



ASSOCIATION OF
AMERICAN RAILROADS

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Honorable Cynthia T. Brown
Chief, Section of Administration
Surface Transportation Board
395 E St., S.W.
Washington, DC 20423

Re: STB Docket No. EP 699, Assessment of Mediation and Arbitration Procedures

Dear Ms. Brown:

In response to the Surface Transportation Board's ("Board") Notice of Proposed Rulemaking served March 28, 2012, attached please find the Comments of the Association of American Railroads for filing in the above proceeding.

Respectfully submitted,

Louis P. Warchot
*Counsel for the Association of
American Railroads*

Attachment

BEFORE THE
SURFACE TRANSPORTATION BOARD

STB Ex Parte No. 699

ASSESSMENT OF MEDIATION AND ARBITRATION PROCEDURES

COMMENTS OF THE
ASSOCIATION OF AMERICAN RAILROADS

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Introduction

In a Notice of Proposed Rulemaking (“NPR”) served on March 28, 2012, the Surface Transportation Board (“Board”) proposed to modify its rules regarding alternative dispute resolution (“ADR”), specifically mediation and arbitration of disputes subject to the Board’s jurisdiction. The Board proposed to: (1) require parties to mediate certain matters and otherwise change its rules regarding mediation; (2) establish a new arbitration program that would allow shippers and others to elect in individual cases whether to consent to arbitration, but require Class I and Class II railroads to affirmatively “opt-out” of participation or otherwise find themselves bound to arbitrate certain disputes subject to the jurisdiction of the Board (“Opt-Out Proposal”); and (3) make other changes to its rules.

The Association of American Railroads (“AAR”), on behalf of its member railroads, submits these comments in response to the Board’s NPR. The AAR supports Board efforts to encourage the use of voluntary mediation and arbitration processes to resolve disputes in lieu of bringing matters before the Board in formal proceedings. Voluntary resolution of disputes without resort to formal litigation could conserve resources and may lead to positive outcomes

for all parties. However, as detailed below, the AAR has substantive legal concerns over the Board's proposed changes, particularly the proposed arbitration program. And, even if those legal concerns could be resolved, there would still need to be a number of administrative/structural changes to the Board's proposed procedures to ensure a fair and equitable process for the resolution of disputes consistent with the provisions of the ICC Termination Act. The AAR is concerned that the proposed rules would be counterproductive and not in keeping with the Board's stated goal of encouraging arbitration. The AAR submits that, instead of the proposed rules, the modifications to the Board's current rules suggested in Section II.C of these comments would more effectively encourage arbitration. Should the Board nonetheless wish to pursue establishing pre-dispute "participant" model arbitration procedures, it must make necessary modifications to its original proposal. The Board should also consider the impacts of a successful arbitration program on other areas of its regulatory mission. Finally, the Board should clarify certain aspects of its proposal regarding mediation.

Background

The Board has established rules implementing ADR procedures in a variety of ways, including arbitration and mediation of disputes. First, the Board has established alternative dispute resolution rules, set forth at 49 C.F.R. § 1109 *et seq.*, pursuant to the Administrative Dispute Resolution Act, 5 U.S.C. §§ 571-584 ("ADRA").¹ Pursuant to those rules, "[a]ny proceeding may be held in abeyance for 90 days [and additional 90 day periods on request] while administrative dispute resolution (ADR) procedures (such as arbitration and mediation) are

¹ See *Use of Alternative Dispute Resolution Procedures in Commission Proceedings and Those in Which the Commission is a Party*, 8 I.C.C.2d 657 (1992).

pursued.” See 49 C.F.R. § 1109.1. The 49 C.F.R. Part 1109 rules apply to all proceedings pending before the Board and allow for voluntary, non-binding mediation or voluntary, binding arbitration upon the mutual consent of the parties. Written consent for use of the ADR procedures is required. *Id.*

In addition to the general ADR rules at Part 1109, the Board adopted additional arbitration rules in 1997.² These rules, set forth at 49 C.F.R. § 1108.1 *et seq.*, provide for “binding, voluntary arbitration of disputes” before they are filed as proceedings at the agency. The procedures are “intended for the resolution of specific disputes between specific parties involving the payment of money or involving rates or practices related to rail transportation services subject to the statutory jurisdiction of the STB.” 49 C.F.R. § 1108.2 (b). These arbitration procedures under 49 C.F.R. Part 1108 are separate from and in addition to the ADR mechanisms available under 49 C.F.R. Part 1109 (which include both arbitration and mediation).³ In establishing these rules under Part 1108, the Board affirmatively disavowed, without explanation, reliance on the ADRA for authority. 49 C.F.R. § 1108.2(c). Instead, the Board relied on its general authority to carry out Subtitle IV of Title 49 found at 49 U.S.C. § 721(a).⁴

The Board has required mandatory, non-binding mediation in rate reasonableness cases considered under both the Board’s stand-alone cost methodology and simplified methodologies. See 49 C.F.R. § 1109.4; *Simplified Standards for Rail Rate Cases*, EP 646 (Sub-No. 1) slip op. at

² See *Arbitration of Certain Disputes Subject to the Statutory Jurisdiction of the Board*, 2 S.T.B. 564 (1997) (“1997 Arbitration Rules”).

³ See 49 CFR § 1108.2 (c).

⁴ *1997 Arbitration Rules*, at 567.

103-104 (STB served Sept. 5, 2007) (“*Simplified Standards*”). According to the Board’s website 11 rate reasonableness complaints have been voluntarily settled since 2009.⁵

The Board has also established a Rail Customer and Public Assistance Program (“RCPA”) as part of the Board’s Office of Public Assistance, Governmental Affairs & Compliance. The RCPA informally addresses concerns, complaints and inquiries involving railroad-related matters.⁶ The RCPA is staffed with Board employees with railroad and shipper transportation experience whose role is to assist in informally resolving railroad-shipper issues before a formal complaint is filed with the Board. The RCPA’s activities range from providing information to shippers to “lengthy informal mediation efforts” on issues such “rates and other charges, railroad-car supply service issues, claims for damages, [and] interchange issues....”⁷

Lastly, in addition to the ADR processes established by the Board, the parties are also free, similarly to other business entities in the private sector, to establish private dispute resolution mechanisms to resolve disputes based on mutual agreement if they choose to do so. The Board both recognizes and promotes the establishment of such private-sector dispute resolution mechanisms. As noted in the Board’s decision establishing its existing rules governing voluntary pre-complaint arbitration, “[the Board’s arbitration rules] are not intended to displace existing private dispute resolution mechanisms that may be available.”⁸ The Board, in furtherance of its policy goals, also “promotes private-sector negotiations and resolutions where possible and appropriate”⁹

⁵ See http://www.stb.dot.gov/stb/industry/Rate_Cases.htm.

⁶ See Surface Transportation Board, *FY 2010* (July 14, 2011), at 9.

⁷ See http://www.stb.dot.gov/stb/rail/consumer_asst.html.

⁸ *1997 Arbitration Rules*, at 565.

⁹ Surface Transportation Board, *FY 2007-2008 Report* (Sept. 1, 2009), at 1.

By a Notice and Request for Comments served on August 20, 2010 (“Notice”), the Board sought “input regarding measures it can implement to encourage greater use of mediation and arbitration procedures, including changes to the Board’s existing rules and establishment of new rules.”¹⁰ The AAR filed comments on October 25, 2010, noting that the Board’s current rules provided parties with a wide array of ADR mechanisms and that the AAR believed that the Board’s current rules governing mediation and arbitration were already structured to encourage the use of ADR where it is deemed potentially useful and cost-effective by the parties. Following the receipt of comments, the Board served its NPR in this proceeding on March 28, 2012, proposing to modify its ADR rules as earlier described herein. The AAR’s Comments on the Board’s NPR are set forth below.

Discussion

I. The Board Lacks Statutory Authority to Implement the Opt-Out Proposal in the NPR

Though the Board asserts that its proposed rules “clarify and revise the Board’s existing rules at 49 CFR Part 1108 to establish that most disputes falling within the Board’s jurisdiction may be arbitrated before the Board on a voluntary basis,” NPR at 6, the Opt-Out Proposal goes far beyond truly voluntary arbitration. Instead, the proposed rules create a lopsided process whereby Class I and Class II railroads would be assumed to consent to arbitration for an ambiguous range of disputes and shippers and other parties would be free to pick and choose which disputes to arbitrate.

The Board has no authority to impose arbitration without the voluntary consent of the parties. As explained below, the Board’s proposed arbitration program pressures only Class I

¹⁰ *Assessment of Mediation and Arbitration Procedures*, EP 699 (STB served March 28, 2012).

and Class II railroads to submit to binding arbitration without full knowledge of the matters or issues to be arbitrated, which cannot be meaningful consent. Moreover, as the Board itself noted, it has neither the authority to require mandatory binding arbitration nor the authority to completely delegate its adjudicatory responsibilities to private parties under 49 U.S.C. § 721 or the ADRA.¹¹

A. The proposed arbitration program is not a voluntary resolution of a dispute by the parties, but rather a delegation of the Board's adjudicatory responsibilities to a private arbitrator not authorized by 49 U.S.C. § 721.

In contrast to the Board's existing ADR procedures, the proposed arbitration program is not voluntary resolution of a dispute. The cornerstone of ADR is that administrative or legal disputes can be solved fairly and expeditiously through voluntary consent of the parties. Rather than adhering to the strictures of formal litigation, individual parties can often agree to limit the scope of their dispute, streamline procedures, and come to a voluntary agreement to solve part or all of a dispute. The Board has often recognized the value of ADR.¹² But rather than continuing to allow parties to arbitrate disputes on a case-by case basis when all parties to the dispute consent, the Board now is seeking to bind Class I and Class II railroads to arbitrate disputes at the election of shippers and other parties.

The Board has recognized in the past that it has no authority to require parties to Board proceedings to submit rate and service disputes to binding arbitration absent the parties' consent. *See, e.g., Arbitration — Various Matters Relating to Its Use As an Effective Means of Resolving*

¹¹ While the Board claimed authority for its proposed changes to its mediation program under 49 U.S.C. § 721(a) and the ADRA, it claimed authority to make changes to its arbitration program under only 49 U.S.C. § 721(a). Nonetheless, as further explained in II.B below, the provisions of the ADRA should be considered in this context.

¹² The Notice beginning this proceeding states, “[t]he Board favors private sector resolutions of disputes as an alternative to its formal processes where possible. To that end, the Board has rules in place that allow for mediation and arbitration of matters subject to its jurisdiction.” Notice at 1.

Disputes That Are Subject to the Board's Jurisdiction, EP 586 (STB served Oct. 26, 2001), Slip op. at 1 (“current law permits arbitration of disputes within the Board’s jurisdiction only where the parties agree to use that process”). That understanding is shared by many stakeholders.¹³ The Board’s current rules for arbitration of disputes not yet filed as proceedings at the Board at 49 C.F.R. Part 1108 claim their authority from only 49 U.S.C. § 721(a) and explicitly disclaim authority from the ADRA.¹⁴ But in contrast to the Opt-Out Proposal, the existing Part 1108 rules contemplate *voluntary* resolution of matters by arbitration where all parties consent.¹⁵ Because any arbitration that would result from the Board’s current Opt-Out Proposal could not be understood to be voluntary on the part of Class I or Class II railroads, the Board lacks authority under 49 U.S.C. § 721(a) to adopt the proposal.

A significant reason for this result is that the NPR fails to adequately define what disputes would be subject to the proposed arbitration program, thereby making it impossible for railroads that do not opt out to have the knowledge necessary to voluntarily consent to arbitration. On page 3 the NPR refers to “certain defined types of disputes, such as complaints relate to demurrage and accessorial changes, or the misrouting of mishandling of rail cars, where the complainant seeks monetary damages for past harm, not for injunctive or prospective relief.” On page 7, the NPR is somewhat more concrete, “The Board proposes that the following types of disputes would be subject to arbitration under its arbitration program: demurrage charges; accessorial charges; compensation for misrouting or mishandling of rail cars; redress for a carrier’s misapplication of its published rules and practices as applied to particular prior

¹³ See, e.g., Railroad-Shipper Transportation Advisory committee (“RSTAC”) Comments at 6 (filed March 15, 2011)(“the Board lacks clear authority to order binding arbitration”).

¹⁴ See 49 C.F.R. § 1108.2(c).

¹⁵ The issue of authority was not challenged by the AAR or other parties because the arbitration rules adopted in 1997 were voluntary and available to all parties on an equal basis. See AAR Comments at 4, EP 560 (filed Apr. 25, 1997).

shipments; and compensation for other alleged unreasonable practices and procedures related to past service.” But the text of the actual proposed rule is circular and open ended:

(b) *Arbitration program-eligible matters* are those disputes, or components of disputes, that may be resolved using the Board’s arbitration program and include disputes involving one or more of the following subjects: 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.

Moreover, the limitations that the discussion in the NPR seems to place on the Opt-Out Proposal are not included in the proposed rules. The NPR states that disputes that would fall within the Opt-Out Proposal “should possess monetary value but lack policy significance,” NPR at 7, and that “[d]isputes that raise novel questions would not be suitable for resolution” under the Opt-Out Proposal. *Id.* Neither of these restrictions is found in the text of the proposed rules. This omission further obscures what disputes would be sent to automatic “required” arbitration should the Board adopt its proposal and a Class I or Class II railroad failed to opt-out. For example, the proposed rule’s phrase “disputes involving a carrier’s published rules and practices as applied to particular rail transportation” does not make clear that important policy issues such as disputes over the reasonableness of coal loading rules or conditions on TIH shipments would not be subject to automatic arbitration. Similarly, the phrase “other-service related matters” could be interpreted to mean a wide range of subjects including disputes over the extent of the common carrier obligation or some form of forced access.

Even if the subject matter eligible for arbitration were defined, the current proposal cannot be understood as a voluntary agreement to arbitrate a specific issue or dispute because of its one-sided nature. The Opt-Out Proposal would bind Class I and Class II railroads into arbitrating disputes that they might otherwise prefer to litigate before the Board if evaluated on a case-by case basis. The NPR itself states that “the arbitration program would be mandatory for

the carrier...". *Id.* at 3. In contrast, shippers (and Class III railroads and others) would be able to unilaterally elect to arbitrate if the dispute's subject matter was "arbitration program eligible." NPR at 8. Shippers, then, would be able to evaluate each individual dispute and decide whether to submit to arbitration or litigate in front of the Board. The rules also appear to grant the shippers an opportunity to veto a counter claim or arbitration request by a respondent railroad on the grounds that the shipper has not consented to arbitrate that issue. It is difficult to see how such a lopsided system could be viewed as voluntary agreement by the parties to arbitrate a specific matter.

The Board also has no authority under 49 U.S.C. § 721(a) to abdicate its adjudicatory authority in favor of private arbitrators absent the consent of all of the parties. As a general principle, the Board cannot completely delegate its authority over broad swaths of its primary jurisdiction to a private arbitrator.

It is undeniable "that when Congress has specifically vested an agency with the authority to administer a statute, it may not shift that responsibility to a private actor." *Perot v. Federal Election Comm'n*, 97 F.3d 553, 559 (D.C.Cir.1996); *National Small Shipments Traffic Conference, Inc. v. ICC*, 725 F.2d 1442, 1450 (D.C.Cir.1984) (ICC may delegate certain ministerial functions to staff but decision making must remain with commission); *Krug v. Lincoln Nat'l Life Ins. Co.*, 245 F.2d 848, 852 (5th Cir.1957) (administrative agency cannot delegate quasi-judicial functions); *Relco, Inc. v. Consumer Prod. Safety Comm'n*, 391 F.Supp. 841, 845 (S.D.Tex.1975) ("administrative adjudications" may not be delegated).

Ass'n of Am. Railroads v. Surface Transportation Bd., 162 F3d 101, 111-12 (D.C. Cir. 1998)(J. Sentelle, concurring). Congress has vested the Board with broad powers to carry out subtitle IV

of title 49 of the U.S. Code because it is an expert agency with specialized expertise regarding the economic regulation of the railroad industry.¹⁶

The proposed arbitration program also goes far beyond the Board's limited use of mandatory arbitration to interpret labor protective conditions stemming from Board licensing proceedings. Such use has been upheld by courts, but under the Board's explicit authority to protect the interests of affected employees in such transactions, not under the general authority of 49 U.S.C. § 721(a). See *Ass'n of Am. Railroads v. Surface Transportation Bd.*, 162 F3d 101 (D.C. Cir. 1998).¹⁷

The use of mandatory arbitration to interpret labor protection conditions reflects the unique role arbitration plays in labor disputes. First, labor protection conditions arise when a railroad voluntarily seeks a license from the Board to complete a transaction. As a part of the labor conditions imposed upon the Board's licensing authorization, mandatory arbitration is included in the event an implementing agreement between the railroad and the relevant labor organization cannot be reached. Second, the inclusion of mandatory arbitration as a labor protective condition has a long history that traces its lineage back to the Washington Jobs Protection Agreement of 1936, where representatives of 85% of the railroad mileage in the country at that time entered into an agreement with 20 of the 21 national labor organizations representing railroad workers. See *New York Dock Ry v. ICC*, 609 F.2d 83 (1979)(describing the history of mandatory arbitration for labor protective conditions). Third, the Board is not charged with the expertise in labor matters that it possesses in transportation regulatory matters. There is

¹⁶ 49 U.S.C § 721(a) states "[t]he Board shall carry out this chapter and subtitle IV. 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 subtitle IV."

¹⁷ It should be noted that courts have also questioned the statutory basis for the Board's authority to impose mandatory arbitration for interpretation of labor protection conditions. See, e.g., *Black v. Surface Transportation Board*, 476 F.3d 409 (6th Cir. 2007).

thus a significant distinction between the use of arbitration to apply the facts of a given dispute over Board imposed labor protective conditions and the use of arbitration to determine the merits of a rail economic regulatory matters that are the core of the Board's jurisdiction.

B. The ADRA also does not support the Board's proposal because the ADRA gives administrative agencies authority to allow binding arbitration only where it is voluntary and all parties consent in writing.

The Board has relied solely upon 49 U.S.C. § 721 for its arbitration proposal. However, the proposal should also be considered in the context of the ADRA requirements. The ADRA authorizes a federal agency to utilize alternative dispute resolution methods such as arbitration for both cases the agency itself is involved in and those which it is called upon to exercise its jurisdiction and resolve.

The Board's proposal runs counter to the ADRA in both letter and spirit. Under the ADRA, binding arbitration must be voluntary and is authorized only when all parties consent in writing. It prohibits a federal agency from requiring any person to consent to arbitration as a condition of receiving a contract or benefit. 5 U.S.C. § 575. This prohibition is intended to help ensure that the use of arbitration is truly voluntary on all sides." S. Rep. No. 543, 101st Cong. 2d Sess. 5 (1990), reprinted in 1990 U.S.C.C.A.N. 12-13 3942-43. By deeming that Class I and Class II railroads have agreed in advance to arbitrate up front and allowing complainants to choose to arbitrate a la carte, those railroads would never have the opportunity to truly consent to arbitrate a particular dispute. Moreover, even if a railroad expressly states its objection at the outset to arbitration under the proposed rules, it must repeat its objection each year.¹⁸ If it fails to do so, "agreement" to arbitration under the Opt-Out Proposal will be deemed to have occurred not by any voluntary written consent but instead only through no action by the railroad.

¹⁸ NPR at 15 proposed 1108.3(b).

The ADRA's requirements for voluntary consent in writing are understandable; commercial arbitration is a creature of contract law. *See Rent-A-Center, West, Inc. v. Jackson*, 130 S.Ct. 2772 (2010). Indeed, it is the agreement of the parties to an arbitration that governs commercial arbitration. *See, e.g., Adkins v. Labor Ready, Inc.*, 303 F.3d 496 (2002). The Board's Opt-Out Proposal is contrary to the fundamental principle of contract law that silence does not constitute acceptance to form a valid contract, with limited exceptions not present here.¹⁹ The Opt-Out Proposal appears to presume that silence not only means Class I and Class II railroads generally agree to arbitrate, but also that they agree to arbitrate specific disputes, sight unseen.

The ADRA further recognizes the contractual nature of arbitration and allows a party to "submit only certain issues in controversy to arbitration," 5 U.S.C. § 575(a)(1)(A), or agree on "arbitration on the condition that the award must be within a range of possible outcomes." 5 U.S.C. § 575(a)(1)(B). The Board's proposal allows Class I or Class II railroads to do neither. In sum, the Board not only cannot rely on its general authority under 49 U.S.C. § 721 to require Class I and Class II railroads into participating in an opt-out arbitration program, but the provisions of the ADRA also would not authorize the Board's proposal.²⁰

II. The NPR Does Not Meet the Board's Stated Goal of Encouraging Arbitration

A. The Opt-Out Proposal would not encourage arbitration

The AAR supports the Board's goal of encouraging ADR techniques such as arbitration and mediation where the parties to a dispute voluntarily consent. The NPR, however, does not

¹⁹ *See* RESTATEMENT (SECOND) OF CONTRACTS § 69 (1981).

²⁰ The Board also cannot rely on its general authority to require railroads to submit information under 49 U.S.C. § 11145 for its proposal. Though the Board's supplemental notice asking for comments on a burden analysis under the Paperwork Reduction Act cites to § 11145, that section does not give the Board any additional authority to establish an unfair, lopsided arbitration program.

explain why the Board believes the Opt-Out Proposal would encourage arbitration. The AAR submits that the Opt-Out Proposal, in fact, does not encourage arbitration because its structure makes it likely that, if it were adopted, some or all of the Class I or Class II railroads would opt out and continue to evaluate whether to arbitrate a particular dispute on a case-by-case basis.

The proposed rules contain serious deficiencies that make arbitration less attractive than the Board's current rules.²¹ First, the Opt-Out Proposal would place Class I and Class II railroads at a decided substantive disadvantage. By allowing shippers to decide when to pursue arbitration on a case-by-case basis while binding Class I and Class II railroads in advance, the proposed rules create the structure to allow arbitration to be invoked only where it disadvantaged the Class I or Class II railroad. Class I and Class II railroads would not have the ability to evaluate the particular dispute to determine whether arbitration offered an appropriate mechanism to resolve the matter or the clear right to include related issues or claims. It is difficult to see why those railroads would not opt out of the program if it were ever adopted, particularly where the Board also makes arbitration and mediation available on a case-by-case basis.

Second, the Opt-Out Proposal puts Class I or Class II railroads at such a procedural disadvantage as to render the proposal unworkable. By allowing shippers to decide what specific disputes go to arbitration, the Opt-Out Proposal appears to allow shippers to define the scope of that arbitration. If a railroad did not opt out of such a system, a shipper could, for example, demand arbitration regarding a railroad's demurrage charges. At the shipper's election, such a dispute would be sent to automatic arbitration. But it is entirely possible that those charges

²¹ Because of these structural deficiencies, these comments do not address such procedural issues such as discovery or time limits for an arbitrator to render a decision that are typically addressed in the parties' arbitration agreement in a commercial arbitration.

would be part of a larger dispute that the railroad in question would like to raise before the Board in its defense or as a counter-claim. It is unclear whether the NPR would allow the shipper to argue that it did not consent to the inclusion of those matters, or whether an arbitrator could choose to exclude the carrier issues or claims based on concerns that their inclusion would exceed the arbitrator's authority, forcing the carrier to either initiate a second proceeding in court or before the Board or be denied its opportunity to raise those issues. Given this uncertainty, railroads would have reason to be concerned about participating in a system that does not protect their ability defend against unfounded complaints or seek appropriate counter claims.²²

Third, as described above, the proposal fails to adequately define the general subject matters that would be sent to arbitration. Without knowing exactly what types of disputes would be sent to arbitration, the prudent course of action would be for Class I and Class II railroads to err on the side of caution and opt out of the program. Such considerations would also apply to any program that did not limit arbitration to subject matters that turn on findings of fact, rather than legal interpretation. While the application of a railroad tariff provision may be suitable for arbitration in some circumstances, the reasonableness of that practice under 49 U.S.C. § 10702 requires the legal, technical, and policy expertise of the Board. In such cases, a definitive Board ruling with precedential effect would consume fewer resources and provide better guidance for the future than a series of potentially inconsistent arbitration awards.

Fourth, the procedures set forth in the NPR for selecting an arbitrator are inadequate for parties to conclude that, in the event parties could not agree to an arbitrator, the arbitrator

²² The NPR suggests that the Board would retain the right to require parties to adjudicate a pending matter before the Board rather than arbitrate where "the Board concludes that the specific matter is not suitable for arbitration" or where the parties jointly petition the Board, NPR at 7, but does not provide for a mechanism for a Class I or Class I railroad to argue why a specific matter should not be automatically sent to arbitration.

selected by the Board would be both neutral and competent to hear their dispute.²³ The NPR would continue the Board's current practice of maintaining a roster of arbitrators. The Board's current roster has not been compiled in a public and transparent manner and it is not evident how and whether the Board has evaluated the qualifications of the potential arbitrators on the list. It should not be relied on for any arbitration program, let alone one that sends some matters to automatic arbitration without the consent of some railroad parties. The AAR suggests some improvements to the process for selection of an arbitrator in case-by-case arbitrations in Section II.C, below.

Fifth, the Board's proposed standard of review for arbitration awards would not encourage parties to participate in its Opt-Out Proposal. The Board must ensure that arbitration awards under its sponsorship comport with the statute it administers. *See 1997 Arbitration Rules*, at 565 ("We must therefore monitor arbitration conducted under our auspices to protect against outcomes that would contravene fundamental principles of our governing statute."); *See also Alternative Dispute Resolution*, FERC Docket No. RM91-12-000, 60 FR 19494 (Apr. 12, 1995) (stating "the Commission has a statutory responsibility to vacate an arbitration award if it contravenes the public interest or is any other way inconsistent with statutory requirements."²⁴) The Board's proposal to review awards only upon "instances involving a clear abuse of an arbitrator's authority or discretion"²⁵ is inadequate for the Board to ensure that the statutory requirements that it has been charged by Congress to fulfill have been met. Parties are unlikely to participate in any program that does not ensure that their statutory rights will be protected.

²³ The NPR defines arbitration as an evidentiary process conducted by a trained, neutral, third-party arbitrator with expertise in the subject matter. *Id.* at 2 fn. 2.

²⁴ In contrast, "any person adversely affected or aggrieved by an award made in an arbitration conducted pursuant to the ADRA, "may bring an action for review of such award only pursuant to the provisions of [the FAA] sections 9 through 13 of title 9." 5 U.S.C. § 581(a).

²⁵ NPR at 10.

B. The NPR would also not encourage greater use of arbitration on a case-by-case basis

Beyond the problems associated with the Opt-Out Proposal, the NPR would also make changes to the rules governing case-by-case arbitration. The AAR is concerned that the proposed changes actually make arbitration on a case-by-case basis less likely. For example, the Board's current procedures for selecting an arbitrator under 49 C.F.R. § 1108.6, while imperfect, at least allow for the parties to have input on the qualifications of the arbitrator. *See* 49 C.F.R. 1108.6(b). The proposed rules, as currently drafted, do not provide for this opportunity. Similarly, though the Board's current rules provide for two different standards of review of an arbitrator award depending on whether it was issued pursuant to 49 C.F.R. Part 1108 or Part 1109, both standards refer back to the statutory requirements of the Interstate Commerce Act.²⁶ As discussed in the preceding section, the NPR's proposed standard of review does not contain such a protection. The NPR would thus make the selection process of an arbitrator less certain and give the arbitrator more discretion to ignore the statutory scheme governing the economic regulation of the railroad industry. If the Board were to adopt the rules proposed in the NPR, arbitration would appear to be less attractive, not more.

C. The AAR continues to support case-by-case voluntary arbitration

The AAR continues to believe that the Board's existing ADR rules encourage and facilitate mediation and arbitration where it is in the parties' interests. It should be noted that the Board's current procedures allow for arbitration whenever all of the parties consent and already

²⁶ Compare 49 C.F.R. § 1109.2 ("Appeals are limited to clear errors of general transportation importance, and not issues of causation or fact. Arbitration awards can be challenged on the basis that they do not take their essence from the Interstate Commerce Act, or are not limited to the matters the parties have referred for arbitration.") with 49 C.F.R. § 1108.11(c) ("The STB will review, and may vacate or amend, an arbitration award, in whole or in part, only on the grounds that such award (1) Exceeds the STB's statutory jurisdiction; or (2) Does not take its essence from the Interstate Commerce Act.").

explicitly allow for pre-dispute consent to arbitrate a dispute. The ICC stated that railroads may agree to be bound by arbitration before a dispute arises by including appropriate language in a tariff. Shippers can validly accept such an offer by making a notation on the bill of lading. *See Use of Alternative Dispute Resolution Procedures*, 8 I.C.C.2d 657, 662-63 (1992). The ICC noted that shipper consent to arbitration must be demonstrated affirmatively, and should not be inferred from the use of services under a particular tariff. *Id.* at 663 n.14. This structure, coupled with the ability to invoke arbitration after a complaint has been filed upon the consent of both parties, evenhandedly allows the parties to determine what disputes should be subject to binding arbitration.

Minor improvements to the Board's procedures that are clearly within the Board's statutory authority to implement could also encourage parties to arbitrate matters on a case-by-case basis. The AAR submits that the Board should take those more modest steps, instead of seeking to impose a system of compulsory arbitration which calls into question the Board's legal authority to do so.

The Board could reassess how arbitrators are selected. If it were to maintain the current roster system, it should initiate a public and transparent process for establishing the roster of qualified arbitrators. The existing roster has been compiled in an opaque, non-transparent fashion. There are no standards of qualifications for arbitrators and no apparent vetting by the Board. There is no way for parties to evaluate the qualifications of the arbitrators on the roster without undertaking independent fact finding. The Board should declare the existing roster void and institute a proceeding to establish a new list of arbitrators. In that proceeding, the Board should establish objective criteria to judge whether an individual could be an effective arbitrator of disputes. Such criteria should include a minimum number of years of transportation

experience, such as 10 years; a familiarity with the Interstate Commerce Act; and demonstrated neutrality. The Board should also take into account, when assessing the neutrality or impartiality of an arbitrator for inclusion on the roster, whether the individual has consistently testified for or against a category of parties.

In addition to – or as an alternative to – the reforming the roster of arbitrators, the Board should establish clear procedures for selection of an arbitrator in a specific dispute. Before parties will be willing to forego pursuing their statutory rights before the Board, they must be assured that an arbitrator that will be selected to hear their dispute will be competent and impartial. If the roster is to be used, a process for ensuring that a party can disqualify an arbitrator for partiality or incompetence related to the specific matter at issue has to be in place.

Alternatively, the Board could consider dispensing with a roster and allowing the parties to choose an arbitrator subject to the Board's approval. If the parties cannot agree on an arbitrator, the Board can establish a "best final offer" process where each party would submit the name of the arbitrator to the Board, with the reasons in support the party's choice, and the Board would select one of the two.

The Board can also clarify the standard of review it will employ for arbitration awards. As explained above, the Board must ensure that arbitration awards under its sponsorship comport with the statute it administers. The AAR submits that an appropriate standard of review would be deferential to an arbitrator's findings of fact, but ensure that an award does not exceed an arbitrator's authority or contravene statutory requirements. The Board should, at minimum, add the phrase "or contravenes statutory requirements" to its proposed standard of "clear abuse of arbitral authority or discretion."

III. Should the Board Wish to Pursue a Pre-Dispute “Participant” Model to Establish an Arbitration Program, It Must Make Several Adjustments to its Original Proposal.

As established above, the cornerstones of a legitimate binding arbitration program are that it must be voluntary and based on a written document. Any arbitration the Board adopts must restrict automatic arbitration to disputes where all parties are participants in the program for a dispute to be set for automatic arbitration. In other words, it must be reciprocal. Parties would opt-in to the program by submitting a written notice. It is axiomatic that parties must consent to arbitration in writing and such a notice would satisfy the ADRA and would be consistent with the FAA. Written notice of participation would also allow parties to affirmatively state what issues it would be willing to submit to arbitration. Parties should be able to elect to participate for some, but not at all of the subjects eligible for arbitration. Parties should also be able to limit their exposure to less than the maximum amount of monetary damages allowed by the program. Such control over the extent of participation would incentivize parties to participate in the program, particularly at the outset. Moreover, it would allow parties to structure their own approach to arbitration of disputes and prevent overlap with other, private dispute resolution agreements such as the NGFA program. If all parties have agreed to participate in the program for the issues in dispute, only then would the Board send the dispute to automatic arbitration.

The Board should also revise some of the mechanisms associated with participating. Parties should be able to opt-in at any time, but once they opt in, they should be obligated to remain in the program for a minimum of 6 months. Also, parties should be required to give at least 90 days' notice before they are able to withdraw. Such a procedure would minimize the ability of a party to game the system and join the program to arbitrate a specific controversy and then withdraw without subjecting itself to other potential arbitrations.

The same considerations for the qualifications and selection of arbitrators as discussed in Section II above apply to any participant model that the Board considers. Arbitrators must be subject to a minimum set of qualifications which should include, but is not limited to: experience with transportation industry, knowledge of the Interstate Commerce Act, as amended, and demonstrated neutrality. The degree that parties believe that their dispute will be heard by a competent and neutral arbitrator will greatly impact their willingness to participate.

The Board should consider limiting the subject matter that is eligible for automatic arbitration to ensure that questions of general transportation importance or legal interpretation are heard by the Board and not private arbitrators. A limited program of clearly defined issues may see more active use than a broadly or ambiguously defined program. The Board should also make clear that any arbitration should involve factual determinations limited to the application of a rule or regulatory requirement rather than to the legality or "reasonableness" of the rule or requirement itself. For example, if the Board includes disputes regarding demurrage or other money charges as eligible for automatic arbitration, such arbitration should be limited to the application of those charges, rather than the reasonableness of the underlying railroad practices. The Board should also clarify that rail transportation contracts authorized by 49 U.S.C. § 10709 are not subject to arbitration.

IV. The Board Should Consider the Consequences of a Successful Arbitration Program

According to the NPR, the Board would pay for arbitrators out of its annual appropriations. As an independent agency administratively housed within the U.S. Department of Transportation, the Board does not have independent contracting authority. The NPR does not indicate whether or how the Board has the practical ability to hire arbitrators in a timely fashion to hear disputes. The NPR acknowledges that multiple arbitrators could "tax the agency's

resources.” NPR at 9. If several parties utilized arbitration, the need to pay for arbitrators to hear relatively minor disputes could take away from the ability for the Board to hire staff in other areas. The Board should consider how many arbitration proceedings it could reasonably accommodate in a given budget year. It is not a solution to require the parties to pay for the arbitrator or for the loser of the arbitration to pay. Such a payment of money to carry out the Board’s responsibilities would raise questions of whether it would be an unlawful augmentation of the agency’s appropriations from Congress.²⁷

V. Proposed Changes to the Board’s Mediation Rules Require Clarification

Two aspects of the Board proposal regarding mediation require clarification. First, the NPR states that the proposed rules would “give it authority to order mediation in certain types of adjudicatory matters (those in which the Board is not statutorily required to determine the PCN and those that do not involve labor protection) that are the subject of a dispute before the Board.” NPR at 6. The Board has in the past asserted the prerogative to order parties to rate reasonableness cases to non-binding mediation with some success in facilitating settlement agreements between the parties. The AAR does not oppose the proposed change, but asks that the Board clarify its authority to require parties to mediate without first obtaining their consent.

Second, the Board asserts that it can “reserve the right to stay proceedings and toll any applicable statutory deadlines pending the conclusion of mediation.” *Id.* The NPR does not state which deadlines would be tolled and cites no authority for the proposition that the Board has the power to toll the deadlines that Congress has set for it. The AAR is concerned that the Board does not have any authority to toll statutes of limitations on the collection of payments in the courts and that such statutes could run while mediation is ordered by the Board without the

²⁷ See GAO, *Principles of Federal Appropriations Law* 3rd Ed., Volume II, 162-163 (2006).

consent of the parties. The Board should clarify its authority to toll statutory deadlines while mediation is ongoing.

Conclusion

While the AAR supports the Board's stated goal of fostering voluntary, private sector resolution of disputes without resort to formal litigation before the Board, there are many substantive legal and administrative/structural problems with the Board's proposal that render the proposed rules counterproductive to the Board's objectives. The Board should consider the alterations to its existing programs detailed above in Section II.C, and instead move forward with the proposals contained in the NPR. If the Board wishes to move forward with a "participant" model for arbitration, it should carefully consider the comments received and issue a new notice of proposed rulemaking to allow for public comment on its new proposal.

Respectfully Submitted,



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