

BEFORE THE
SURFACE TRANSPORTATION BOARD

STB Ex Parte No. 699

ASSESSMENT OF MEDIATION AND ARBITRATION PROCEDURES

COMMENTS OF
BNSF RAILWAY COMPANY

BNSF Railway Company (“BNSF”) joins in the comments of the Association of American Railroads (“AAR”) regarding the Surface Transportation Board’s (“Board”) proposed modification of its arbitration and mediation rules set forth in its March 28, 2012 Notice of Proposed Rulemaking (“NPRM”) in the above-referenced proceeding. BNSF also submits the following separate comments on its own behalf to provide the Board with additional input based upon BNSF’s own extensive experience with arbitration and mediation.

BNSF is a strong proponent of the use of arbitration and mediation to resolve certain disputes, and it supports the Board’s efforts to encourage broader use of alternative dispute resolution (“ADR”) procedures. Historically, BNSF has developed ADR programs and has also participated in other formalized ADR programs because it believes that ADR is a less costly and more efficient, expeditious means of resolving disputes. For example, for the past several decades BNSF’s transportation contracts have often included arbitration provisions and BNSF has resolved many of its contract disputes with shippers through arbitration.

More recently, BNSF, the Montana Grain Growers and the Montana Farm Bureau Federation developed an ADR program to resolve certain disputes involving BNSF’s rates for

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transportation of grain. That Montana grain ADR program became effective in January 2009 and provides for mediation, followed by binding arbitration, if necessary. The program clearly defines the rate disputes that are eligible for the ADR program, the limited discovery that may be obtained during any ADR proceeding, the factors that the arbitrators may consider in resolving any dispute, the relief that the arbitrators may award, and the standard for vacating or modifying any arbitration award. BNSF also was very involved in the creation of the ADR program established by the National Grain and Feed Association (“NGFA”) and the AAR in 1998 to arbitrate or mediate certain types of transportation disputes between an NGFA member and a signatory AAR member, and BNSF has been a long-term participant in the program.

If the Board is going to adopt an arbitration program in which parties agree in advance to arbitrate certain types of disputes as it proposes to do in its March 28, 2012 NPRM, BNSF believes the program should be modified in certain respects to increase the likelihood that it will be utilized. As indicated above, BNSF has participated in several voluntary arbitration programs. In BNSF’s experience, the arbitration programs and procedures that are the most successful in getting parties to arbitrate their disputes have certain attributes that provide some clarity and certainty for the parties and, thus, allow the parties to be comfortable with their decision to elect arbitration. Those attributes include the following: (1) the programs cover a narrow, well-defined range of disputes, (2) the programs provide clear guidelines for the decision-makers to resolve the dispute, (3) the programs establish criteria for selecting decision-makers that instill confidence in the parties that the decision-makers will be neutral and qualified, (4) the programs provide for an appropriate level of confidentiality, and (5) the programs adopt a clear and meaningful standard of review of arbitration decisions.

Several of these attributes are missing from or incompletely addressed in Board's proposed rules as currently structured in the NPRM. For example, as explained in more detail in the AAR's comments, the Board's proposed rules contain the following arbitration program procedures that are likely to discourage participation (1) they deem Class I and Class II rail carriers to participate unless those carriers "opt-out" in writing, (2) they have a broad and somewhat unclear list of issues that would be subject to arbitration, (3) they lack clarity regarding the necessary qualifications for the potential arbitrators, and (4) they contain a standard of review for arbitral awards at the STB that is too narrow. The combined effect of the first two features is to create a disincentive to arbitrate because the railroads that fail to affirmatively opt-out will not have a clear understanding of the scope of the disputes subject to mandatory arbitration. Unless these features of the arbitration program proposed by the Board in the NPRM are modified as described below and in the AAR's comments, it is likely that railroads will decide to opt-out of the program.

Specifically, BNSF believes that the Board should issue a new notice of proposed rulemaking in which it modifies the procedures relating to its proposed arbitration program in the following ways in order to increase the likelihood that parties will participate in it:

First, if the Board chooses to supplement its existing case-by-case mechanism, BNSF believes that the Board arbitration program should be an opt-in program rather than an opt-out program, and should allow the party opting-in to specify in its notice the types of disputes that it is willing to arbitrate. Under the proposed rules, a Class I or Class II rail carrier is deemed to be a participant in the program unless it affirmatively opts out of the program within a specified time frame. *See* proposed rule at 49 C.F.R. § 1108.3(b)(1). Under the proposed rules, the list of disputes subject to arbitration is very broad and somewhat vague, including "demurrage,

accessorial charges; misrouting or mishandling of rail cars; disputes involving a carrier's published rules and practices as applied to particular rail transportation; and other service-related matters." See proposed rule at 49 C.F.R. § 1108.1(b).

With respect to the mechanics of an opt-in arbitration program, BNSF believes that the rules should provide that a party does not participate in the program until the party submits a written notice opting-in to the program and specifying the issues that the party will submit to arbitration through the program. BNSF believes that an opt-in program that allows a party to specify the issues it is willing to submit to arbitration will result in greater participation because the participants will know in advance precisely the types of disputes that will be arbitrated. In addition, allowing a party to define the disputes subject to the arbitration program will allow that party to carve-out any disputes subject to another mediation/arbitration program, preventing a conflict with another program and further increasing the likelihood that a party will participate in the Board's arbitration program.

Second, BNSF believes the Board's arbitration program should be more specific regarding the standards that will be used to identify the arbitrators who will be eligible to resolve disputes. The standards should be designed to select arbitrators that are neutral and qualified to decide the disputes. The AAR's comments specify appropriate minimum qualifications for the arbitrators. BNSF believes it is important to define the criteria that will be used to select the arbitrators for the arbitration program because a party is more likely to participate in an arbitration program if it believes that the arbitrators eligible to decide the disputes are neutral and well-qualified.

Third, the Board's arbitration program should provide the STB with a somewhat broader standard of review over arbitration awards issued under the program. Under the proposed rule,

the only basis for the STB to modify or vacate an arbitration award is if that award “reflects a clear abuse of arbitral authority or discretion.” *See* proposed rule 49 C.F.R. § 1108.11(c). BNSF believes that the rule should be broadened to allow the STB to vacate or modify an arbitration award on the following additional grounds: (1) the arbitrator has exceeded his or her authority, (2) the arbitration award contravenes statutory requirements, and/or (3) the arbitrator has exhibited evident partiality. While BNSF agrees that an arbitration award should not be subject to de novo review, BNSF believes that a party is more likely to participate in the arbitration program if it knows that the standard of review is broad enough to allow the STB to review and modify or vacate an arbitration award that is clearly in error or is issued under circumstances where the arbitrator is biased or acts outside his or her authority. Except for the contravening statutory requirements prong, the review standard proposed by BNSF is similar to the review standard of arbitration awards under the Federal Arbitration Act. It is appropriate to include “contravening statutory requirements” as a basis for review of an arbitration award under a Board arbitration program because the Board has the responsibility to maintain the integrity of the statutory scheme that it administers.

In sum, BNSF appreciates the Board’s efforts to modify its mediation and arbitration rules to promote the use of these ADR procedures. However, BNSF believes the Board should

modify its proposed rules as explained above to increase the likelihood that parties will turn to them in order to resolve disputes.

Respectfully Submitted,



Samuel M. Sipe, Jr.

Linda S. Stein

STEPTOE & JOHNSON LLP

1330 Connecticut Avenue, N.W.

Washington, DC 20036

(202) 429-3000

Counsel for BNSF Railway Company

Richard E. Weicher
Jill K. Mulligan
Dustin J. Almaguer
BNSF RAILWAY COMPANY
2500 Lou Menk Drive
Fort Worth, TX 76131
(817) 352-2353

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