

BEFORE THE
SURFACE TRANSPORTATION BOARD

Ex Parte No. 699

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ASSESSMENT OF MEDIATION AND ARBITRATION PROCEDURES

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REPLY COMMENTS OF UNION PACIFIC RAILROAD COMPANY

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Pursuant to the Board's Notice of Proposed Rulemaking served March 28, 2012 ("NPRM"), Union Pacific Railroad Company ("UP") hereby submits its reply comments on the Board's proposal to modify its rules regarding the mediation and arbitration of disputes subject to the Board's jurisdiction.¹

The Board's objective for issuing the NPRM was to encourage greater use of mediation and arbitration procedures in lieu of formal adjudication before the Board.² UP supports the Board's objective and believes that voluntary alternative dispute resolution can encourage settlement, expedite dispute resolution, and reduce litigation costs. However, the benefits of alternative dispute resolution and parties' incentives to use such procedures will be lost if the governing rules are unfair, complex, unclear, or broad. Many suggestions in the opening comments reinforce unfair aspects of the NPRM or would complicate and unreasonably expand potential arbitration. If these suggestions were adopted, the effect would be to discourage – rather than encourage – arbitration.

¹ UP also joins in the reply comments submitted by the Association of American Railroads ("AAR").

² NPRM at 2-3.

Part I of UP's reply comments distinguishes the proposed hybrid model from the National Grain and Feed Association's Rail Arbitration Rules ("NGFA model") and explains that the hybrid model differs markedly from the NGFA model in ways that make the hybrid model unfair and unreasonable. Part II replies to parties' comments that would complicate or broaden the scope of the proposed arbitration rules and therefore discourage participation. Part III endorses the suggestion that arbitration decisions should be publicly available and suggests modest modifications.

I. The lopsided hybrid model is markedly different than the reciprocal NGFA model.

In its Opening Comments, UP demonstrated how the non-reciprocal participation requirements of the proposed hybrid model³ would deny Class I and II carriers the same recourse and procedural protections available to other parties. Other parties similarly recognized that the NPRM proposes a "stick" rather than a "carrot" for Class I and II carriers to arbitrate under the hybrid model and that this lopsided treatment will likely discourage those carriers from participating.⁴ The National Industrial Transportation League ("NITL"), however, drew a limited comparison between the proposed hybrid model and the NGFA model and asserted that since many rail carriers subscribe to the NGFA model, the participation requirements of the

³ UP has used the term "proposed hybrid model" or "hybrid model" to refer to the Board's proposal in the NPRM where Class I and II carriers would be deemed to agree in advance to arbitrate certain disputes unless they annually opt out, Class III carriers would agree to arbitrate certain disputes if they opt in, and shippers or other parties would agree to arbitrate certain disputes on a case-by-case basis.

⁴ See Comments of the Montana Grain Growers Association ("MGGA Comments") at 2 ("There is a bit of a stick for the Class 1 railroads, in that they are presumed to be on board unless they very publicly opt out – it would be good to find a carrot for them as well."); Comments of National Grain and Feed Association ("NGFA Comments") at 2 ("[...] [T]he STB's proposed rail arbitration procedures fall short of fostering the fairness and transparency so essential to the successful functioning of an unbiased arbitration system.").

hybrid model are fair and presumptively reasonable.⁵ Despite some superficial similarities between the hybrid model and the NGFA model, the proposed hybrid model departs from the NGFA model in two crucial ways, and such departures will discourage participation.

First, the NGFA model is truly voluntary while the hybrid model imposes arbitration on Class I and II carriers. Each NGFA member understood the rights, obligations, commercial advantages, and commercial disadvantages created by joining NGFA, and by ultimately deciding to join, each NGFA member voluntarily consented to being subject to NGFA's rules, including the arbitration procedures. In contrast, under the proposed hybrid model Class I and II carriers would be *deemed* to agree to arbitrate certain disputes unless they repeatedly opt-out. Inaction is deemed consent for those carriers, which raises serious questions as to whether the hybrid model is voluntary.⁶ The NGFA model does not raise similar concerns because members consent to NGFA's arbitration procedures through the voluntary act of joining the NGFA and they can withdraw from arbitration by providing a single notice.

Second, unlike the hybrid model, the NGFA model is reciprocal for all parties. Under the NGFA model, both railroads *and* rail users participate by becoming a NGFA member and can withdraw their participation by providing 90-days' withdrawal notice.⁷ Because the participation requirements are reciprocal for both railroads and rail users, the NGFA model affords railroads and rail users the same potential recourse and the same procedural protections. Unlike the proposed hybrid model where Class I and II carriers are inevitably the respondents, any NGFA

⁵ NITL Comments at 10.

⁶ See Comments of the Association of American Railroads at 5-7.

⁷ Comments of National Grain and Feed Association, Ex Parte No. 699 (filed Oct. 20, 2010) at 2. See also Bylaws of the National Grain and Feed Association, Article II. NGFA's Bylaws are available at http://www.ngfa.org/about_who_bylaws.cfm.

member, whether railroad or rail user, can seek arbitration against another member.

Accordingly, each member has a voice over the scope of issues arbitrated because it either can file a complaint or it can file a counterclaim to include other relevant issues in the arbitration.⁸

In contrast, the proposed hybrid model imposes an obligation on certain carriers to arbitrate any eligible dispute at the behest of other parties while depriving those carriers the right to seek arbitration against a shipper or to have a voice in the issues to be arbitrated unless the other party agrees.⁹ While the NGFA model encourages railroads and shippers to resolve certain disputes through voluntary, reciprocal arbitration, the proposed hybrid model does not equally provide such a “carrot” for all interested parties.¹⁰

II. The Board’s proposed arbitration rules should not be complicated or expanded further.

Parties will be more likely to engage in Board-sponsored arbitration over formal Board proceedings if the governing rules are fair, simple, clear, and narrow, and the Board should not expand or otherwise complicate its proposed rules.

Expansion of the Hybrid Model to Include Carmack Disputes, Railcar Damage, and Other Service Failures. Without providing a justification for why the additional categories were needed, NITL argued that the hybrid model should be expanded to include (1) disputes involving loss and damage claims arising under receipts and bills of lading governed by 49 U.S.C. § 11706 (“Carmack disputes”); (2) disputes involving damage to a shipper’s railcars; and (3) disputes involving damage as a result of service failures not otherwise covered in the proposed hybrid

⁸ NGFA Rail Arbitration Rules, § 2(d).

⁹ See UP Opening Comments at 4-5.

¹⁰ UP is not suggesting that the Board should adopt the NGFA model but is highlighting the important differences between the proposed hybrid model and the NGFA model.

model (“other service failure disputes”).¹¹ Each category proposed by NITL, however, is unnecessary, already subject to other arbitration procedures, or ambiguous and overbroad.

Expanding the scope of the hybrid model to include Carmack disputes is unnecessary, and NITL has not demonstrated why this expansion is needed. From UP’s experience, the vast majority of Carmack disputes are informally and quickly resolved. The few Carmack disputes that require formal resolution are either arbitrated pursuant to existing arbitration agreements¹² or litigated to summary judgment. Matters decided by summary judgment generally should not be arbitrated because by definition they involve legal, not factual, issues, and summary judgment provides guidance to other parties for resolving future disputes with similar legal issues. In contrast, one chief virtue of arbitration is its suitability for resolving factual disputes without creating precedent.

The Board should also not expand the scope of the hybrid model to include disputes involving damage to a shipper’s railcars because those disputes are already subject to arbitration under the AAR Interchange Rules and can involve technical matters that appear to be beyond the expertise of the arbitrators on the Board’s roster.¹³ Expanding the scope of the hybrid model to

¹¹ NITL Comments at 8.

¹² Even though Carmack disputes are eligible for arbitration under the NGFA model, UP has not been a party to NGFA arbitration involving a Carmack dispute since 2005. In addition to reasons explained in Part I, UP’s agreement to arbitrate Carmack disputes under the NGFA model does not similarly indicate its willingness to arbitrate Carmack disputes under the hybrid model because the NGFA model covers a relatively narrow range of commodities and the NGFA has access to numerous arbitrators with specific industry experience for those commodities and their associated claims. The hybrid model, on the other hand, covers a broad range of commodities and relies upon a limited number of arbitrators, who may not have the requisite expertise on Carmack disputes.

¹³ UP recently received the Board’s roster of arbitrators in connection with *Denver Rock Island R.R. Co. v. Union Pac. R.R. Co.*, NOR 42135. In reviewing their experience, the arbitrators on the roster do not seem to possess expertise on mechanical standards for railcars.

cover an issue that already has an established arbitration procedure is unnecessary and will cause confusion among the parties about which procedures govern.

Likewise, the Board should not expand the scope of the hybrid model to include other service failure disputes because that subject-matter is ambiguous and overbroad. It is unclear what type of dispute would potentially fall under this category, especially if the hybrid model already covers “other service-related matters.”¹⁴ If the types of disputes subject to arbitration are unclear or if the hybrid model is expanded to include another broadly defined, catch-all category, parties will be deterred from participating because they will not be able to anticipate the range of disputes that could be subject to arbitration.

Expansion of the Hybrid Model to Include Amtrak Disputes. Amtrak concluded that it would not be considered a participant in the hybrid model absent its consent presumably because Amtrak believes it is not a Class I, Class II, or Class III rail carrier under the NPRM.¹⁵ The NPRM does not define the terms “Class I and II rail carriers” or “Class III rail carriers,” so it is not clear whether Amtrak could participate in the hybrid model, if at all.¹⁶ If Amtrak could arbitrate disputes on a case-by-case basis as an “other party” under the hybrid model, Class I and II freight carriers will be put at a disadvantage once again because of the hybrid model’s lopsided participation requirements.¹⁷ Furthermore, disputes between Amtrak and freight carriers are not

¹⁴ The definition of “arbitration program-eligible matters” includes “other service-related matters.” *See* NPRM at 14. UP argued in its Opening Comments that “other service-related matters” was overbroad because that category could include disputes having policy significance, such as the reasonableness of a carrier’s tariff rules.

¹⁵ Comments of National Railroad Passenger Corporation (Amtrak) at 3.

¹⁶ If the Board adopts a final rule that differentiates between classes of rail carriers, the Board should clarify and define the terms “Class I rail carrier,” “Class II rail carrier,” and “Class III rail carrier.”

¹⁷ *See* UP’s Opening Comments at 3-7.

similar to the other types of disputes eligible for arbitration under the hybrid model because the law governing passenger service issues is evolving and largely unsettled. Consequently, disputes involving Amtrak are best left to the Board's expertise.¹⁸

Expansion of Board-Sponsored Arbitration for Contract Disputes. NITL asked the Board to clarify that parties could use Board-sponsored arbitration for contract disputes where all parties to the dispute agree and where the contract does not contain an arbitration clause.¹⁹ UP believes that it is both unnecessary and imprudent for the Board to modify its rules so that parties could use Board-sponsored arbitration for contract disputes because such modification will complicate the procedures and will raise more questions as to the Board's jurisdiction. Parties to a contract dispute can already agree on the particular arbitration rules that will govern. For example, parties can agree to arbitrate their dispute pursuant to American Arbitration Association rules and procedures. Likewise, parties to a contract dispute could similarly agree to use the Board's procedural rules for arbitrating their dispute. If the parties merely agreed to adopt the Board's procedural rules for arbitrating their dispute, the arbitration, however, would not be conducted under the Board's jurisdiction, their arbitration agreement would be enforceable under the Federal Arbitration Act, and the arbitration decision would remain confidential.

¹⁸ As long as the parties have not agreed to other arbitration procedures in their contracts, Amtrak and freight carriers could arbitrate disputes under the Board's voluntary, case-by-case arbitration procedures if both parties agree to Board-sponsored arbitration.

¹⁹ NITL Comments at 9. It is not clear whether NITL was suggesting that parties could arbitrate contract disputes under the Board's proposed hybrid model or whether parties could arbitrate contract disputes under the Board's procedures for voluntary, case-by-case arbitrations. If NITL were suggesting that contract disputes should be included as an eligible issue under the proposed hybrid model, the Board does not have jurisdiction to impose arbitration over 49 U.S.C. § 10709(c) transportation contracts.

In contrast, by providing that parties could use Board-sponsored arbitration for contract disputes will raise more questions, such as (1) whether an arbitrator in a Board-sponsored arbitration has jurisdiction over a 49 U.S.C. § 10709 contract; (2) whether parties could appeal an arbitration decision to the Board although the Board does not have jurisdiction over 49 U.S.C. § 10709 contracts²⁰; and (3) whether the Interstate Commerce Commission Termination Act (“ICCTA”) would guide arbitrators even though 49 U.S.C. § 10709 contracts are not subject to ICCTA. Such questions engender uncertainty about what the Board’s procedures can and cannot do, which will lead to arguments that will lengthen the resolution of the dispute.

Expansion of Board-Sponsored Arbitration for Rate Challenges. The Montana Grain Growers Association suggested that rate prescriptions should be added to the Board’s arbitration rules.²¹ The Board stated in the NPRM that matters involving prospective or injunctive relief are generally complicated or implicate significant policy or regulatory issues that are better suited for resolution using the Board’s formal adjudicatory procedures.²² The Board’s rationale specifically applies to rate prescriptions because rate challenges are complex. As UP explained in its Opening Comments, rate prescriptions should not be available in Board-sponsored arbitrations because arbitrators will not have access to the required data and will not have the required expertise or resources to decide whether a rate is reasonable especially within an expedited arbitration period.²³

²⁰ 49 U.S.C. § 10709(c)(1).

²¹ MGGA Comments at 2.

²² NPRM at 10.

²³ UP Opening Comments at 8-9.

III. Publishing the arbitration decision will add credibility to Board-sponsored arbitration and will likely encourage parties to use Board-sponsored arbitration.

NGFA suggested, based on its experience with disputes filed under the NGFA model, that arbitration decisions should be publicly available because the transparency created by publishing decisions (1) encourages settlement; (2) allows interested parties to scrutinize the arbitration procedures; (3) promotes arbitrator discipline and integrity; and (4) increases confidence in the arbitration procedures.²⁴ Furthermore, NGFA agreed with the Board that arbitration decisions should not have precedential effect even if arbitration decisions were made public.²⁵

UP supports NGFA's suggestion to publish arbitration decisions so long as (i) the decisions do not disclose confidential information presented during the arbitration, (ii) the decisions are not precedential, and (iii) the decisions are not admissible in future arbitrations. As long as confidential information is not disclosed, UP believes that public information on a dispute and the arbitrator's rationale for the decision will add credibility to the Board's arbitration procedures, especially since the Board's arbitration procedures have rarely been utilized.²⁶ Many parties commented that a successful arbitration procedure must ensure that the arbitrators are qualified and neutral.²⁷ Publishing arbitration decisions would address concerns about arbitrator qualifications and perceived potential bias because interested parties would be

²⁴ NGFA Comments at 8-9.

²⁵ *Id.*

²⁶ The AAR's reply comments propose that arbitrators should submit a summary of the decision to the Board for publication and that the Board's normal rules regarding protective orders should apply if a party appeals the arbitration decision. UP supports the AAR's proposal.

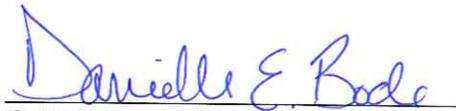
²⁷ See UP Opening Comments at 10-11; AAR Comments at 14-15, 17-18; BNSF Comments at 2-4; NGFA Comments at 5-6; NITL Comments at 11; Comments of U.S. Department of Agriculture ("USDA Comments") at 2-3; WCTL Comments at 10.

able to evaluate a particular arbitrator's qualifications, neutrality, and decision-making quality. UP urges the Board to consider revising its proposed arbitration rules consistent with this section, the NGFA's opening comments, and the AAR's reply comments.

IV. Conclusion

UP supports the Board's efforts in encouraging greater use of mediation and arbitration in lieu of formal adjudication before the Board, and UP believes that the Board can achieve its objective if the governing procedures are fair, simple, clear, and narrow. The Board should carefully consider the comments received and revise its proposed rules so that all parties are treated fairly and so that the governing rules encourage parties to mediate and arbitrate disputes.

Respectfully submitted,



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