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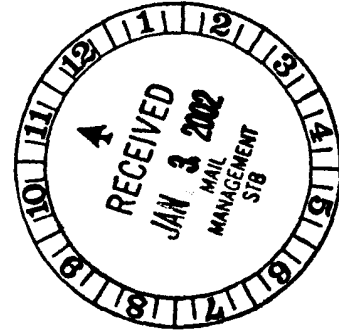
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January 3, 2002

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 Reply 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

ENTERED
Office of the Secretary

JAN 3 2002

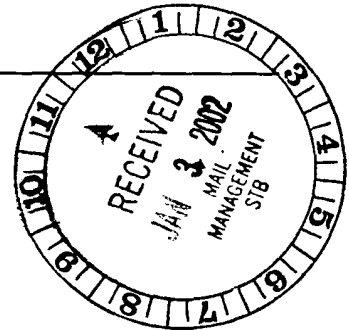
Public Record

Enclosures

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



204276

REPLY COMMENTS OF
WESTERN COAL TRAFFIC LEAGUE

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Dated: January 3, 2002

Attorneys for the
Western Coal Traffic League

BEFORE THE
SURFACE TRANSPORTATION BOARD

ARBITRATION--VARIOUS MATTERS	)	
RELATING TO ITS USE AS AN	)	
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**REPLY COMMENTS OF
WESTERN COAL TRAFFIC LEAGUE**

INTRODUCTION

The Western Coal Traffic League ("WCTL") submits these Reply Comments in response to the Board's Notice in this proceeding served September 20, 2001 ("Decision") requesting comments and reply comments concerning the use and encouragement of arbitration to resolve disputes brought before the Board (especially for smaller size cases).

In response to the Board's Decision, WCTL filed its opening Comments on November 21, 2001 ("Comments"). In its Comments, WCTL emphasized that (1) there is a continuing vital need for federal agency supervision of rail rates; (2) the existing Coal Rate Guidelines currently provide bulk shippers, the railroads, and Board staff with an acceptable analytical framework for evaluating the reasonableness of rates charged to market dominant rail movements; and (3) the Board is currently the most appropriate forum to decide such complex cases. WCTL also noted that, while it is unlikely that a complainant in a SAC

rate case would ever elect to invoke arbitration under the Board's existing 49 C.F.R. Part 1108 arbitration standards, the increased use of arbitration might benefit some parties in resolving disputes, but any such arbitration should not be imposed on parties to a dispute unless it is at the election of the complainant shipper. Finally, WCTL submitted that 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 -- a problem that the Board's proposed changes do not address. WCTL also suggested that Board leadership and guidance is needed before the Congress, not just in encouraging the use of alternative dispute resolution methods, but also in examining and addressing the underlying competitive problems (e.g. the lack of "bottleneck" and competitive access remedies) that inhibit shippers' ability to resolve rate disputes with rail carriers in the private sector arena.

In response to the Board's Decision, some nineteen parties filed comments. Many of the responding parties agree with WCTL that mandatory arbitration should be available only at the request of the complaining party.¹ Others support mandatory

¹See Comments of The Alliance for Rail Competition at 6; Comments of American Chemistry Council at 2; Comments of The Fertilizer Institute at 2; Comments of PPL Generation, LLC at 8. Edison Electric Institute ("EEI") states that it would support arbitration "where a party chooses to invoke ADR procedures to resolve a matter within the Board's statutory jurisdiction" -- but it limits its support for party-invoked arbitration only to areas contemplated under pending legislation S. 1103, which restricts the ability of non-shippers from invoking prescribed

arbitration of "small rate disputes" at either party's option² or support extending arbitration to many types of cases, not just small rate cases.³ The Class I Railroads oppose mandatory arbitration and open a whole new issue by proposing mandatory non-binding mediation.⁴ WCTL strongly believes that shippers with a dispute with a railroad should not be forced into unwanted mandatory arbitration or non-binding mediation as proposed by the Class I railroads. WCTL explains the reasons for this in these Reply Comments.

I.

ONLY A COMPLAINANT SHIPPER SHOULD BE
AUTHORIZED TO INVOKE BINDING ARBITRATION

Commentors supporting mandatory arbitration of disputes at either party's election limit their support only to certain "small rate cases." The test for determining a "small rate case", however, is not well defined under these parties' proposals.⁵

arbitration. See Comments of EEI at 1 and 4.

²See, e.g., Comments of National Industrial Traffic League at 4-13; Comments of Dow Chemical Company at 2.

³See, e.g., Comments of The Alliance for Rail Competition at 6; Comments of The Fertilizer Institute at 11-13; Comments of National Grain and Feed Association at 12-13; Comments of National Industrial Traffic League at 13-17.

⁴See Comments of Association of American Railroads at 11-17; Comments of The Canadian National Railway Company and the Canadian Pacific Railway Company at 9-11.

⁵See, e.g., Comments of the National Industrial Transportation League at 10 (recommending that in determining whether a dispute is a "small rate case" that should be subject to arbitration the Board base its decision on an unspecified

WCTL doubts that the traffic moved by any of its members would qualify for a "small rate case" that would be subject to these parties' proposed mandatory arbitration procedures. However, it is possible that a rate dispute involving a WCTL member could meet the suggested "small rate case" test or that the Board may be considering extending mandatory arbitration to other disputes. As submitted in its Comments, WCTL believes that 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.

Shippers should not be forced into mandatory arbitration by railroads for the reasons set forth in WCTL's Comments. At least for maximum rate reasonableness cases, 49 C.F.R. Part 1108 or private arbitration are not well-suited for bringing complex cases brought under the Board's Coal Rate Guidelines.⁶ WCTL believes that the regulatory standards under the Board's Coal Rate Guidelines -- which do not lend themselves to arbitration -- work and provide an adequate backstop protection to help prevent railroad market power abuse.

"carload test or a freight revenue test over an annual period."

⁶As stated in WCTL's Comments, given the complexity of large rate cases, which are based on SAC and which require discovery of large amounts of information from the defendant carrier, 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 Board's existing arbitration standards unless the underlying substantive standards for relief were changed.

Additionally, 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. For maximum rate reasonableness and other cases involving rates and service where shippers are the intended beneficiaries of the Board's authority to decide disputes, a shipper should not be forced into an unwanted arbitration proceeding against its will where it believes that the Board, rather than an arbitrator, is better suited to decide its case.⁷

Another issue mentioned by several commentators is that mandatory arbitration should not be applied to private contracts. WCTL agrees -- although, as the Board does not have jurisdiction over private contracts (see 49 U.S.C. § 10709), this point seems unnecessary. As stated in WCTL's Comments, shippers and carriers presently are free, should they jointly elect to do so, to pursue arbitration of rate disputes (or to pursue any other appropriate alternative dispute resolution methods, including mediation) subject to mutually agreed upon terms and conditions. Parties should not be discouraged from negotiating whatever alternative dispute resolution procedures they desire, and any proposed legislation should not interfere with a party's right to enter into any such negotiated contractual arrangements.

⁷Such 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."

II.

THE AAR'S MEDIATION PROPOSAL SHOULD BE REJECTED

The Association of American Railroads ("AAR") has filed comments in this proceeding calling for use of "mandatory, non-binding mediation" as an alternative to arbitration.⁸ As an initial matter, AAR recognizes that mediation is "not appropriate in all cases," (AAR Comments at 12) but AAR nonetheless states that private mediation is appropriate for "small rate disputes" (id. at 11-15) -- although it does not suggest a proper measure for determining a "small rate dispute."

Under its proposed procedures for non-binding mediation, AAR states that "a shipper in a small rate case who satisfies the criteria of quantitative and qualitative market dominance should be entitled to request non-binding mediation as a matter of right." AAR Comments at 15. Such a request for mediation could be coupled with a formal complaint. Id. Mediation would be "presided over by an STB staff official drawn from a group of STB officials specifically designated to preside over such mediations" -- although such staff officials would be precluded from participating in any subsequent litigation between the parties at the STB. Id. at 16. While no precise procedures for mediation would be implemented, "[i]n seeking to resolve the

⁸The Canadian National Railway and The Canadian Pacific Railway submit that "a newly introduced mediation process" in Canada "constitut[es] a very promising tool to allow shippers and railways to settle rate and services disputes". Comments of Canadian National Railway Company and The Canadian Pacific Railway Company at 2.

dispute, the mediator would recognize substantive rate reasonableness standards that draw their essence from ICCTA."

Id. AAR further submits that the STB consider "adopting measures designed to ease the cost and time commitment for small shippers associated with any mediation." Id.

The AAR's proposed mediation proposal appears to provide for a shipper-only (and not a railroad) option for invoking mediation. WCTL does not oppose Board actions allowing shippers only the option to mediate (or, as noted above, arbitrate) rate or other disputes that are subject to the Board's jurisdiction.⁹ However, the procedures suggested by AAR for mediation clearly would render such an alternative dispute resolution process for facilitating settlement of rate cases effectively meaningless for shippers.

Mediation is designed to facilitate private negotiated resolution of disputes by the parties. As an initial matter, AAR's comments appear to suggest that mediation is necessary because a shipper may not have fully considered and discussed with the railroad its dissatisfaction with rates, or attempted to negotiate a consensual agreement over the rates and/or terms of service, prior to bringing a maximum rate reasonableness case at the Board. AAR states, "[m]andatory mediation of small rate

⁹As stated above, shippers and railroads currently are not precluded from agreeing to mediate disputes (or engage in any other alternative dispute resolution method they so desire) over rates or other service issues and they do not necessarily need a Board imposed mediation procedure to be able to engage in mediation.

disputes would not necessarily result in the resolution of all such disputes, but at a minimum it would assure that any shipper dissatisfaction with rates on small movements came to a railroad's attention." Id. at 11.

There is no basis for the assertion that a railroad may be unaware of a shipper's dissatisfaction with rates or may otherwise be "caught off guard" by a shipper's filing of a rate complaint. Shippers that bring rate cases before the Board do so only as a last resort, and (in the experience of WCTL members) only after considering all other options, and only after they have been unsuccessful in resolving disputes with the railroads through private negotiations. Those negotiations can last months or longer, and often involve numerous proposals and counter-proposals. Accordingly, forced mediation should not be viewed by the Board as a tool necessary to allow parties the opportunity to resolve any "missed opportunities" for private sector resolution of rate or service disputes.

Turning to the AAR's mediation proposal itself, even a cursory review of the proposal reveals that the procedural and substantive aspects of the proposal are highly undesirable for shippers and are very much skewed in favor of the railroads. First, under the AAR's proposal, in order to invoke mediation, a shipper would have the "burden of demonstrating that it is paying more than 180% of variable costs and that it has no readily available intermodal or intramodal competitive alternatives." Id. at 15. This threshold requirement, in essence, would require

the parties to engage in mini-rate case on market dominance issues. Parties would have to engage in full-blown discovery and employ appropriate expert witnesses to present testimony; the Board and its staff would have to review such evidence; and the Board would have to decide in a shipper's favor on the qualitative and quantitative market dominance issues. Based on the Board's past experience in considering market dominance issues, it is clear that it would take many months and be extremely costly to litigate and decide such complex matters.

Even if a shipper successfully invoked mediation, the substantive standards to be considered by the mediator would put shippers at a severe disadvantage vis-a-vis the railroads. Under the AAR proposal, the mediator would be required to facilitate discussions based on the "substantive rate reasonableness standards that draw their essence from ICCTA." Id. at 16. The railroads suggest that the mediator might "require the parties to offer written statements as to their positions and/or conduct joint and separate meetings with each party." Id. For a SAC case, while the shipper would presumably have access to and be able to utilize any information on market dominance issues it may have gained in its initial efforts to invoke mediation, it presumably would not have access to railroad traffic and revenue information necessary to make an adequate evidentiary presentation on SAC issues. Without discovery on SAC issues, shippers would effectively be precluded from making meaningful SAC presentations, and would therefore be unable to meaningfully

assist the mediator in helping to resolve SAC issues. This would put shippers at a severe disadvantage vis-a-vis the railroads in being able to effectively participate in the mediation process. Even if discovery were allowed on SAC issues, this would require shippers to hire expert witnesses, present evidence, etc. -- a lengthy and costly exercise that is at odds with the Board's goal of promoting quick and efficient remedies for shippers.

Moreover, because mediation would be non-binding, if mediation were unsuccessful, and the parties were otherwise unable to resolve their differences, the shipper likely would be left with having to bring a full-blown rate reasonableness case at the STB. At that point, a shipper would presumably engage in additional discovery (including discovery on SAC issues), employ appropriate expert witnesses, and then present a full evidentiary case on appropriate market dominance, variable costs, and SAC issues -- which may or may not include some or all of the same evidence previously considered by the Board in its initial determination on whether mediation could be invoked. Additionally, under the AAR's proposal, expert STB staff who participated in the prior mediation would be precluded from participating in subsequent rate case, and a whole new team of STB staff (if even available) that were not involved in the mediation process would need to be employed by the Board to review the evidence.

In short, all of the above strongly suggests that the AAR's mediation proposal does not offer an appropriate method of

resolving rate and service disputes more quickly, and with less expense than the present regulatory procedures. To the contrary, the proposal would likely lead to complex, costly, and uncertain litigation at the outset of proceedings and would involve a mediation process that is skewed in favor of the railroads. If mediation were unsuccessful, it would likely often result in the filing of a rate case, with the parties having to make multiple submissions on similar issues in each proceeding (and the Board having to consider similar issues in each proceeding). The current rate reasonableness process is complex, lengthy, and expensive enough. Shippers do not need yet another hurdle blocking their ability to obtain reasonable rates.

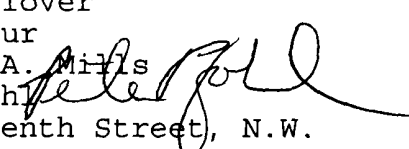
CONCLUSION

For the reasons set forth in its Comments and these Reply Comments, mandatory arbitration should be available at the option of a non-railroad party to a dispute, and the AAR's mediation proposal should be rejected.

Respectfully submitted,

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