



Norfolk Southern Corporation
Law Department
Three Commercial Place
Norfolk, Virginia 23510-9241

232318
ENTERED
Office of Proceedings
May 17, 2012
Part of
Public Record

Greg E. Summy
General Solicitor

Writer's Direct Dial Number

Phone (757) 533-4890
Fax (757) 533-4872
E-mail: Greg.Summy@nscorp.com

May 17, 2012

Via Electronic Filing

Cynthia T. Brown
Chief, Section of Administration
Surface Transportation Board
395 E Street, S.W.
Washington, D.C. 20423

Re: Ex Parte No. 699, Assessment of Mediation and Arbitration
Procedures

Dear Ms. Brown:

Pursuant to the Board's Decision of March 28, 2012, attached please find the Comments of Norfolk Southern Railway Company for filing in the subject proceeding.

Respectfully,

Greg E. Summy

Attachment

BEFORE THE
SURFACE TRANSPORTATION BOARD

STB Ex Parte No. 699

ASSESSMENT OF MEDIATION AND ARBITRATION PROCEDURES

COMMENTS OF
NORFOLK SOUTHERN RAILWAY COMPANY

In a Notice of Proposed Rulemaking (“NPR”) served on March 28, 2012, the Surface Transportation Board (the “Board”) proposed to modify its rules regarding alternative dispute resolution (“ADR”). Norfolk Southern Railway Company (“NS”), a class I rail carrier operating in the eastern United States, files these Comments concerning the Board’s NPR. In this proceeding, the Board proposes the establishment of an easy to enter, hard to withdraw, sight unseen with respect to the particular matter arbitration process that lacks the essential element of voluntariness that arbitration by outside neutrals must have in an agency-sponsored arbitration process.

NS supports voluntary mediation and voluntary arbitration services provided under the Board’s auspices. In fact, most recently, NS suggested mediation in its reasonable practices dispute with Ag Processing.¹ Although Ag Processing initially rejected that suggestion, the parties ultimately engaged in mediation at the Board.² NS continues to support voluntary mediation and voluntary arbitration on a case-by-case basis.

¹ Ag Processing Inc.—Petition for Declaratory Order, STB Docket No. FD 35387.

² Ultimately, the parties could not reach a resolution in mediation and the case was briefed, argued before the Board, and a Decision rendered just last week.

In addition, NS joins in the Comments filed by the Association of American Railroads (“AAR”) in this NPR. NS files its Comments to emphasize the impact of the Alternative Dispute Resolution Act, 5 U.S.C. 570 *et seq* (“ADRA”) with respect to this NPR.

In describing its authority for establishing an arbitration process, the Board cites only 49 U.S.C. 721. But the Board’s authority is not unlimited under Section 721. Section 721 provides that “The Board shall carry out this chapter and subtitle IV.” 49 U.S.C. 721. It provides further that “enumeration of a power of the Board in this chapter or subtitle IV does not exclude another power the Board may have in carrying out this chapter or subtitle IV.” 49 U.S.C. 721. These powers seem broad, but they likely do not include the power to delegate Board power to private arbitrators. In addition, the agency’s power under Section 721 is limited by other statutes. For example, the Board cannot simply issue rules without complying with the limitations of the Administrative Procedure Act.³ Similarly, the Board cannot disregard the Sunshine Act.⁴

Unlike the authority it lists for the mediation portion of its proposed rules, the Board fails to cite ADRA. ADRA is the statute that governs arbitration processes involving or established at federal agencies.⁵ See 5 U.S.C. 575 (providing the requirements and limitations on arbitration at federal agencies)⁶.

³ 5 U.S.C. 553.

⁴ 5 U.S.C. 552.

⁵ Although the statute originally seemed to apply to arbitrations in which the government was a party, Congress amended the statute in 1992 to clarify that the term “issue in controversy” in 5 U.S.C. 571 includes disagreements “between persons who would be substantially affected by the decision.” 1992 USSCAN at 831 (“Because of an oversight, Congress failed to provide authority for an agency to use ADR techniques where a dispute is between parties appearing before it, but the agency is not formally a party to the dispute,” and explaining the legislative change to fix this oversight).

⁶ The Board cannot conclude that it may adopt an arbitration process that is inconsistent with ADRA, because if it did so, it would render ADRA and the limitations contained therein meaningless.

This omission is critical. First, ADRA restricts agency power with regard to “alternative dispute resolution authorized” thereunder. 5 U.S.C. 572(c). Although the Act reserves the ability of agencies to adopt “other available agency dispute resolutions techniques,” such as the Board’s technical conferences, the scope of permissible arbitration is limited by ADRA and Section 575 in particular⁷. 5 U.S.C. 572(c).

A unique element of the Board’s arbitration proposal is the requirement that Class I railroads are deemed to have accepted arbitration in lieu of Board review and decisions in certain general categories of cases unless the railroad “opts out” of mandatory arbitration. The proposed opt-out procedure violates the ADRA requirement that arbitration may be used only where the parties agree. Section 572 requires that “an agency may use a dispute resolution proceeding for the resolution of an issue in controversy that relates to an administrative program, if the parties agree to such a proceeding.” 5 U.S.C. 572(a). Further, that Act provides: “The arbitration agreement that sets forth the subject matter submitted to the arbitrator shall be in writing.” 5 U.S.C. 575(a) (2). These requirements contemplate that the decision to allow an agency to contract out its adjudicatory responsibilities is not to be taken lightly and must be done with the express consent of the parties who will be affected by the decision of the arbitrator. Failing to opt out is neither agreement nor is it in writing.

The Restatement of Contracts illustrates the lack of acceptance in a contract context that is similar to what is happening here:

⁷ The Board did not need to address ADRA in its prior rulemaking in *Arbitration of Certain Disputes Subject to the Statutory Jurisdiction of the Surface Transportation Board*, STB Ex Parte No. 560 (Mar. 26, 1997) (62 FR 14385). That Decision did not violate ADRA because the arbitration authorized in that proceeding was voluntary, the parties could agree to arbitrate on a case-by-case basis, and the scope of issues and amounts in controversy was limited.

Example 4: A offers by mail to sell to B a horse already in B's possession for \$ 250, saying: "I am so sure that you will accept that you need not trouble to write me. Your silence alone will operate as acceptance." B makes no reply, but he does not intend to accept. There is no contract.

According to the Restatement, although A has stated that B's silence will constitute acceptance, B must also intend to accept in this manner. Because there is no such intent in Example 4, B's silence is not an acceptance. Under ADRA, the STB does not have the power to declare what a railroad's silence means. Thus, a process in which parties are deemed to agree unless they opt out violates the requirement of Section 572 that parties agree to arbitration.

Given that the proposed rules mandate that railroads are subject to mandatory arbitration unless they opt out, it cannot be said that the arbitration agreement -- when there is not one -- is in writing. Indeed, the requirement that the arbitration agreement be in writing confirms that the opt-out procedure, which makes arbitration mandatory for a railroad and does not require any written document at all, violates the requirement that the agreement to arbitrate itself be in writing. 5 U.S.C. 575(a) (2) ("The arbitration agreement that sets forth the subject matter submitted to the arbitrator shall be in writing"). Again, the requirement that the parties must *agree* to arbitrate *in writing* makes it very clear that Congress never intended that an agency could or should offload its adjudicatory responsibilities to a for-hire contractor.

Second, and more significant, the opt-out process that requires parties to accept arbitration for a pre-determined list of topics – without the ability to accept arbitration for a sole topic or disavow arbitration for one or more of the topics – also violates ADRA. Section 575(a) (1) provides that “a party may agree to (A) submit only certain issues in controversy to arbitration; or (B) arbitration on the condition that the award must be within the range of possible outcomes.” 5

U.S.C. 575(a) (1). The opt-out process deprives railroads of their statutory right to agree to arbitration only in *specific* situations where the outcomes are *limited*.

Third, the lopsided nature of the proposal also violates ADRA. Under the proposal, a railroad must opt out or is deemed to agree to arbitration for the list of general issues. A shipper party, however, enjoys the right to agree on a case-by-case basis to arbitration. Thus, if the issue is about whether demurrage applies and the railroad would like to arbitrate, the shipper has the right to decline arbitration at the time of the dispute. If the shoe is on the other foot and the shipper would like to arbitrate, the railroad is stuck with arbitration – if it has not opted out long enough before the shipper files for arbitration.⁸ The fact that the railroad is bound to arbitrate generally, regardless of what it might want to do in a specific case, denies it of its rights under 575(a)(1) to agree to arbitration on only certain issues, or on a case-by-case basis, or on the condition that the award be within a certain range.

Fourth, the mandated limit on arbitration awards in the proposal similarly denies the railroad its rights under Section 575(a) (1) to agree to arbitration only on the condition that the award be within a certain range.

In sum, NS supports the Board's existing voluntary arbitration rules, which comply with ADRA because they provide all parties an equal opportunity to agree to arbitrate (consistent with 5 U.S.C. 572) and to agree to "(A) submit only certain issues in controversy to arbitration; or (B) arbitration on the condition that the award must be within the range of possible outcomes" (consistent with 5 U.S.C. 575). However, NS believes that the current proposal to amend arbitration rules to make it mandatory for railroads unless they opt out, or to predefine a general scope of topics covered, or to arbitrarily establish a limitation on damages

⁸ If a railroad has not opted out, and it decides later to opt out, it remains subject to arbitration for 90 additional days.

awarded in arbitration – all without the agreement of the railroad on a case-by-case basis – is unlawful.

Respectfully submitted,

A handwritten signature in blue ink, appearing to be 'MSA', is written above the typed name.

James A. Hixon
John M. Scheib
Greg E. Summy
Three Commercial Place
Norfolk, VA 23510
(757) 533-4890

*Counsel for
Norfolk Southern Railway Company*

May 17, 2012