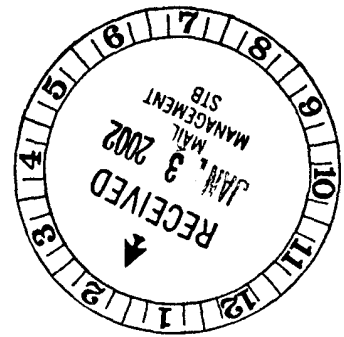


204267

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***

REPLY COMMENTS

ENTERED
Office of the Secretary

JAN 13 2002

submitted by

Part of
Public Record

THE NATIONAL INDUSTRIAL TRANSPORTATION LEAGUE

THE NATIONAL INDUSTRIAL TRANSPORTATION
LEAGUE
1700 North Moore St.
Suite 1900
Arlington, Virginia 22209

By Its Attorney

Nicholas J. DiMichael
Thompson Hine LLP
1920 N. St. N.W.
Suite 800
Washington, D.C. 20036
(202) 263-4103

Dated: January 3, 2002

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

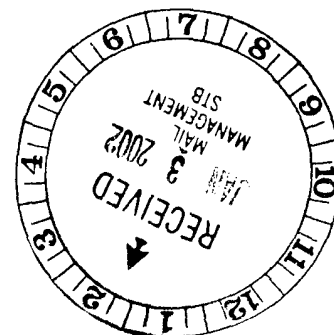
Ex Parte No. 586

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

REPLY COMMENTS

submitted by

THE NATIONAL INDUSTRIAL TRANSPORTATION LEAGUE



The National Industrial Transportation League ("League") respectfully submits its Reply Comments in this proceeding, in accordance with the Board's notice of inquiry served September 20, 2001, and as modified by the Board's decision served December 12, 2001.

On November 23, 2001, the League submitted its initial Comments in this proceeding. In those Comments, the League commended the Board for 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. In its Comments, the League indicated that it strongly favors legislative change that would permit arbitration of small rate disputes, at either party's option. In its Comments, the League also set forth its views on a number of issues raised by the Board's proposal. Finally, the League declared that such a legislative change should also permit the use of mandatory arbitration for a broad array of disputes between shippers and rail carriers that are subject to the Board's jurisdiction.

As a general matter, the League stated that the use of mandatory arbitration to adjudicate rights given to shippers under the ICC Termination Act of 1995 would be completely consistent with the 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 many disputes between individual shippers and rail carriers.

More specifically, in its Comments the League indicated that the current jurisdictional requirements for rail rate proceedings, involving market dominance and the existence of a rate that equals or exceeds the jurisdictional threshold, are appropriate for the arbitration of small rate disputes. NITL Comments, p. 5. The League suggested that an arbitrator should be able to revoke an exemption with respect to the movement at issue in the arbitration, provided that the arbitrator finds that the requirements for revoking an exemption have been met. *Id.*, pp. 6-7. The League disagreed strongly with the Board's proposal that a "small rate case" should be determined by the total number of carloads that a shipper transports over the lines of a single railroad (a proposal referred to in these Reply Comments as the "total railroad test"), and instead suggested a test that would consider the number of carloads tendered or revenue paid by a shipper between a discrete origin/destination pair, whichever was greater. NITL Comments, pp. 8-10.

With respect to the conduct of "small rate case" arbitration, the League suggested that an arbitration demand be permitted to be filed up to 120 days before the end of a contract; that the arbitration be adjudicated by a single arbitrator from a roster kept by the Board (unless otherwise agreed to by the parties); that the arbitration be conducted in no more than 90 days (unless otherwise agreed to by the parties); and that there should be expedited discovery. NITL Comments, pp. 11-12. The League suggested that rail rate arbitration should be conducted as final offer or "baseball-style" arbitration; that the arbitrator should be able to consider all of the facts and circumstances in determining a "reasonable" rate; and that he or she should be empowered to prescribe a rate up to two years and award damages up to one year. *Id.* at 12-13. Appeals should be directed to the Board and expedited (with no more than 30 days for decision after an appeal is filed) under the standards set forth in the Federal Arbitration Act. *Id.* at 13. See, 9 U.S.C. § 9 and 10.

Finally, with respect to the use of arbitration other than in so-called "small rate cases," the League indicated that there were a wide variety of disputes that might be resolved more quickly, more cheaply, and more easily through arbitration. These included disputes as to: the application of demurrage/storage rules or of rail classifications, rules and practices to a particular shipper; the application of the terms of receipts and bills of lading; damages for failure to provide service on reasonable request; application of a railroad's car or equipment program rules or general car distribution rules; certain matters involving the reasonableness of a railroad's published rules and practices applied in specific circumstances; the terms of sidetrack agreements; and the reasonableness of terminal switching charges, weighing and overloading charges, car diversion charges, or similar accessorial charges, as applied to the facts of a particular movement. NITL Comments, pp. 15-16. The League suggested that, in such non-rate

disputes, arbitration should be conducted under standard procedures, that is, rather than “baseball” style, final-offer arbitration, to give the arbitrator maximum flexibility to craft an appropriate resolution of the dispute. *Id.* at 16. The League indicated that the Board itself (rather than an arbitrator) should rule in disputes where general rules of industry applicability are involved, or where relief granted to one shipper would directly affect the service provided to another shipper. *Id.* at 15.

As discussed further below, a wide variety of commenters in this proceeding support expedited arbitration of small rate and other disputes, and many parties agree with the thrust of the League’s suggestions for the conduct of such arbitration. Only the Association of American Railroads (“AAR”) and the Canadian National and the Canadian Pacific Railroads (“CN/CP”) opposed the idea in total, along with a single short line, the Genessee & Wyoming (“G&W”). As set forth in more detail below, the railroads’ critiques of arbitration are utterly misplaced and are completely inconsistent with the experience of businesses in this country and around the world, which have increasingly relied on arbitration as an effective means of adjudicating commercial disputes. Such “nay-saying” does nothing to assist the Board or the Congress in attempting to fashion a more responsive and efficient system for resolving disputes between shippers and rail carriers.

I. A WIDE SPECTRUM OF COMMENTERS SUPPORT EXPEDITED ARBITRATION OF SMALL RATE DISPUTES AND OTHER DISPUTES, AND MANY PARTIES AGREE WITH THE THRUST OF THE LEAGUE’S SUGGESTIONS FOR THE CONDUCT OF SUCH ARBITRATION

The vast majority of commenters in this proceeding supported the concept of arbitration of small rate and other disputes, and a number of positive and creative ideas were offered in the comments filed for the Board’s and the Congress’ consideration. Support of the concept of arbitration was voiced by the Alliance for Rail Competition; the American Chemistry Council;

the Dow Chemical Company; the Edison Electric Institute; the Fertilizer Institute; the Montana Wheat and Barley Committee, et al; the National Grain and Feed Association; the North Dakota Wheat Commission; the North Dakota Public Service Commission; PPL Generation, LLC; the United States Department of Transportation; and the Western Coal Traffic League.¹ As stated by NGFA, which has administered an arbitration system among its members for many years, “arbitration has the potential to provide a more commercially feasible manner of dispute resolution than does court or regulatory litigation . . .” NGFA Comments, p. 2.

While support for arbitration was strong, many of these commenters echoed the League’s concern with the Board’s proposed “total railroad test” to determine eligibility for “small rate case” arbitration. Many commenters noted that the Board’s proposed “total railroad test” is conceptually flawed and would make arbitration virtually unavailable.² NGFA points out, for example, that the Board’s “total railroad test” is inconsistent with the Board’s market dominance determinations, which are made on an origin-to-destination basis, and which is commodity-specific. Moreover, NGFA notes that there is no rational basis to assume that a shipper who tenders a greater number of carloads to a railroad has greater leverage. NGFA Comments, pp. 5-6.

The Comments of the Dow Chemical Company in particular demonstrate the flaws in the Board’s reasoning that apparently led the Board to suggest the “total railroad test.” Dow notes

¹ Comments of the Alliance for Rail Competition (“ARC”), p. 5; Comments of the American Chemistry Council (“ACC”), p. 2; Comments of the Dow Chemical Company (“Dow”), pp. 1-2; Comments of the Edison Electric Institute, p. 1; Comments of The Fertilizer Institute, pp. 1-2; Comments of the Montana Wheat & Barley Committee, et al (“Wheat Committees”), p. 2; Comments of the National Grain and Feed Association (“NGFA”), p. 2; Comments of the North Dakota Wheat Commission (“NDWC”), p. 1; Public Service Commission of North Dakota (“PSCND”), p. 4; Comments of PPL Generation, LLC (“PPL”), p. 4; Comments of the United States Department of Transportation (“DOT”), p. 1; Comments of the Western Coal Traffic League, p. 8.

² See, e.g., ARC Comments, p. 5; ACC Comments, p. 2; Dow Comments, p. 3; Wheat Committees Comments, p. 2; PPL Comments, p. 4.

that it tenders approximately 95,000 rail cars per year from its major U.S. production facilities, but that 72,000 of these cars (approximately 75%) are tendered from just four facilities, all of which are captive to one railroad and for which there is limited intermodal competition. Dow Comments, pp. 4-5. Under the Board's proposed "total railroad test," Dow would be ineligible for arbitration, since it tenders much more than 500 carloads on the one railroad that serves these four facilities. Yet, although the total number of carloads that Dow tenders from these origins is large, Dow ships these products to literally thousands of destinations, so that there are few carloads tendered to any one destination. Specifically, in 2000, Dow indicated that it shipped 98,550 carloads by rail in the continental U.S., but the traffic was spread over 3,164 different traffic lanes. *Id.*, p. 5. Over 90% of these traffic lanes handled 100 carloads or less during the year, accounting for nearly half of the total number of carloads. *Id.* Moreover, many of the destinations receiving more than 100 cars in that year received more than one different commodity, each paying different rates. *Id.* A complaint at the Board, of course, must be commodity- and rate-specific. See, 49 C.F.R. § 1111.1(a). Complicating the situation even further is the fact that Dow's traffic patterns change frequently: there is a 25%-35% change in destinations annually. *Id.* Thus, Dow would appear to be a shipper for whom arbitration would be perfectly suited: a captive shipper with little traffic over any one lane, with relatively small dollar amounts at stake in any one complaint. Yet, the Board's "total railroad" test would make such a shipper completely ineligible for arbitration.

Though many shippers do not ship Dow's number of total carloads, in all other respects Dow's experience is typical of many merchandise and bulk commodity shippers (other than shippers of coal, who generally transport many hundreds of carloads per year from one or a few origins frequently to one destination). These characteristics include a plant's captivity to a single

railroad³; shipments to a wide variety of destinations with concomitant few shipments between any single origin/destination pair,⁴ and relatively frequent change in the destinations to which the plant's product is shipped. Even though such a shipper's movements are clearly subject to a railroad's market power; and even though that shipper is "large" under a "total railroad" test, such a shipper cannot readily access the theoretical protections afforded by the statute under the Board's existing standards. The wide geographic dispersal of such shippers' traffic makes a rate case under the Board's Constrained Market Pricing rules virtually impossible because of its complexity and expense relative to the dollar amounts at stake. The uncertainties and likely expense under the Board's non-coal rate guidelines have also discouraged shippers since their issuance.

Moreover, as discussed in more detail below, the time it takes to litigate a case even under the Board's guidelines for non-coal rate cases, substantially lessens the utility of such a challenge, especially in view of the relatively frequent "turnover" of destinations. While arbitration is not and cannot be a panacea,⁵ a well-designed arbitration system, in which complaints can be adjudicated much more quickly and cheaply than under the Board's existing procedures, would make it possible for many shippers to access the rights given them by the statute. The Board's proposed "total railroad test," however, would virtually eliminate

³ And frequently, due to the merger of many rail carriers in the past ten years, even plants that are located in different geographic areas are captive to the same railroad, thus eliminating whatever leverage such geographic dispersal may have afforded in the past.

⁴ Of course, since many plants are captive to a single railroad, there are often "bottlenecks" controlled by that railroad. However, under the Board's bottleneck decision, a shipper frequently is not permitted to challenge the rate over that bottleneck, as, for example, where the origin carrier can serve the destination, but where the destination can also be served by another carrier; or where the shipper does not have a contract with the joint-line carrier serving the destination.

⁵ These same facts explain why many shippers support broadened and reformed "competitive access," such as reciprocal switching within a set distance of a terminal or other forms of competitive access, which would automatically provide market choices instead of a litigation remedy (*i.e.*, either administrative litigation or arbitration)

arbitration as a realistic alternative for shippers who cannot feasibly utilize the agency's procedures now, and who are subject to a rail carrier's market power.

A number of commenters agreed with the League that the proper test for determining what is a "small rate" case is based on origin-destination pairs. See, *e.g.*, NGFA Comments, p. 9; TFI Comments, p. 7; Dow Comments, p. 6; PPL Comments, p. 5; ARC Comments, p. 5. The League believes that NGFA's origin-destination approach to small rate cases, which would make arbitration available to any party, but limited to a recovery of \$250,000 per origin-destination pair for each year the arbitration award would be effective, is a creative approach that should be investigated further by the Board.

Most commenters also favor some form of final-offer arbitration.⁶ Although suggested procedures vary, commenters favor prompt resolution of arbitration, limited or tightly-controlled discovery, and appeals only under Federal Arbitration Act standards.⁷ Many commenters, like the League, explicitly oppose the use of Constrained Market Pricing standards in arbitration.⁸

Finally, many commenters agree with the League that arbitration should be considered for many disputes other than "small rate case" disputes.⁹ NGFA, for example, notes that it "sees no reason why mandatory arbitration at the election of a party should be confined to those cases where the maximum level of a rail rate is at issue. Other types of disputes subject to the Board's

⁶ See, *e.g.*, PPL Comments, p. 7; NGFA Comments, p. 10; ACC Comments, pp. 2-3; ARC Comments, p. 6; TFI Comments, p. 10.

⁷ WCTL Comments, p. 10; PPL Comments, pp. 7-8; NGFA Comments, pp. 10-11; TFI Comments, pp. 9-11; ARC Comments, p. 2.

⁸ PPL Comments, p. 6; TFI Comments, p. 10.

⁹ TFI Comments, pp. 11-13; ARC Comments, p. 6; EEI Comments, p. 2; Wheat Committees Comments, p. 4-5; NGFA Comments, p. 12; PPL Comments, p. 9.

jurisdiction are also susceptible of resolution through arbitration and can be arbitrated, probably at less cost and in less time, than they can be litigated through administrative proceedings followed by unlimited judicial reviewThe Board should review the types of disputes that the Board is capable of resolving through arbitration in addition to rate cases and frame an appropriate recommendation to Congress for the extension of arbitration in those instances.” NGFA Comments, p. 12.

In sum, the comments reflect widespread support of arbitration for small rate cases and other disputes, and concern over the unavailability of existing statutory remedies for many shippers. The comments submitted to the Board widely agree that mandatory, binding arbitration, if implemented properly, is a valuable means to expand these remedies to more shippers. The League urges the Board to consider these views carefully and to support legislatively-mandated arbitration of small rate case and other disputes.

II. THE MAJOR RAILROADS’ OPPOSITION TO IMPROVEMENTS IN THE SYSTEM FOR RESOLVING DISPUTES BETWEEN SHIPPERS AND CARRIERS IS SIMPLY A PRO-REGULATORY ATTEMPT TO PRESERVE THE CURRENT SYSTEM FOR THE CARRIERS’ OWN NARROW ENDS

Though the railroads proffer in their comments that they prefer private-sector dispute resolution, their comments entirely oppose the concept of arbitration of small rate case disputes. As the Board has recognized in its September 20 Notice, the current system administered by the Board necessarily involves relatively lengthy, and therefore expensive, governmental processes in order to adjudicate shippers’ rights granted under the statute. The very length and expense of these governmental processes foreclose many persons from accessing those rights. Arbitration has been increasingly utilized by businesses across the economy precisely because it is a quick and relatively inexpensive means of resolving disputes. Indeed, NGFA’s experience in administering an arbitration system for its members, as well as the experience of shippers under

the Canadian statute as recently reported by the Canadian Transportation Act Review Panel, powerfully testify to the benefits of arbitration. The railroads' broad opposition to arbitration plainly stems from a desire to preserve a lengthy and expensive governmental process because the very length and expense of the process forecloses all but the largest claims. The carriers' pro-regulatory stance is, however, inconsistent with appropriate governmental policy and fundamental fairness, and the thrust of ICCTA for more expedition in the agency's processes. 49 U.S.C. § 10101(15).

A. The AAR's Opposition to Arbitration on the Grounds That Private-Sector Dispute Resolution Does Not Support Such a Procedure, Is Entirely Incorrect

In its Comments, the AAR first argues that, for a variety of reasons, the Board's desire to promote private-sector resolution of disputes does not support a mandatory arbitration procedure. The AAR's Comments entirely miss the mark.

The AAR first argues that, since existing methods such as the Board's current rules for small rate cases and voluntary arbitration have not been used, the use of arbitration is "premature" because the "problem" may be illusory. This is utter nonsense. As a February 1999 report of the General Accounting Office convincingly demonstrated, over seventy percent of rail customers consider existing formal rate relief processes to be too costly and time-consuming to be worth pursuing. *Railroad Regulation: Current Issues Associated with the Rate Relief Process*, GAO/RCED-99-46, February 1999, p. 4. The League strongly believes that many shippers are effectively precluded from utilizing the agency's processes because of the time and expense required.

The Board's current rules with respect to small rate cases establish a formal, lengthy, highly legalistic regulatory process whose very length and expense discourages its use. Even

under the statutory time frame for deciding non-coal cases (6 months from the close of the record, see 49 U.S.C. § 10704(c)(2)), the total time for litigation is much longer. Under the Board's rules, close to two months will be consumed in determining whether a case is even eligible for small rate case treatment. See 49 C.F.R. § 1111.9. Then, the railroad will insist upon discovery on the market dominance issue, and the shipper will often need some discovery on the railroad's costs. Under the Board's procedural rules, a minimum of three or four months is likely to be consumed in such matters, much more if either one of the litigants files a motion to compel, which are rarely acted on by the Board in less than three months after such a motion is filed.¹⁰ Finally, the Board has consistently acted so that the record does not "close" (and therefore the time for decision under the statute does not begin to run) until the filing of briefs in a case, an exercise that consumes another month.¹¹ The time frame from "start to finish" for litigating a small rate case under present Board procedures is at a minimum a year, and more realistically probably closer to fifteen months or more, even if the Board meets the 6-month statutory deadline for the issuance of a decision after the close of the administrative record.

The Board's existing rules regarding arbitration have never been tried because of the nature of the rights granted under the statute and because arbitration under those rules is voluntary. Unlike contractual arbitration clauses, where the existence of a competitive market gives both parties an incentive to arrive at agreed-to processes for dispute resolution, and where both parties may often be able to take advantage of the benefits of arbitration to resolve disputes,

¹⁰ As one current example, on December 31, 2001, the Board issued a decision on a motion to compel in the case of *Arizona Electric Power Company v. Burlington Northern Santa Fe Railroad Company*, STB Docket No. 42058. That motion was filed on April 16, 2001, and decided eight and a half months later.

¹¹ For example, under the statute, the Board must issue a decision in a stand-alone rate case no more than nine months after the close of the record. 49 U.S.C. § 10704(c)(1). In the case of STB Docket No. 42022, *FMC Wyoming Corporation et al v. Union Pacific Railroad Company*, for example, the Board ordered briefs to be filed in the case, and then issued a decision not nine months after the filing of the last evidence, but nine months after the filing of the briefs.

only shippers can bring rate complaints against market-dominant carriers. It has been impossible to arrive at an agreement to arbitrate rate or similar disputes between shippers and rail carriers under the Board's voluntary rules, because it is not possible to obtain the agreement of the carrier defendant, who mightily benefits from the length and cost of the current system.

The AAR then argues that arbitration of small rate disputes should not be legislatively prescribed because it is "coercive" and therefore would not foster the private sector resolution that the Board seeks to promote. Again, the AAR is incorrect, for at least two reasons.

First, it is self-evident that mandatory arbitration of small rate case and other disputes is "coercive" only in the sense that it would *require* the use of arbitration to decide such matters. But the point is that such a system will take advantage of the relative informality, ease and speed of arbitration to afford more shippers *practical* access to the rights that they have *already* been granted, but which they cannot effectively use.

Second, and even more to the point, the Canadian experience indicates that the very *existence* of such a remedy can promote private-sector resolution of disputes. As noted in the Comments of ACC, the report of the Canadian Transportation Act Review Panel indicated that only 23 final-offer arbitrations have been filed in Canada since that process was adopted in 1988, with most of these filed since 1996. See, ACC Comments, p. 3. More than half of these claims were settled. *Id.* It is highly likely that the existence of the remedy led to the settlement of other disputes for which arbitration claims were never even filed. Indeed, the CTA Review Panel Report notes that "the arbitration process encourages parties to reach commercial settlement of their disagreement" *Vision and Balance, The Report of the Canadian Transportation Act Review Panel*, June, 2001, p. 71 ("CTA Review Panel Report").

The Canadian experience thus powerfully demonstrates that a mandatory arbitration remedy can and does lead to the resolution of disputes, rather than to extensive litigation. It should be noted that the Comments of the CN/CP are directed almost solely to a critique of the Canadian final offer arbitration system. Their remarks are effectively rebutted by the CTA Review Panel Report, which found no major flaws in the system. Indeed, the Review Panel concluded, as CN/CP themselves concede, that the Canadian final offer arbitration provisions *“adequately address the problem of carrier dominance and potential abuse in a way that is fair to both shippers and carriers.”* See, CTA Review Panel Report, p. 72 [emphasis added]; Comments of CN/CP, p. 6.

Next, the AAR argues a mandatory arbitration process could permit an arbitrator to render a decision “unfettered” by statutory standards and regulatory principles, and thereby lead to inconsistent and unpredictable results. See, AAR Comments, pp. 6, 8-10. This is a red herring. In its Comments, the League has suggested that a decision of an arbitrator should be subject to appeals to the Board under the Federal Arbitration Act. As pointed out by NGFA in its comments, such standards would require a finding by the Board on appeal that the arbitrator had jurisdiction to decide the dispute, which would provide assurance that no rate is set that is under 180 percent of the defendant railroad’s variable costs or mandated in the absence of market dominance, since both of these elements are jurisdictional in rate reasonableness proceedings. NGFA Comments, p. 11; see 5 U.S.C. § 10(a)(4) (arbitration decision may be vacated where the arbitrators exceeded their powers). Thus, the arbitrator would be constrained just as the Board is now. As to the railroads’ fear of “standardless” decision-making within these boundaries, the system that the League has proposed – a reasonableness determination based on the facts and circumstances of the case, with parties precluded from presenting evidence on

“Stand Alone Costs” – is similar to the approach adopted by the Board in Ex Parte 347 (Sub-No. 2). As the Board’s Decision in that decision concludes, the revenue and cost “benchmarks” outlined by the Board in its *Non-Coal Rate Guidelines* “serve merely as the starting point of an analysis that should be further developed and tailored to the individual case.” Ex Parte 347 (Sub-No. 2), *Rate Guidelines – Non-Coal Proceedings*, 1 S.T.B. 1004, 1045 (1996). Thus, decisions of arbitrators would be no more “unpredictable” than decisions of the Board under the agency’s current small rate case standards -- and they would be much quicker and significantly less expensive.¹²

Finally, the AAR argues that it could be difficult to find a sufficient number of arbitrators with expertise in rail transportation and without longstanding ties to rail or shipper interests. AAR Comments, p. 7. But railroads (when arbitrating among themselves), shippers (when competitively-negotiated contracts call for arbitration of disputes), rail labor interests (where arbitration is frequently used to resolve disputes), and others, have not found it difficult to obtain expert, unbiased arbitrators when called upon to do so, and the League has no doubt that if legislation is approved to expand the use of arbitration, a cadre of expert, unbiased arbitrators will soon step forward.¹³

¹² The AAR’s complaint that arbitration does not necessarily offer any time or expense advantage over the current framework for adjudication before the Board, is flatly belied by the explosive growth in arbitration as a means for resolving disputes by businesses generally. The Board’s processes are no less expensive or speedier than litigation of common business disputes in court: yet, businesses generally have increasingly opted in commercial disputes for arbitration rather than resort to the court system. An arbitration system that would provide for a decision in 120 days, as the League suggests, would by its very nature constrain the expense of litigation, if only because the time for incurring the expense would be itself tightly constrained.

¹³ AAR argues that the staff of the Board is “better suited” to make detailed cost calculations. But the Board already has a well-developed set of standards for evaluating cost evidence, and arbitrators can choose to employ their own experts. It is even possible for legislation to provide for arbitrators to utilize Board staff for technical matters on a cost-reimbursement basis.

B. Mandatory, Non-Binding Mediation As Suggested by the AAR Is Not a Substitute for An Effective Mandatory System of Arbitration

At page 11 of its Comments, the AAR proposes mandatory, non-binding mediation. The League respectfully disagrees. While mediation can be useful to resolve disputes where both parties have agreed to try to have a third party assist in resolving the matter, it makes little sense to require mediation. Indeed, the mediation programs cited by the AAR in its Comments are virtually all voluntary, only utilized if both parties consent to its use. Mediation by its nature requires both parties to have come to the conclusion that some "help" would be useful. If one or both parties have concluded that there has been a sincere effort to resolve the dispute, and instead of help, a *decision* is needed, then mediation is useless. Indeed, *mandatory* mediation as advocated by the AAR may only exacerbate the current problem, by extending the time for coming to a decision in a dispute even longer than it is now, since mediation would be required as an additional step in the final adjudication of a shipper's complaint

III. CONCLUSION

The League respectfully requests the Board to consider the views expressed above as it considers this matter and develops a report to Congress recommending a legislative change that would permit 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,

THE NATIONAL INDUSTRIAL TRANSPORTATION LEAGUE
1700 North Moore St., Suite 1900
Arlington, Virginia 22209

By Its Attorney

A handwritten signature in cursive script, appearing to read "Nicholas J. DiMichael".

Nicholas J. DiMichael
Thompson Hine LLP
1920 N. St. N.W., Suite 800
Washington, D.C. 20036
(202) 263-4103

Dated: January 3, 2002