resolving smaller rate disputes.

The League believes that the arbitrator should have the authority to prescribe rail rates for up to two years, unless the parties agree otherwise. This would be an appropriate horizon given that the traffic patterns may change over a longer time period, and a longer period may unduly impinge upon a carrier's ability to respond to changed economic conditions. Moreover, since the arbitrator would be dismissed at the conclusion of the proceeding, there would be no ongoing authority to whom either party could appeal to modify the order. The League believes that the arbitrator should have the ability to award damages reaching back one year, in the event that the challenged rate exceeds the prescribed rate. The amount of damages should be determined using the difference between the prescribed rate and the rate paid during the challenge period.

E. Appeals

Finally, appeals to the Board for review of the arbitrator's decision should be limited to the circumstances permitted by the Federal Arbitration Act. *See* 9 U.S.C. § 10 (award procured by corruption, fraud, undue means; evident partiality; misconduct; etc.). A party that seeks to contest the arbitrator's decision should have 10 days to file an appeal with the Board and any such appeals should be decided by the Board within 30 days of the filing of an appeal.

IV. THE LEAGUE BELIEVES THAT LEGISLATIVE CHANGE SHOULD ALSO PERMIT THE USE OF MANDATORY ARBITRATION TO RESOLVE MANY OTHER TYPES OF DISPUTES BETWEEN SHIPPERS AND RAIL CARRIERS

On October 9, 2001, the League submitted to the Board a Petition to Broaden Inquiry, asking the Board to issue an amended notice that would invite comments on the possible use of arbitration to resolve disputes in addition to small rate disputes. In a decision served October 26, the Board indicated that it would not preclude parties from discussing the merits of arbitration in general or suggesting mandatory arbitration as to other issues. The League believes that there are many types of disputes that might be resolved more quickly, more cheaply, and more easily

through arbitration, and believes that that there should be legislative change that would permit the use of mandatory arbitration, at either party's request, in a wide variety of individual disputes between shippers and rail carriers. The demands of modern transportation require resolution of disputes quickly and inexpensively, and only alternative disputes resolution methods including arbitration offer the speed, economy and finality necessary for modern business.

As the League pointed out in its Petition to Broaden, arbitration is beginning to be used to resolve a number of kind of disputes between shippers and carriers. For example, the National Grain and Feed Association ("NGFA") and the Association of American Railroads ("AAR") have negotiated an agreement to utilize arbitration for certain commodities in a variety of disputes. Such disputes include: application of a demurrage rule or term; misrouting of loaded rail cars or locomotives; disputes arising under receipts and bills of lading; application of a railroad's special car or equipment program rules; application of a railroad's general car distribution rules; mishandling of private cars; and others. See, Rail Arbitration Rules of the National Grain and Feed Association, adopted August 24, 1998.³ The Board's own recently-published rules regarding rail mergers include a provision urging the offer of arbitration by merger applicants as part of their mandated service assurance plans. *Major Rail Consolidation Procedures*, decision served July 11, 2001, at 40-42, 66 Fed Reg. 32582 (June 145, 2001). The League itself entered into a recent settlement with the Canadian National Railway Company in the context of CN's proposed merger with the Wisconsin Central Railway Company, in which the League and the CN agreed that CN would arbitrate service disputes arising as a result of the merger. See, *Canadian National Railway Company, et al. - Control - Wisconsin Central Transportation Corporation, et al.*, served September 7, 2001, slip op. at 12. Thus, there is

³ <http://www.ngfa.org/traderules/2001%20Rail%20Arbitration%20Rules.pdf>

precedent on a national level for the use of arbitration in disputes other than those involving rates.

A. Mandatory Arbitration Is Appropriate for the Resolution of a Variety of Specific Disputes Between Shippers and Rail Carriers

Under the Board's current procedures for voluntary arbitration, arbitration is not permitted for issues of general transportation importance. The League believes that, in general, that restriction is an appropriate one in order to distinguish between those disputes that can and should be subject to mandatory arbitration at a party's request, and those disputes that should be reserved to the Board. Thus, where general rules of industry applicability are involved, such a dispute should be brought before the Board, rather than adjudicated by an arbitrator who, by his or her nature, is not in a position to consider the requirements of the industry as a whole.

In addition, the League believes that arbitration may not be appropriate even in specific disputes between a shipper and a rail carrier where relief granted to one shipper will directly impact upon the service provided to another shipper. Thus, for example, a dispute in which a shipper is seeking the provision of additional cars might mean that the carrier must remove cars from the service of another shipper. In such a case, it would appear that only the Board is in a position to balance the needs of one shipper against the needs of another.

However, even with these two exceptions, there are numerous disputes that are subject to the Board's jurisdiction that would appear to be appropriate for arbitration. Such disputes would involve the application of a variety of carrier rules and practices to a particular shipper, or the reasonableness of such charges, rules, and practices as applied to the facts of a particular shipper. As part of the authority granted by legislation in this area, a variety of areas might be described

as appropriate for arbitration, with authority given to the Board to flesh out and define disputes and circumstances that may be brought before an arbitrator.

The League believes that, in such non-rate disputes, arbitration should be conducted under standard procedures, that is, rather than "baseball" style, final-offer arbitration. This would give the arbitrator maximum flexibility to craft a resolution appropriate to the facts of the case. Other than the absence of a "final offer" component, the League believes that arbitration procedures should be the same as small rate disputes with respect to the selection of the arbitrator, the time limits for decision, discovery, appeals, etc.

B. Types of Disputes for Which Arbitration Would Be Appropriate

The League believes that the following disputes would appear to be appropriate for mandatory arbitration at either party's option.

1. Disputes involving application of demurrage/storage rules.
2. Disputes involving application of rail classifications, rules and practices to a particular shipper
3. Disputes arising under receipts and bills of lading (*e.g.*, loss and damage claims)
4. Damage claims for failure to provide service on reasonable request
5. Disputes involving application of a railroad's car or equipment program rules, and application of a railroad's general car distribution rules
6. Specific railroad/rail user disputes involving the reasonableness of a railroad's published rules and practices applied in specific circumstances, except for the reasonableness of car allocation/distribution practices
7. Disputes involving misrouting
8. Disputes involving a sidetrack agreement
9. Disputes involving the reasonableness of terminal switching charges, weighing and overloading charges, car diversion charges, and similar accessorial charges contained in published railroad tariffs, as applied to the facts of a particular movement.

10. Reciprocal switching in a terminal area under 49 U.S.C. §11102.

Finally, the League believes that the Board should also investigate whether it may be practical even for parties with large rate cases to utilize arbitration to resolve their disputes, at the option of either party and/or upon the agreement of both. In such a case, it may be necessary to permit the arbitrator to consult with the Board's staff in order to resolve technical issues, with the parties reimbursing the Board for the time involved. The Board may find that such an arrangement might still be more efficient and effective for the parties, and a better use of the Board's own resources, than requiring the Board to be involved from the beginning to the end of a large rate case. For example, the arbitrator could possibly resolve discovery disputes and procedural issues far more quickly than is possible for the Board, thus cutting the time and potentially the expense of a large rate case for the parties.

V. CONCLUSION

The League respectfully requests the Board to consider the views expressed above as it considers this matter and develops a report to Congress on the feasibility of arbitration in the resolution of an array of disputes between shippers and rail carriers that may be subject to the Board's jurisdiction.

Respectfully Submitted,

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