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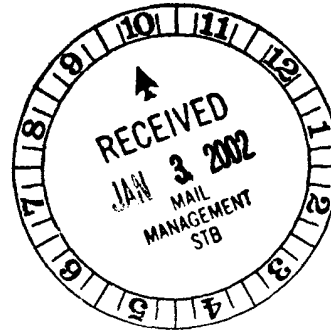
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204269

January 3, 2002



Honorable Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, N.W.
Washington, DC 20423

Re: 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 are a signed original and 10 copies of Reply Comments of National Grain and Feed Association, as well as a floppy disk containing the same.

Sincerely,

Andrew P. Goldstein

Andrew P. Goldstein

ENTERED
Office of the Secretary

APG/rmm

ORIGINAL

BEFORE THE
SURFACE TRANSPORTATION BOARD



204269

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 OF
NATIONAL GRAIN AND FEED ASSOCIATION

ENTERED
Office of the Secretary

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Part of
Public Record

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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 OF
NATIONAL GRAIN AND FEED ASSOCIATION**

These Reply Comments are filed on behalf of National Grain and Feed Association ("NGFA"), which submitted initial comments ("Comments") on November 21, 2001. NGFA is encouraged by the broad support evinced for arbitration as a mandatory means of dispute resolution by virtually all commentators, save those associated with the railroad industry. This reply accordingly is directed mainly to the Initial Comments of the Association of American Railroads ("AAR"), filed on behalf of itself and its individual members.

I. Change is Not Premature

AAR suggests (Initial Comments at 4-5) that "it is premature to suggest that new mechanisms are needed to assist small shippers wishing to pursue rate disputes" because

neither the Board's voluntary dispute resolution procedures at 49 C.F.R. Part 1108 nor its rules for "simplified" rate proceedings have been utilized.

The non-utilization of existing procedures is not a reason for bypassing development of new procedures; non-utilization is, in fact, precisely why new procedures are appropriate. Litigation over "small" rate cases has not been commenced, and arbitration has not been proposed by shippers, because neither such process can be justified under a cost-benefit analysis that relies on existing "small rate case" approaches. See NGFA Comments at 7-8.

Arbitration should offer an expeditious, simplified, and less expensive means of dispute resolution than does formal litigation. Arbitration under the Board's alternate dispute resolution procedures unfortunately does not appear to meet those goals for rate cases.

For instance, the Board's arbitration procedures incorporate limitations on the Board's authority to conduct arbitration; arbitration cannot exceed the Board's own statutory jurisdiction. See 49 C.F.R. §§ 1108.2 and 1108.3. Thus, because the provisions of 49 U.S.C. § 10701(d)(3), as reflected by the Board's regulations at 49 C.F.R. § 1111.1, require the Board to distinguish between large (stand-alone) rate cases and "simplified" (small) rate cases, the Board lacks jurisdiction to arbitrate a rate case asserted by a complaining party to be a "simplified" or "small" rate case without first making a relatively complicated jurisdictional determination that the case qualifies for "simplified" treatment. Arbitration of a "small" rate dispute before the Board accordingly would commence with precisely the same type of burdensome dispute over access to "small case" procedures as would pursuit of the same rate issue in a formal complaint.

Existing arbitration procedures before the Board not only carry the same baggage as do formal litigation, but fail to provide the brevity that optimally should characterize arbitration. A decision of an arbitrator rendered pursuant to the Board's present procedures is not final, and the Board has reserved to itself the right to reverse that decision when it does "not take its essence from the Interstate Commerce Act." 49 C.F.R. § 1108.11(c).¹ Arbitration of a "small rate case" before the Board thus begins and ends with the need to resolve issues that should be alien to a simplified arbitration process, while the substance of the arbitration itself remains subject to high costs and an outcome that is decidedly inferior to the results obtainable under stand-alone rate challenges. See NGFA Comments at 11-12. For these reasons, among others, "small rate case" challenges have not been pursued by shippers.

Arbitration before the Board is consensual, and cannot proceed without the defendant railroad's agreement to arbitrate. None of AAR's member railroads have come forward with a pledge to arbitrate "small rate cases," regardless of how that term is defined. Accordingly, AAR and its members seem poorly positioned to demand that the Board's arbitration procedures be tried and proven inadequate before new arbitration procedures are installed. In any event, even assuming that there are railroads willing to arbitrate "small rate cases" under the Board's present procedures, it is hardly remarkable that there has not been a rush of shippers seeking to invoke those arbitration procedures, given the many defects inherent in the present process.

¹ NGFA does not favor administrative review of arbitration decisions and believes that review as provided in the Federal Arbitration Act is sufficient.

II. Mandatory Arbitration Will Foster Private Sector Solutions

AAR maintains that voluntary dispute resolution inherently promotes private sector dispute resolution, while mandatory arbitration is unlikely to do so (Initial Comments at 5, 11).

It has been NGFA's experience that compulsory arbitration in fact promotes private sector solutions. As noted in NGFA's Comments, NGFA maintains Grain Trade Rules and Arbitration Rules which are among the oldest in the nation. When an NGFA member is involved in a dispute arising under NGFA's Grain Trade Rules, that dispute is subject to compulsory arbitration. NGFA's experience is that fewer than one-third of the arbitration cases initially filed for resolution under NGFA's arbitration procedures survive the full arbitration process without settlement; over two-thirds of all arbitration cases formally commenced before NGFA are resolved privately after the parties have had an opportunity to examine their opponent's opening evidence and argument. Furthermore, NGFA's members indicate that the specter of binding, compulsory arbitration actually results in the resolution of a great many additional disputes prior to the commencement of arbitration. As a result, arbitration of rail disputes pursuant to NGFA's Rail Arbitration Rules² -- a process made compulsory through the parties' participation in a collective agreement to arbitrate -- has generated an increased level of private dispute resolution.

The efficacy of arbitration is driven by practical considerations that are overlooked by AAR. Compulsory, binding arbitration works best when the following conditions are present: (1) commencement of arbitration proceedings is simple and inexpensive, (2) the process encourages a negotiated solution at any time prior to final decision,

² See NGFA Comments at 2-3.

(3) the arbitration system is not slanted toward the interests of one party or the other, and
(4) the outcome has visibility, including public reporting of the arbitrator's decision.
These elements all are present in NGFA's arbitration system, which is one reason why it not only has been enduring, but so often leads to pre-decisional settlements.

Admittedly, arbitration of "small" disputes regarding maximum rail rates may not meet these criteria, primarily because of the complexity and costs attendant to "small rate case" deliberations and an outcome which fails to provide a sufficient reward to justify such risks and investments. See NGFA Comments at 11-12, pointing out that, under the Board's "simplified" procedures for "small rate cases," it is unrealistic to anticipate that a maximum lawful rate would be set below 240% of variable cost, more or less, so that there are likely to be few such cases that will appear to justify the necessary major investment in dispute resolution under those circumstances. While NGFA remains fully committed to its rail arbitration agreements with rail carriers (and would likely oppose actively any steps to over-ride that system by a government-administered system), binding, mandatory arbitration is likely to be highly effective with respect to many classes of railroad-shipper disputes other than those involving rate levels. The Board should explore or suggest to Congress new substantive standards that will equalize the results obtainable in "small rate cases" with those obtainable in stand-alone, or "large" rate cases, and should similarly explore or suggest to Congress the use of mandatory arbitration to resolve one-on-one disputes involving issues other than rate levels.

III. Mediation in Lieu of Arbitration is Not the Correct Solution

While continuing to oppose any new method of alternative dispute resolution for maximum rate disagreements, AAR argues that, should any new process be deemed ad-

visible, then it should be mandatory, non-binding mediation. Initial Comments at 11-15. AAR then offers proposed procedures for non-binding mediation. Initial Comments at 15-17.

Mediation is not inherently flawed. Even mediation which is non-binding may be beneficial if the mediation can be conducted on simple, understandable grounds and does not require a substantial cost. But mandatory, non-binding mediation as proposed by AAR will not improve the processes available for the resolution of maximum rate disputes involving less than stand-alone traffic volumes. To the contrary, AAR's proposal will further weigh down that process and further discourage shippers from challenging the level of railroad rates even where those rates are in fact jurisdictionally subject to challenge and unreasonably high.

To commence mediation under AAR's proposal, a shipper either would be required to file a formal complaint with the Board and pay the Board's substantial filing fee for formal rate complaints, currently set at \$5,700 for a "simplified" case, and then request the Board to hold the formal proceeding in abeyance pending mediation; or would be permitted to request mediation without first filing a formal complaint, in which case the shipper's right to reparations would be extinguishable under the applicable statute of limitations while mediation (for which no time limits are proposed by AAR) is pursued to conclusion. Initial Comments at 15.

AAR proposes that mediation should "recognize substantive rate reasonableness standards that draw their essence from ICCTA, including the standard that the resolution of the dispute must take account of the carrier's need to earn adequate revenues." Initial Comments at 16. Thus, mediation as proposed by AAR would bring to bear all of the

issues currently relevant in the formal adjudication of maximum rate disputes. Those disputes, as the Board knows quite well, are intensively fact-driven, and it is literally impossible to "recognize substantive rate reasonableness standards" absent extensive discovery, expert witnesses, and the use of counsel. AAR thus proposes another layer of substantial cost to achieve a non-binding result.

AAR offers no convincing reason why expensive, technical, mandatory, non-binding mediation should take the place of binding arbitration for rate reasonableness disputes. AAR does point to the fact that there are judicial mediation programs. Initial Comments at 12-13. However, at the trial court level, such mediation is not compulsory; and, where it is required at the appellate level, it proceeds on the basis of a factual record already established.

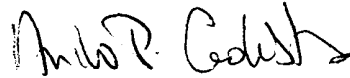
The only benefit asserted by AAR to flow from mandatory mediation is that -

* * * it would assure that any shipper dissatisfaction with rates on small movements came to a railroad's attention. AAR does not agree with allegations that its members sometimes overlook the interests of small shippers, but mandatory mediation would resolve any shipper concern in that regard, whether or not there is a basis for it.

Initial Comments at 11. Railroads have sales and marketing representatives who constantly are apprised when there is shipper dissatisfaction with the railroad's rates. Formal, expensive mediation as proposed by AAR is not practical nor should it be necessary to overcome the inability of railroad representatives to pay attention to their customers' rate concerns.

The Board should not allow AAR's inapt mediation proposal to divert the Board from timely and appropriate consideration of arbitration as a means of resolving disputes between railroads and their customers.

Respectfully submitted,



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