

BEFORE THE
SURFACE TRANSPORTATION BOARD

Ex Parte No. 699

*ARBITRATION OF CERTAIN DISPUTES SUBJECT TO THE STATUTORY JURISDICTION
OF THE SURFACE TRANSPORTATION BOARD*

COMMENTS
of
THE NATIONAL INDUSTRIAL TRANSPORTATION LEAGUE
and
THE AMERICAN FOREST & PAPER ASSOCIATION

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The National Industrial Transportation League (“League”) and the American Forest & Paper Association (“AF&PA”) (collectively, “Interested Associations”) submit these Comments in response to the Notice of the Surface Transportation Board (“STB” or “Board”) served on September 2, 2010, in which the Board seeks comments on the use of mediation and arbitration as an effective means of resolving disputes that are subject to the Board’s jurisdiction. In that Notice, the Board indicates that it favors private sector resolutions of disputes as an alternative to its formal processes where possible, and that the Board has rules in place that allow for mediation and arbitration of certain matters subject to its jurisdiction. The Board is seeking input on measures that it can implement to encourage greater use of mediation and arbitration procedures, including changes to the Board’s existing rules. The Board also is seeking input regarding possible changes to its rules to permit the use of Board-facilitated mediation procedures without the filing of a formal complaint.

The Interested Associations applaud the Board’s initiative to reassess its mediation and arbitration procedures. Like the Board, the Interested Associations strongly favor private

resolution of disputes. They believe that mediation and arbitration hold much promise for quickly and cost-effectively resolving a wide variety of transportation claims.¹ The Interested Associations are well aware that the Board's mediation procedures, where used both in mandatory and non-mandatory settings, have shown much promise and have had significant success in resolving even large disputes.² The Interested Associations believe that the Board's mediation procedures should be expanded to permit the mediation of matters even without the filing of a formal Board complaint. On the other hand, arbitration under the Board's procedures has never have been used. The Board can and should take steps to reform, broaden and improve its arbitration procedures, and in these Comments the Interested Associations suggest a number of possible improvements that the Board should explore in a further proceeding.³

I. THE INTERESTED ASSOCIATIONS' STATEMENTS OF INTEREST

The League is one of the oldest and largest national associations representing companies engaged in the transportation of goods in both domestic and international commerce. The League

¹ The Interested Associations support recent testimony by the Board's Chairman before the Senate Committee on Commerce, Science and Transportation which emphasized the Board's desire to further encourage the private resolution of disputes; to bolster the Board's informal dispute resolution team and mediation; and promised to initiate an effort to update the Board's arbitration procedures. See, Testimony of Daniel R. Elliott III, Chairman, Surface Transportation Board, September 15, 2010, p. 6 [hereinafter "Elliott Testimony"].

² See, e.g., STB Docket No. 42112, *E.I DuPont de Nemours and Company v. CSX Transportation Inc.*, slip op. served May 11, 2009 (mandatory mediation resolves dispute); STB Docket No. 42122, *NRG Power Marketing LLC v. CSX Transportation Inc.*, slip op. served July 8, 2010 (mandatory mediation resolves dispute). Another current dispute, STB Docket No. 42117, *Cargill, et al. v. Aberdeen and Rockfish Railroad Company, et al.*, is currently under non-mandatory mediation requested by the parties, see slip opinion served June 8, 2010.

³ The Interested Associations are well aware that the Congress is currently considering a wide variety of changes to the Board's statutory authority, including a broader use of arbitration. See, Section 305 of S. 2889, "Surface Transportation Board Reauthorization Act of 2010." While the Interested Associations believe that the Board should reassess its mediation and arbitration procedures, this view in no way diminishes the Interested Associations' strong support for passage of the regulatory reforms set forth in S. 2889.

was founded in 1907, and currently has over 600 company members. These company members range from some of the largest users of the nation's and the world's transportation system, to smaller companies engaged in the shipment and receipt of goods. The majority of the League's members include shippers and receivers of goods, however, third party intermediaries, logistics companies, and other entities engaged in the transportation of goods are also members of the League. Many members of the League are engaged in transportation of goods via rail subject to the jurisdiction of the Board, and therefore have a strong interest in the efficient and timely resolution of disputes between shippers and rail carriers.

AF&PA is the national trade association of the forest products industry, representing pulp, paper, packaging and wood products manufacturers, and forest landowners. The forest products industry relies on the railroads for the transportation of raw materials to its mills and for bringing finished products to the marketplace.

II. THE BOARD SHOULD IMPROVE ITS MEDIATION PROCEDURES TO PERMIT PARTIES TO ACCESS THOSE PROCEDURES EVEN WHERE A COMPLAINT HAS NOT BEEN FILED, AND SHOULD MORE BROADLY PUBLICIZE THE AVAILABILITY OF ITS MEDIATION PROCEDURES

In its Notice, the Board requested input regarding possible changes to the Board's rules to permit the use of Board-facilitated mediation procedures without the filing of a formal complaint. Currently, the Board's rules provide that "any proceeding" may be held in abeyance while alternative dispute resolution procedures are pursued. Thus, under the Board's current rules, mediation is only available where a "proceeding" has been instituted.

This limitation is unnecessary and counterproductive. The Interested Associations are aware that other federal regulatory agencies, such as the Federal Maritime Commission, make available mediation procedures even without the filing of a formal complaint, and the Interested Associations know of no statutory limitation that would prevent the Board from acting likewise.

The role of mediation is to resolve disputes, not create them, and forcing parties to a dispute to file a complaint imposes unnecessary barriers and costs to accessing the Board's expertise which can be helpful in successfully mediating transportation disputes. In fact the requirement may exacerbate disputes by potentially hardening positions by requiring the filing of a complaint and the incurrence of associated legal costs. The Board should remove such regulatory limitation.

If the Board does permit its mediation procedures to be used more broadly, then the Board should publicize its mediation expertise in a variety of fora – print media, addresses at conferences, etc. – in order to let the public know that the Board's procedures are available to the transportation industry in general with or without a proceeding at the agency.

III. THE BOARD SHOULD CONSIDER SUBSTANTIAL CHANGES TO ITS ARBITRATION RULES

Unlike the Board's mediation procedures, which are regularly used in both mandatory and non-mandatory settings, the Board's arbitration procedures have never been used. As discussed below, there may be a variety of reasons for this. To rectify the situation, the Board should consider substantial changes to its arbitration procedures, including: (a) adopting a limited category of disputes in which arbitration may be invoked by only one party; (b) permitting disputes not subject to the Board's jurisdiction to be subject to arbitration if both parties agree; (c) making changes to its arbitration procedures to make them quicker, more efficient and cost-effective; and, (d) updating its roster of arbitrators.

A. The Board Should Consider Adopting a Limited Category of Disputes In Which Arbitration May Be Invoked by One Party

Under the Board's current regulation, arbitration requires "all necessary parties" to "voluntarily subject themselves to arbitration." 49 C.F.R. 1108.3(a). In the ten years since they

were implemented, these current procedures have never been used.⁴ There may be a variety of reasons for this lack of use, including that a party prefers to have disputes resolved by the STB because of its expertise or other factors, or because the availability of the procedures is not widely publicized or promoted. However, the Interested Associations believe that one key reason has been that parties have failed to agree to arbitration, or that it is so obvious that there will be a failure to agree that an agreement is not even attempted. It is a fact of life that, in litigation, one party may have a tactical reason not to want a quick, easy and cheap resolution to the dispute: for example, a party might want to pressure its opponent with the spectre of a lengthy litigation in order to get what it wants through a settlement; or a defendant may not desire quick and cheap resolution of a dispute as a potential tactic to deter the filing of future claims, by making it as long and as difficult as possible for a plaintiff to get relief.

In light of these “facts of litigation life,” the Board should strongly consider amending its rules to permit an option whereby one party could trigger arbitration, without the agreement of the other party. Under such an arrangement, a party could choose to litigate a matter at the Board, but could also choose to arbitrate, as long as the dispute was within the requirements for one-party-triggered arbitration.

The Interested Associations believe that the Board’s underlying Statute gives the agency broad authority to carry out the responsibilities delegated to it.⁵ Although under 5 U.S.C. § 572(a) and 575(a)(3) (from the Administrative Dispute Resolution Act of 1990, P.L. 101-552, the “ADRA”) and in later amendments in 1996, P.L. 104-320 (the “ADRA of 1996”), arbitration can be used only if all parties consent, it is clear that this statute is not the sole source of

⁴ Elliott Testimony, p. 8.

⁵ 49 U.S.C. § 721.

authority for the Board to adopt one-party-triggered arbitration. Indeed, the Board itself implicitly acknowledged that in its 1997 rulemaking establishing the current arbitration rules⁶ as a review of the regulations reveal that the statutory authority for the Board's actions is not only 5 U.S.C. § 571 *et seq.*, but also various sections of the Board's own statute, including 49 U.S.C. § 721, 10704, and 11701.⁷

There is also precedent both at the Board⁸ and at other federal agencies of the use of one-party triggered arbitration.⁹

⁶ STB Ex Parte No. 560, *Arbitration of Certain Disputes Subject to the Statutory Jurisdiction of the Surface Transportation Board* decision served September 2, 1997 ("1996 STB Arbitration Decision").

⁷ The legislative history of the ADRA also indicates that agencies had used alternate dispute resolution methods even before the passage of the ADRA. See, S.Report 101-543 (Oct. 19, 1990), reprinted at 1990 U.S.C.C.A.N. 3931-3932 (while the purpose of the bill was to "place government-wide emphasis on the use of innovative ADR procedures by agencies and to put in place a statutory framework to foster the effective and sound use of these flexible alternatives to litigation....[t]hese techniques are intended to supplement – not replace or limit – existing dispute resolution practices and procedures." S.Report 101-543 (Oct. 19, 1990), reprinted at 1990 U.S.C.C.A.N. 3932). See also *Department of the Air Force v. Federal Labor Relations Authority*, 316 F.3d 280 (D.C. Cir. 2003) ("The ADR Act...is voluntary and merely supplements, rather than limits, other available ADR techniques."). Moreover, in 1986 the Administrative Conference of the United States ("ACUS") recommended greater use of ADR processes by federal agencies, stating "[a]dministrative agencies, where not inconsistent with statutory authority, should adopt the alternative methods discussed in this recommendation for resolving a broad range of issues." ACUS Recommendation 86-3 at § 1. See also § 10 ("In many situations, agencies already have the authority to use techniques to achieve dispute settlements."); ACUS Recommendation 87-5 at Introduction, para. 2 ("Existing law authorizes resort to arbitration in a variety of different contexts").

⁸ Under 49 U.S.C. § 11326 (and its predecessor, 49 U.S.C. § 11347), Congress has directed the Board to provide employee protective conditions in certain transactions involving rail carriers. The current protective conditions imposed by the Board are based upon *New York Dock Railway – Control – Brooklyn Eastern District Terminal*, 360 ICC 60 (1979). The *New York Dock* conditions include the availability of arbitration, at the request of "either party," to resolve any dispute regarding the interpretation, application, or enforcement of the conditions. 360 ICC at 85 and 87-88. One party has been able to trigger arbitration in these situations since 1962. *Southern Railway Company – Control – Central of Georgia Railway Company*, 317 ICC 557, 566 (1962). Decisions of an arbitrator under *New York Dock* are appealable to the STB, whose

Moreover, members of the rail industry and one national association have entered into an arrangement whereby arbitration for a defined category of disputes can be triggered by only one party to the dispute.¹⁰ There is also legislation pending before Congress that would require the Board to explicitly develop such an arrangement.¹¹

The Interested Associations believe that the Board should propose, for further exploration in a rulemaking, to establish a limited category of disputes where arbitration can, if desired, be triggered by only one party. First, for line-haul rate disputes, the Board should allow one-party-triggered arbitration for rate disputes under the Board's Simplified (small case) Procedures, but with a maximum relief of \$750,000 over a three-year period, instead of the Board's \$1 million

own decision is then subject to judicial review. *Norfolk and Western Railway Company v. Brotherhood of Railroad Signalmen*, 164 F.3d 847, 854 (4th Cir. 1998).

⁹ The federal Commodity Futures Trading Commission ("CFTC") regulates the commodity futures transactions under the Commodity Exchange Act ("CEA"), 7 U.S.C. § 1 et seq. Persons who participate in the commodity futures market must register with the CFTC. Under the CEA, Congress has allowed CFTC to delegate the registration function to a private industry association, the National Futures Association ("NFA"). *R.J. O'Brien & Associates, Inc. v. Pipkin*, 64 F.3d 257 (7th Cir. 1995). When a dispute related to a futures transaction arose between two persons registered with the NFA, one party (O'Brien) demanded arbitration under the NFA rules. The second party (Pipkin) objected to NFA jurisdiction, but the arbitration proceeded to a decision awarding O'Brien \$82,000. O'Brien then sought to confirm the arbitration award in federal court, and Pipkin again objected to NFA jurisdiction. Under NFA rules, arbitration is binding and can be invoked by one party to a dispute. Despite Pipkin's objections and Constitutional due process claims, the court approved of the NFA arbitration. 64 F.3d at 261-262.

¹⁰ See Section 2(b) of the Rail Arbitration Rules of the National Grain and Feed Association, adopted August 24, 1998 and amended at various times thereafter, ("NGFA members shall arbitrate the following disputes arising between railroads and rail users . . . upon the filing of a complaint with the National Secretary . . ."). See, http://www.ngfa.org/files/misc/Web2010_Rail_Arbitration_Rules.pdf

¹¹ See, Section 305 of S. 2889, "Surface Transportation Board Reauthorization Act of 2010."

relief limit over five years.¹² This would permit a party to a line-haul rate dispute to use arbitration, but ensure that arbitration would be limited to small-dollar rate disputes, where it may be especially important to have quick and efficient procedures. Second, in the case of disputes dealing with other than line-haul rates, the Board should permit one-party-triggered arbitration to be used in the following matters: (a) demurrage disputes; (b) disputes over accessorial charges; (c) unreasonable practice disputes over misrouting or mishandling of rail cars; (d) specific railroad-user disputes involving the reasonableness of a railroad's published rules and practices as applied in particular circumstances on matters related to transportation or service; and (e) Carmack disputes (*i.e.* disputes arising under 49 U.S.C. § 11706).¹³ As in the line-haul rate category, relief should be limited to \$750,000 over three years for such disputes.

This list is very similar to the list of covered disputes published in the Rail Arbitration Rules of the National Grain and Feed Association, under which the nation's railroads have already agreed to arbitrate such disputes involving NGFA shipper members. See Section 2(b) of the NGFA Rail Arbitration Rules.¹⁴

Finally, one-party-triggered arbitration should be permitted for complaints seeking revocation of an exemption for one or a limited number of individual movement(s), subject to an

¹² The Board's rules should insure that one-party-triggered arbitration should be an option, not a requirement, and could not be used to unduly limit a potential plaintiff. Thus, a shipper with a \$20 million dispute should not be required to arbitrate the matter under a \$750,000 relief cap.

¹³ If because of the specific provisions of 49 U.S.C. § 11706 the Board believes that it cannot establish one-party-triggered arbitration for Carmack disputes, the Board might explore whether each of the nation's Class I railroads might agree to subject themselves to arbitration under the Board's rules for this category.

¹⁴ http://www.ngfa.org/files/misc/Web2010_Rail_Arbitration_Rules.pdf.

immediate appeal to the Board (i.e., no joinder of exemption requests and rate disputes in a single arbitration); it should not apply to revocation of a class exemption in its entirety.

B. The Board Should Permit the Use of Its Arbitration Procedures Even Where the Dispute is Not Subject to the Jurisdiction of the Board, As Long As the Parties Agree

Under the Board's current regulations, the agency's arbitration procedures are applicable only to a controversy that is "subject to resolution by the STB," that is, a matter "over which the STB has statutory jurisdiction." 49 C.F.R. 1108.3(a) and (b). In its *1996 STB Arbitration Decision*, the Board made clear that rail transportation contract disputes were not subject to arbitration. Slip op. at 3-4. The Board should lift this restriction, so as to permit parties to a contract to utilize the Board's arbitration procedures, but only where both parties to the contract agree.

C. The Board Should Make A Variety of Changes to Its Arbitration Procedures

In connection with a change in the Board's rules to permit one-party-triggered arbitration, the Board should also consider changes to its arbitration rules to streamline and expedite the process.

For example, the Board should consider requiring "baseball-style"¹⁵ arbitration in rate disputes or where there is a determinable amount of charges in dispute. For other disputes (like identified service complaints, such as misrouting or mishandling), the arbitrator should be free to prescribe the relief. The Board's current small-case procedures already contain key elements of baseball-style arbitration,¹⁶ and the Interested Associations believe that baseball-style arbitration

¹⁵ In baseball-style arbitration, the arbitrator's final decision must be either of the positions put forth by the parties; the arbitrator cannot develop an alternative or split the difference. Thus, each party to the dispute is forced to advocate for a reasonable position.

¹⁶ Under the Board's small case Simplified Standards, the Board will choose one party's comparison group, rather than choose elements of both parties' groups. Ex Parte 646 (Sub-No.

holds much promise, since it tends to produce more reasonable litigation positions, which may in turn lead to settlement.

In addition, the Board should consider reducing its time limits for arbitration. Under the Board's current rules, an answer is due in 10 days; the parties then agree on an arbitrator (no time limits); the evidentiary process is completed 90 days from the start date established by the arbitrator; and a decision is rendered in 30 days. 49 C.F.R. 1108.8. The Board should consider modifying this schedule to provide greater certainty and reduce the time frame: (a) for line-haul rate disputes, the time limits should be 10 days for the filing of an answer; 14 days for the selection of an arbitrator; 90 days for the filing of evidence after an arbitrator is selected; and 30 days for a decision; (b) in non-line-haul rate disputes, the time for evidentiary filing should be reduced to 60 days, in addition to the changes for line-haul rate disputes.

Discovery should be at the arbitrator's discretion, instead of by agreement as provided in the current rules. The Board should reinforce that its standard of review on appeals will be "very narrow." See, *1996 STB Arbitration Decision*, slip op. at 10. The Board should be very sensitive to the fact that appeals could drive up the cost of arbitration significantly, and therefore the Board should make every effort to restrict the time and cost of such appeals. Thus, appeals should be filed within 10 days of a decision, with replies in 10 days, with appeals and replies limited to 10 pages each, with a Board decision in 30 days.¹⁷

1), *Simplified Standards for Rail Rate Cases*, decision served September 5, 2007, slip op. at 18. This key element is effectively baseball-style arbitration, and it has produced shipper and carrier comparison groups that are often very close. The technique should be broadened to other aspects of rate and dollar-determinable litigation.

¹⁷ Compare, 49 C.F.R. 1108.11, which states that appeals may be filed within 20 days, replies are due in 20 days, and an appeal can be as long as 20 pages in length, with a Board decision in 50 days.

Overall, the Board's arbitration procedures should be reviewed on an ongoing basis by the Railroad-Shipper Transportation Advisory Council ("RSTAC") to insure that the procedures are working in an efficient and cost-effective manner.

D. The Board Should Update Its Roster of Arbitrators and Seek Arbitrators Broadly From the Industry

The Interested Associations believe that the Board's roster of arbitrators has not been updated in many years, and the Board should update its roster of arbitrators, under the general supervision of the RSTAC. Every effort should be made to recruit arbitrators with practical experience in the industry, and particular effort should be made to recruit non-lawyers.

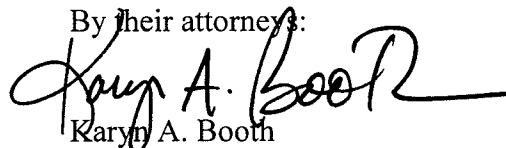
The Interested Associations appreciate the opportunity to make their views known on this matter.

Respectfully submitted,

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By their attorneys:

A handwritten signature in black ink, appearing to read "Karyn A. Booth". The signature is fluid and cursive, with the first name "Karyn" being more prominent.

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