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Office of the Secretary

NOV 21 2001

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November 21, 2001

VIA HAND DELIVERY

The Honorable Vernon A. Williams
Secretary
Surface Transportation Board
Case Control Unit
1925 K Street, N.W.
Washington, D.C. 20423-0001



Re: 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

Dear Secretary Williams:

Enclosed for filing in the above-referenced proceeding
please find an original and ten (10) copies of the Comments of
Western Coal Traffic League.

We have enclosed an electronic copy of these Comments
on a computer diskette, and have enclosed an additional hard copy
of these Comments to be date-stamped and returned to the bearer
of this letter.

Thank you for your assistance in this matter.

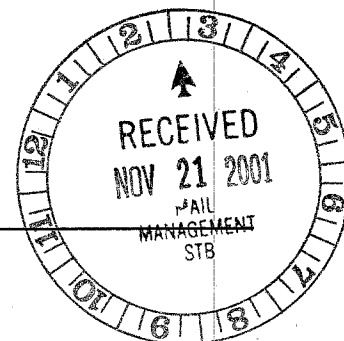
Sincerely,

Peter A. Pfohl
An Attorney for
Western Coal Traffic League

Enclosures

203903

BEFORE THE
SURFACE TRANSPORTATION BOARD



ARBITRATION--VARIOUS MATTERS
RELATING TO ITS USE AS AN
EFFECTIVE MEANS OF RESOLVING
DISPUTES THAT ARE SUBJECT TO
THE BOARD'S JURISDICTION

STB Ex Parte No. 586

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COMMENTS OF
WESTERN COAL TRAFFIC LEAGUE

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Dated: November 21, 2001

ARBITRATION--VARIOUS MATTERS)
RELATING TO ITS USE AS AN)
EFFECTIVE MEANS OF RESOLVING) STB Ex Parte No. 586
DISPUTES THAT ARE SUBJECT TO)
THE BOARD'S JURISDICTION)

The Western Coal Traffic League ("WCTL") submits the following comments in response to the Board's decision served September 20, 2001 ("Decision"). The Decision requests comments from interested parties on (i) issues involving the use and encouragement of the use of arbitration by parties of certain matters subject to the Board's jurisdiction; and (ii) "whether binding arbitration should be legislatively prescribed for small rail rate disputes and, if so, how such a requirement would work best."

IDENTITY AND INTEREST

¹WCTL members include: Alliant Energy; Arizona Electric Power Cooperative, Inc.; Associated Electric Cooperative, Inc.; Central Louisiana Electric Company, Inc.; City of Austin, Texas; City Public Service Board of San Antonio; Kansas City Power &

million tons of coal annually, nearly all of which moves by rail. WCTL has been active for many years before the Board and its predecessor, the Interstate Commerce Commission, in dealing with railroad issues of general transportation importance, and in the various proceedings that have addressed the substantive and procedural issues involving the Board's complaint processes for rate reasonableness and other proceedings. In particular, WCTL participated in 1997 in Ex Parte No. 560,² the Board's last proceeding addressing the implementation of rules governing voluntary arbitration of certain disputes subject to the statutory jurisdiction of the Board. That proceeding culminated in the implementation of the Board rules found at 49 C.F.R. Pt. 1108, governing arbitration proceedings.

Several WCTL members have also brought stand-alone cost ("SAC") rate cases against western railroads under the Board's Coal Rate Guidelines, 1 I.C.C.2d 520 (1985), and they are familiar with the evidentiary requirements of such cases. WCTL members have a continuing interest in promoting the fair and expeditious resolution of disputes between parties to the Board, and in the adoption of rules that best meet the needs of parties that may seek to bring complaints to the Board.

Light Company; Lower Colorado River Authority; MidAmerican Energy Company; Minnesota Power; Nebraska Public Power District; Northern States Power; Omaha Public Power District; Reliant Energy; Texas Municipal Power Agency; Western Resources, Inc.; Wisconsin Public Service Corporation.

²STB Ex Parte No. 560, Arbitration of Certain Disputes Subject to the Statutory Jurisdiction of the Surface Transportation Board.

II.

DISCUSSION

In its Decision, the Board states that the purpose of this proceeding is (1) to update its qualified arbitrator list, which it has done. The Board also states that it seeks: "(2) to remind and encourage users and providers of rail transportation to take advantage of our existing procedures; and (3) to explore issues related to requiring, through legislation, binding arbitration of small rail rate disputes." No WCTL member comes close to fitting the small size definition suggested by the Board as to the amount of traffic moved (in the 200-500-carload-per-year-range) to be eligible for mandatory, binding arbitration. Nonetheless, because the reporting portion of the Board's Decision may implicate larger size cases, and because some parties may suggest that larger proceedings be subject to mandatory binding arbitration,³ WCTL submits the following comments in response to the Board's Decision.

A. Arbitration Statement in Individual Rail Complaint Cases

In order to remind and encourage parties to utilize arbitration, the Board has requested comment on its proposal that its formal complaint procedures, at 49 C.F.R. Part 1111, be modified to require that "in those cases in which the dispute is

³See Decision (served Oct. 26, 2001) (stating that the Board will not "preclude parties from discussing the merits of arbitration in general or suggesting mandatory arbitration as to other issues, nor will we limit the type of dialogue that parties may have about how arbitration ought to work").

potentially arbitrable under Part 1108, the complaint must include a statement that the complainant has considered seeking arbitration but decided against it (or could not obtain the agreement of the other party or parties to the dispute)."

Decision at 2. While the Board's reporting proposal seems primarily targeted at complaints involving "small entities,"⁴ it appears that the proposed language is not limited only to specified smaller proceedings.⁵

As an initial matter, and as the Board is well aware, the STB's current docket demonstrates that there is a need for continuing federal agency supervision of rail rates. Now pending before the Board are six major maximum coal rate proceedings,⁶

⁴The Board has "preliminarily certifi[ed]" that the proposed rule would not have a significant effect "on a substantial number of small entities" (*id.* at 2) and it seeks comments on "whether there would be other effects on small entities that should be considered." (*Id.* at 3).

⁵The Board's present arbitration procedures are intended for the resolution of certain specified disputes between parties, regardless of amount of traffic or the monetary stakes involved in the dispute. Arbitration is available for disputes "involving the payment of money or involving rates or practices related to rail transportation or service subject to the statutory jurisdiction of the STB." 49 C.F.R. § 1108.2(b). Arbitration is not available "to obtain the grant, denial, stay or revocation of any license, authorization (e.g., construction, abandonment, purchase, trackage rights, merger, pooling) or exemption, or to prescribe for the future any conduct, rules, or results of general, industry-wide applicability." *Id.*

⁶These cases include Docket No. 42051, Wisconsin Power and Light Company v. Union Pacific Railroad Company (pending on petitions for reconsideration); Docket No. 42054, PPL Montana, LLC v. The Burlington Northern and Santa Fe Railway Company; Docket No. 42056, Texas Municipal Power Agency v. The Burlington Northern and Santa Fe Railway Company; Docket No. 42057, Public Service Company of Colorado D/B/A Xcel Energy v. The Burlington Northern and Santa Fe Railway Company; Docket No. 42058, Arizona

four of which involve WCTL members. As an expert agency, one of the Board's essential functions is to decide complex and highly technical cases.

The development of the Board's Coal Rate Guidelines to provide for the proper analytical framework for evaluating the reasonableness of rates charged to market dominant rail movements was the result of an extensive, multi-year process. The Board has developed considerable expertise in the numerous technical areas involved in such cases. The Board also has an expert economic staff to deal with the complexities of a rail rate analysis. The ground rules for such cases, including the substantive evidentiary and procedural standards, are familiar to the parties, and afford parties access to discovery necessary to develop their cases and present their evidence in a manner that allows the Board to fully evaluate the complex issues involved. Shippers bringing cases under the Board's Coal Rate Guidelines strongly believe that the continuation of these regulatory standards is necessary to provide a backstop protection to help prevent railroad market power abuse. WCTL also believes that the Board is currently the most appropriate forum to decide such complex cases.

Given the complexity of large rate cases, which are based on SAC and which require discovery of large amounts of

Electric Power Cooperative v. The Burlington Northern and Santa Fe Railway Company and Union Pacific Railroad Company; and Docket No. 42059, Northern States Power Company Minnesota D/B/A Xcel Energy v. Union Pacific Railroad Company.

information from the defendant carrier,⁷ and the greater complexity involved in presenting and evaluating the evidence, it is unlikely that a complainant in a SAC rate case would ever elect to invoke arbitration under the Boards existing 49 C.F.R. Part 1108 arbitration standards.⁸ Nonetheless, complainants should not be precluded from pursuing arbitration, or the use of any other alternative forms of dispute resolution, should they believe that such an extra-agency option is more appropriate for resolving disputes.

WCTL notes that shippers and carriers are free, should they jointly elect to do so, to pursue arbitration of rate disputes (or to pursue other appropriate alternative dispute resolution methods) subject to agreed upon terms and conditions, or, if they so choose, to utilize the Board's existing arbitration procedures -- although, as indicated above, the latter are not well-suited for complex litigation. Accordingly,

⁷See Coal Rate Guidelines, 1 I.C.C.2d at 548, where the ICC stated: "We recognize that shippers may require substantial discovery to litigate a case under CMP, and we are prepared to make that discovery available to them." As the Board is well-aware from recent rate cases, discovery is not only conducted on a large scale in such cases, but discovery disputes routinely arise that require resolution by the agency.

⁸Under the Board's rules governing arbitration, the arbitrator is not bound by any procedural rules or regulations adopted by the Board (49 C.F.R. § 1108.3(b)); discovery is available "only upon the agreement of the parties" (*id.* at §1108.(a)(2)); the evidentiary process must be completed within 90 days from the start of the proceeding (*id.* at §1103.8(a)(1)) and the arbitrator's decision is to be issued within 30 days from the close of the record (*id.*). Moreover, although the arbitrator "shall be guided by the Interstate Commerce Act and by STB and ICC precedent" (*id.* at §1108.3(b)), grounds for petitions for vacation or modification, or grounds for appeal are very limited.

while WCTL is not opposed to the Board's proposed reporting requirement, because the proposed statement on arbitration appears more suitable for those smaller cases that are more suitable candidates for arbitration under the Board's existing Part 1108 governing rules, the Board may desire to limit the requirement that a complainant must include a statement on arbitration to those (smaller, non-Coal Rate Guidelines) cases where arbitration might be more appropriate, or clarify that complainants may alternatively explore the possible use of non-Part 1108 alternative dispute resolution procedures.

B. Legislatively Prescribed Arbitration
for Small Rate Disputes

In its Decision, the Board seeks comment on "whether binding arbitration should be legislatively prescribed for small rail rate disputes, and, if so, how such a requirement would work best." Decision at 3. The Board discusses that Members of Congress and "smaller rail customers" have expressed concerns that the Board's formal rate guidelines are "impracticable" for processing smaller rate cases. Id. The Board states that it intends to use this proceeding to "assist Congress by providing a record on issues related to requiring, through legislation, the arbitration of small rail rate disputes." Id.⁹ In particular, the Board seeks comments on "(1) how it should identify the small rail shippers for whom arbitration of rate disputes should be

⁹Legislation is necessary, states the Board, as the governing statutes require Board adjudication of challenged rail rates, and therefore Congress needs to change the existing laws in order to provide for arbitration. Id.

required; (2) the types and amounts of traffic that would be embraced; and (3) the form that binding arbitration should take and the extent of the arbitrator's authority." Id. at 4.

1. Only a Complainant Shipper Should Be
Authorized to Invoke Binding Arbitration

The Board's Decision states that it is "rail customers" who are in need of a more expedited and less costly means of resolution of disputes with the railroads. WCTL does not disagree that certain non-coal shippers with disputes that are too small to warrant prosecution of a regular complaint may have been left without any real remedy. While the adoption of the Ex Parte No. 347 (Sub-No. 2) Non-Coal Rate Guidelines to assess the reasonableness of challenged rail rates where constrained market pricing procedures are not practical offers the prospect of some protection to these small shippers, even under those guidelines, the associated expense, complexity; and the existing evidentiary standards may discourage shippers from asserting claims.

The Board seeks through this proceeding to enhance the opportunities for small shippers to obtain the potential advantages of arbitration. Therefore, if the Board is to recommend that the Congress legislatively prescribe binding arbitration, the decision to elect arbitration, regardless of the size of the case, should be at the option of the complainant shipper only. A shipper should not be forced into unwanted arbitration proceeding against its will where it believes that the Board, rather than an arbitrator, is better suited to decide

its case.¹⁰ Shippers are the intended beneficiaries of the Board's authority to decide rate-reasonableness disputes. Accordingly, if the Board is to recommend to the Congress that arbitration be made mandatory in certain smaller cases, it should only be at the option of a non-railroad party to a dispute.¹¹

2. Board Interaction with Congress

As stated above, WCTL believes the Board's existing Coal Rate Guidelines offer a reasonable and workable methodology for determining the reasonableness of rates charged to coal shippers. However, in the almost five years since the Board adopted its Non-Coal Rate Guidelines, shippers have not brought any cases, apparently "because [the Board's] formal procedures are still impractical for the limited amounts of traffic that they ship." Decision at 3.

WCTL is encouraged that the Board, through this proceeding, is seeking to provide leadership and endeavoring to

¹⁰For example, while not a small case, in the pending Arizona Electric Power Cooperative, Inc. v. The Burlington Northern and Santa Fe Railway Company and Union Pacific Railroad Company proceeding (STB Finance Docket No. 34041) ("AEPCO"), the involved defendant railroads challenged their obligation to establish common carrier rates upon request under 49 U.S.C. § 11101(b). To the Board's credit, it promptly acted on the Complainant's Petition for Emergency Relief and ordered defendants to immediately restore the involved canceled rates. See AEPCO (Decision served May 8, 2001). It is clear that if the involved dispute were subject to mandatory, binding arbitration (or subject to railroad-elect arbitration) such arbitration would have prolonged and could ultimately have thwarted AEPCO's ability to obtain a rate to be challenged.

¹¹Such shipper-elect arbitration is consistent with pending S. 1101, § 303, which authorizes only non-railroad complainants to invoke arbitration in those cases involving "the reasonableness of rates or other charges or the provision of service."

provide a record that Congress can utilize to potentially streamline the existing complaint process through the enhanced use of arbitration. Encouraging the increased use of arbitration, however, cannot be expected to fix all the underlying problems inhibiting shipper access to existing statutory relief mechanisms. For example, the Board's arbitration rules merely establish an expedited alternative dispute resolution process for deciding cases; they do not provide for the use of any substantive streamlined or simplified evidentiary guidelines/methods. If anything, the dearth of complaints brought under the Board's Non-Coal Rate Guidelines indicates that the hurdles for non-coal/small shippers to obtain rate relief remain too demanding, not that the process needs to be expedited through arbitration. WCTL notes that the Board's proposed changes do not seek to address this problem.

Additionally, if there is a lack of available remedies, WCTL submits that it is in large part attributable to underlying substantive decisions that presently inhibit the ability of rail customers to resolve disputes with carriers in the private marketplace arena or in proceedings before the Board. In particular, the Board's "bottleneck" and competitive access decisions have inhibited shippers' ability to negotiate acceptable arrangements with carriers, thus necessitating shippers' need to invoke agency adjudicatory remedies.

An important way to improve private sector resolution of disputes in an expedited manner is to improve the competitive

landscape facing captive shippers. While the Board, as an expert agency, is particularly well-suited to assisting Congress in developing pro-competitive railroad policies, the Board in the past has declined to make recommendations to the Congress on such issues.¹² WCTL respectfully submits that, to achieve its intended result in the present proceeding, the Board needs to pursue a dialogue with the Congress, as well as take actions itself, not just on its proposals to expand the use of arbitration, but also on a whole range of other important substantive competitive issues growing out of the Board's Ex Parte No. 575 proceedings -- issues with which the Board is intimately familiar.

III.

CONCLUSION

Encouraging arbitration as an option for resolving disputes falling under the Board's jurisdiction may benefit the parties directly involved and the Board itself, especially in smaller cases. However, arbitration should not be imposed on parties to a dispute unless it is at the election of the non-railroad complainant, thus furthering the public interest. Additionally, to the extent that the Board seeks to become involved in assisting Congress in the legislative arena, WCTL

¹²The Board has stated that such issues are "fundamental, and they raise basic policy issues -- concerning the appropriate role of competition, differential pricing, and how railroads earn revenues and structure their services -- that are more appropriately resolved by Congress than by an administrative agency." See Letter to Hon. John McCain and Hon. Kay Bailey Hutchison from Chairman Morgan (Dec. 21, 1998) at 4.

suggests that Board leadership and guidance to the Congress might be better served by examining and addressing the competitive causes of grievances that are being aired by Congress and railroad customers.

Respectfully submitted,

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Dated: November 21, 2001

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