

UNITED STATES OF AMERICA
SURFACE TRANSPORTATION BOARD

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HEARING

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IN THE MATTER OF: :
ASSESSMENT OF MEDIATION AND : Docket No.
ARBITRATION PROCEDURES. EP 699
:
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Thursday,
August 2, 2012

Surface Transportation Board
Suite 120
395 E Street, S.W.
Washington, D.C.

The above-entitled matter came on
for hearing, pursuant to notice, at 9:30 a.m.

BEFORE:

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FRANCIS P. MULVEY Vice Chairperson
ANN D. BEGEMAN Member

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1 P-R-O-C-E-E-D-I-N-G-S

2 9:31 A.M.

3 CHAIRMAN ELLIOTT: Good morning.

4 Welcome, everyone. Today, we'll hear oral
5 presentations in our proposed rulemaking
6 concerning the assessment of mediation and
7 arbitration procedures in Docket EP 699.

8 The Board launched this proceeding
9 with a notice and request for comments in late
10 2010 as part of its initiative to enhance the
11 use of alternative dispute resolution for
12 matters coming before this Agency. We greatly
13 appreciate the effort that members of the
14 public devoted to responding to that notice.
15 After reviewing and evaluating the many
16 thoughtful comments provided by the public, we
17 followed up this past spring with a Notice of
18 Proposed Rulemaking on a specific set of
19 proposed new rules, as well as modifications
20 to our existing rules, involving the Board's
21 mediation and arbitration procedures.

22 This hearing will address the

1 further comments filed by the parties in
2 response to the Board's specific rulemaking
3 proposals in response to our June 28, 2012
4 notice announcing today's hearing.

5 We received requests for
6 participation from nine parties. The order of
7 appearance in one of two panels and the
8 requested times to speak were set out in our
9 subsequent July 25, 2012 decision. Copies are
10 available at the back of the hearing room. We
11 ask that all parties come up to the table --
12 you're already up there, we don't have to
13 worry about that.

14 We will hear from each member of
15 the panel and the Board will then subsequently
16 ask questions. Any party making a PowerPoint
17 presentation or using similar hard copy aids
18 using materials previously placed in the
19 record should have provided those materials in
20 hard copy to the Board. We will have any
21 pages used today in such presentations bound
22 into the transcript to this proceeding.

1 Speakers, please note the timing
2 lights are in front of me. You will see a
3 yellow light when you have one minute
4 remaining and a red light when your time has
5 expired. The yellow one-minute light will be
6 accompanied by a single chime and a red light
7 signifying that your time has expired will be
8 accompanied by two chimes. Please keep to the
9 time that you have been allotted. When you
10 see the red light and hear the double chime,
11 please finish your thought and take a seat.

12 In addition, I would like to
13 remind everyone today to please turn off their
14 cells phones.

15 And I believe Vice Chairman Mulvey
16 has some opening comments.

17 VICE CHAIRMAN MULVEY: Thank you,
18 Dan. I want to welcome our panelists to our
19 hearing this morning.

20 The Board has looked at ways to
21 encourage less formal resolution of disputes
22 ever since we were created back in 1995 under

1 ICCTA. In 1997, we established procedures for
2 voluntary binding arbitration based upon
3 recommendations we received from our Rail
4 Shipper Transportation Advisory Committee in
5 Ex Parte 560.

6 In 2001, we updated our list of
7 arbitrators. We built a record for the
8 Congress to consider legislative action to
9 require non-voluntary binding mediation and we
10 did that through Ex Parte 586.

11 And today, we're looking at ways
12 to increase participation in our arbitration
13 program and to improve our mediation
14 procedures. This is Ex Parte 699.

15 Now some of the Board's efforts in
16 the past have paid some dividends. We've had
17 some cases resolved through the Board's
18 mediation processes and sometimes in rate
19 cases the parties will resolve some of the
20 issues before us, thus streamlining and
21 reducing the cost and time involved in a full
22 SAC case.

1 One full SAC case, NRG v. CSX back
2 in July of 2010, was fully resolved through
3 mediation. And we've also beefed up our Rail
4 Customer and Public Assistance Program.
5 Growth in the number of cases that are
6 resolved by our very capable staff has been
7 fairly dramatic over the last few years. But
8 there's been no movement at all towards
9 increased use of the Board's arbitration
10 procedures. In fact, there's been no use at
11 all of the Board's arbitration procedures, and
12 despite the fact that arbitration is widely
13 recognized as an effective alternative to
14 dispute resolution and many federal agencies
15 do have arbitration procedures.

16 Arbitration of service disputes is
17 used by Canadian regulators, although I
18 understand that the railroads up there are not
19 always happy with the way that goes forward,
20 in part because of the final offer arbitration
21 process and the Canadian railroads' feeling
22 that sometimes the arbitrators aren't fully

1 aware of the uniqueness of railroad
2 operations.

3 A significant private mediation
4 program also exists in Montana. The National
5 Grain Dealers Program has gotten a lot of
6 praise from both shippers and railroads alike
7 as an effective alternative dispute resolution
8 process.

9 I'm looking forward today to
10 hearing the testimonies. I'd like to get to
11 the core of why arbitration has not been
12 pursued at the Board, why there are continued
13 reservations about our arbitration process.
14 I want to hear what changes can be made to the
15 Board's current procedures that can be made to
16 address these core concerns, and finally, I
17 want to hear if there are any new ideas that
18 could increase the use of arbitration.

19 I would like to hear from both
20 shippers and carriers as to what a perfect
21 program might look like in their eyes. And as
22 some believe that no arbitration program at

1 all is the most desirable, that's the perfect
2 one is none at all, no matter how we design
3 it, well, I want to hear that also.

4 With that, back to you, Mr.
5 Chairman.

6 CHAIRMAN ELLIOTT: Commissioner.

7 MEMBER BEGEMAN: Thank you. I'll
8 be very brief. First, I want to thank
9 everyone who is here today and also the folks
10 on the second panel and everyone else who has
11 been participating in the whole record, even
12 though they may not be testifying today.

13 I think the Vice Chairman really
14 summed up the questions that I have as well.
15 When we put out the Notice of Proposed
16 Rulemaking, I had a couple of questions
17 myself, actually a number of questions, but
18 the reason that I supported putting it out
19 when we did is because we would have an
20 opportunity to have input from any interested
21 party.

22 I'm not looking to support only

1 the proposal we issued. I'm open minded. We
2 all want a workable program, particularly an
3 arbitration program that can be utilized, if
4 we can get there. And if we can't get there,
5 I'd like to hear why not. None of us are
6 really interested in wasting additional time
7 and resources. Thank you.

8 CHAIRMAN ELLIOTT: Thank you,
9 Commissioner, now we'll begin with Panel I.
10 I assume we're going to go in this order. I
11 would ask you if this is possible (I know one
12 of you has a plane to catch), to stay around
13 afterwards, after your panel goes, just in
14 case we do have some follow-up questions
15 because this is kind of a unique circumstance
16 where there may be some need for give and
17 take. Because really as the other members
18 mentioned, we're trying to get something that
19 works here, not shove anything down someone's
20 throat. That doesn't ever work. I think
21 we've already succeeded in doing that since we
22 have a program that's never been used.

1 Our hope today is to really bring
2 everyone together and have willing
3 participants in a program. So we would
4 appreciate anybody that can, please staying
5 around in case we have some follow-up
6 questions. Thank you.

7 I assume we're beginning with Mr.
8 Gordon?

9 MR. GORDON: Good morning,
10 Chairman Elliott and Vice Chairman Mulvey and
11 Commissioner Begeman. It's my first
12 opportunity to testify before this Board and
13 I'm honored at the opportunity to do so. And
14 I will be staying for the entire panel and to
15 respond to your questions.

16 I am accompanied today by Thomas
17 Wilcox who serves as one of the NGFA's
18 transportation outside counsels and is here to
19 assist in responding to any questions the
20 Board may have about the NGFA submittal in
21 this petition.

22 The National Grain and Feed

1 Association commends this Board for conducting
2 both this public hearing and to further
3 explore ways to improve upon its proposed
4 regulations that are intended to increase the
5 use of mediation and arbitration as a means
6 for resolving commercial disputes between rail
7 carriers and shippers.

8 As you know, the NGFA consists of
9 more than a thousand member companies that
10 operate more than 7,000 facilities and handle
11 more than 70 percent of the U.S. grain and oil
12 seed crop. Our members include all sectors of
13 the industry including grain elevators, feed,
14 and feed ingredient manufacturers, bio fuels
15 companies, grain and oil seed processors, and
16 millers, exporters, livestock and poultry
17 integrators and associated firms that provide
18 goods and services to our nation's grain and
19 feed industry.

20 That latter category of our
21 members includes rail carriers who are
22 associate trading members of the NGFA. In

1 addition, we have 26 state and regional
2 affiliates that are members of the NGFA and
3 Vice Chairman Mulvey mentioned one of those in
4 his opening comments.

5 The NGFA supports the STB's
6 efforts to expand the availability of and
7 improve upon its arbitration program. We
8 generally believe that providing more access
9 to arbitration for rail shippers would be a
10 very positive development and will facilitate
11 the ability of both shippers and carriers to
12 resolve disputes in a business-like manner.

13 Today, I want to amplify on the
14 NGFA's written statements previously submitted
15 for the record as part of this proceeding and
16 to share our association's experiences in
17 offering private sector rail arbitration
18 services for agricultural commodities. We
19 have no further comments at this time on the
20 mediation aspects of the Board's proposed
21 rules which we also support.

22 The NGFA's rail arbitration system

1 has been in place since 1998 and has
2 functioned extremely well. All of the Class
3 1 carriers and a number of shortline and
4 regional carriers are participating in NGFA's
5 rail arbitration system, as are most NGFA
6 member grain handling, feed processing, and
7 exporting companies. In fact, the only NGFA
8 members that have really opted out of the
9 program are those that don't ship by rail.

10 I believe carriers and shippers
11 alike view the success of our rail arbitration
12 system as being attributable to the NGFA's
13 century-long experience in offering
14 arbitration services to the commercial grain
15 and feed industry, as well as to the
16 transparency, the integrity, the fairness, and
17 the cost effectiveness of which the system
18 operates.

19 The NGFA appreciates the fact that
20 the Board, in its proposed regulations,
21 references our rail arbitration system and
22 proposes to adopt several components of that

1 system. We do, however, believe it is
2 extremely important that the Board emphasize
3 that the STB's rail arbitration program is not
4 intended to impinge upon or dilute existing
5 industry rail arbitration systems such as
6 ours.

7 One particular area we ask the
8 Board to reexamine is Section 1108.3(d) of the
9 Board's proposed regulations, which we believe
10 could be misinterpreted to apply only to
11 arbitration clauses in rail transportation
12 contracts. Our system, for instance,
13 references arbitration as a condition of
14 membership and is embodied in our bylaws, not
15 necessarily in a transportation contract.

16 The NGFA respectfully requests
17 that this section be clarified further in the
18 final regulations to state that the Board's
19 arbitration rules also do not preempt the
20 applicability or otherwise supersede existing
21 industry operated rail arbitration systems.

22 Let me touch very briefly on

1 several suggested improvements that the NGFA
2 recommends be made in final regulations to be
3 issued by the Board. First, we reiterate our
4 belief that the STB rail arbitration should
5 utilize a panel of three arbitrators with
6 experience in the type of dispute involved in
7 the case. The NGFA's experience is that this
8 improves the likelihood of well-reasoned
9 decisions, enhances the balance and fairness
10 with which the system is viewed, and reduces
11 the potential for inadvertent errors.

12 We are cognizant of the Board's
13 financial limitations and operating its
14 arbitration program. That is something NGFA
15 system frankly doesn't confront because we use
16 industry volunteers, both from the rail and
17 the shipper sector who donate their time and
18 talent to service arbitrators. But we do
19 suggest that the Board further evaluate
20 methods by which panels of three arbitrators
21 would be utilized in all STB arbitration
22 proceedings.

1 Second, the NGFA believes strongly
2 that the final rule should require all
3 arbitration decisions to be published with
4 confidential material redacted. We recognize
5 there's a difference of opinion on this point
6 in the record of this proceeding, but our
7 experience has shown that when arbitrators and
8 parties to a case know that the arbitration
9 decisions will be published and the names of
10 the arbitrators attached to those decisions,
11 the parties to a case know that the
12 arbitration decision -- excuse me, it enhances
13 the transparency and fairness of the system
14 and facilitates commercial settlements. Our
15 experience has been that most of these cases
16 are resolved by the parties before they ever
17 are submitted to the arbitrators and we think
18 this is one of the reasons why.

19 Further, we believe written and
20 publicly accessible arbitration decisions
21 generally promote discipline and competence by
22 the arbitrators, build confidence and trust in

1 the system, establish its credibility with
2 stakeholders and have important educational
3 value to the industry as a whole.

4 Third, as reflected in our written
5 comments, we urge the STB to increase the
6 \$200,000 maximum per arbitrable dispute cap on
7 cases. As noted in our comments, the NGFA's
8 Rail Arbitration Committee has decided to
9 review the NGFA's current \$200,000 cap which
10 was put in place 14 years ago. One of the
11 reasons we're doing that, obviously, is
12 because of the increased value of agricultural
13 commodities and the fact that in our non-rail
14 arbitration cases, the average claim well
15 exceeds \$200,000.

16 Fourth and finally, the NGFA
17 encourages the STB to clarify and/or modify
18 the appellate standards contained in its
19 proposed regulations. While proposed rule
20 Section 1115.8 states that the standard for
21 STB review will be "whether there is a clear
22 abuse of authority or discretion," proposed

1 Section 1108.3(c) states that arbitrators also
2 are to be "guided by the Interstate Commerce
3 Act and by STB precedent."

4 This language arguably holds arbitrators to a
5 more restrictive standard of deciding cases
6 based on Agency precedent, which we believe
7 would remove some of the flexibility that
8 makes arbitration an effective alternative and
9 attractive alternative to formal litigation.

10 Further, as other parties involved
11 in this proceeding have pointed out, the
12 requirement that the Board decisions on
13 arbitration appeals are reviewed under the
14 Hobbs Act, appears to add another layer of
15 potential confusion and uncertainty as to the
16 standards to be applied in STB arbitration
17 cases.

18 The NGFA's position as stated in
19 its written submissions is that the Board
20 should not instruct arbitrators to be guided
21 by prior STB and ICC decisions, except for
22 jurisdictional issues. In addition, this more

1 limited guidance should be coupled with the
2 proposed "clear abuse of arbitrable authority
3 or discretion" standard in Section 1108(3)(c)
4 of your proposed regulations.

5 In closing, the NGFA again wishes
6 to commend this Board for examining ways to
7 improve on its rail arbitration program and
8 hopes that our suggestions are viewed in the
9 constructive intent in which they are offered.
10 Thanks and again, we'll be pleased to respond
11 to questions at the appropriate time.

12 CHAIRMAN ELLIOTT: Thank you, Mr.
13 Gordon. Now we'll proceed with Mr. Warfel and
14 Ms. Booth from NITL.

15 MR. WARFEL: Chairman Elliott,
16 Vice Chairman Mulvey, and Commissioner
17 Begeman, good morning. I am Curt Warfel,
18 Sourcing Manager for Bulk Transportation for
19 AkzoNobel's North American operations. I'm
20 here today on behalf of the National
21 Industrial Transportation League, the nation's
22 oldest and largest organization of shippers.

1 Accompanying me is Ms. Karyn Booth, the
2 League's general counsel, who will also
3 present testimony on behalf of the League.

4 The League is no stranger to this
5 Board, but for the benefit of everyone at the
6 hearing let me note that the League was
7 founded in 1907 and today represents more than
8 500 member companies which range from some of
9 the largest to the smallest users of the
10 nation's transportation systems. Rail
11 transportation is vitally important for many
12 League members and especially for those who
13 ship chemicals, petroleum, cement,
14 agricultural, and paper and forest products.

15 I personally have been a member of
16 the League and its Rail Committee for 26
17 years. I also served as chairman of the Rail
18 Committee from 1998 to 2001, served on the
19 League's Board of Directors from 1998 to the
20 present, and acted as chairman of the League's
21 Board of Directors from November 2006 to
22 November 2008.

1 The League commends the Board for
2 opening this proceeding to reassess its
3 mediation and arbitration procedures. Like
4 the Board, the League strongly favors the
5 private resolution of disputes between
6 railroads and their customers whenever
7 possible. In that regard, the League would
8 like to express its strong support for the
9 Board's proposals that are intended to
10 increase the use of mediation and arbitration
11 of railroad shipper disputes.

12 My testimony will focus on a
13 number of important business considerations
14 that may lead League member companies to
15 engage in mediation or arbitration when a
16 dispute with a rail carrier cannot be resolved
17 through other commercial measures. I will
18 also address a number of refinements to the
19 Board's proposed arbitration program that have
20 been recommended by the League and that we
21 believe may encourage greater participation in
22 such a program by League members and other

1 shippers.

2 Karyn will address certain legal
3 and procedural issues as have been raised in
4 this proceeding.

5 Let me state up front that the
6 railroads are important business partners for
7 many League members who depend on reliable
8 rail service. Railroads and their customers
9 must and typically do work together to
10 facilitate the efficient and cost effective
11 movement of freight throughout North America.
12 But every now and then we don't see eye to eye
13 and a disagreement may arise over service,
14 rates, or other matters. When that
15 disagreement escalates and can't be resolved
16 through normal commercial dealings, shippers
17 need to evaluate whether to bring a complaint
18 before this Board to help resolve the problem.
19 However, formal legal proceedings, whether in
20 court or before this Board are time consuming
21 and expensive and involve a risk that most
22 companies would prefer to avoid. They require

1 companies to divert both personnel and
2 financial resources away from their primary
3 business needs, thus, having the option to
4 resolve disputes informally using mediation or
5 arbitration offers substantial benefits to all
6 parties to the dispute.

7 If a company can resolve their
8 railroad dispute quickly, they will be much
9 further ahead than when forced to engage in
10 drawn-out litigation. Certainly avoiding
11 costly and time-consuming legal proceedings
12 would benefit the railroads in a similar
13 manner and it would also assist this Board in
14 managing its resources and dockets.

15 Given these substantial benefits,
16 the League supports the proposal to permit the
17 Board to order mediation and adjudicatory
18 proceedings brought before it upon the request
19 of one or all parties to the dispute or upon
20 the Board's own initiative, except for matters
21 involving public convenience and necessity
22 determinations for labor disputes.

1 The proposal for parties to engage
2 in mediation over a 30-day period is
3 reasonable since it provides the parties with
4 sufficient time to try to work out their
5 differences without causing an unreasonable
6 delay in the formal proceeding commenced at
7 the Board.

8 Additionally, providing the option to extend
9 the mediation period if the parties are making
10 progress toward resolving the dispute also is
11 a sound proposal supported by the League.

12 I am aware that the Board's use of
13 mediation in large rate cases has been
14 successful on a number of instances, thus
15 expanding the use of mediation in other formal
16 proceedings may also reduce the need for
17 parties to engage in expensive litigation
18 before this Board.

19 Let me now turn to the issue of
20 arbitration. Unlike the Board's experience
21 with mediation, the current arbitration
22 procedures have never been used. There could

1 be any number of reasons for this which I will
2 not dwell on, rather, I would like to commend
3 the Board for taking the initiative to
4 reassess its current procedures and for
5 proposing a voluntary arbitration program with
6 the goal of encouraging parties to use such a
7 process to resolve disputes in a faster and
8 more cost-effective manner.

9 As you know from the League's
10 filings in this proceeding, we agree with many
11 of the elements of the arbitration proposal.
12 The League did, however, suggest several
13 modifications to help encourage even greater
14 use of the arbitration procedures. Let me now
15 highlight the key reforms supported by the
16 League as well as certain changes we would
17 recommend.

18 One, the League agrees with the
19 Board's proposal to establish a voluntary
20 arbitration program which Class 1 and 2
21 carriers would consent in advance to arbitrate
22 a limited set of disputes unless they freely

1 choose to opt out of the program by providing
2 notice to the Board. This proposal has the
3 potential to lead to greater use of
4 arbitration while preserving the right of the
5 railroad to voluntarily consent to its
6 participation in the arbitration proceedings.
7 The notice period proposed by the Board for
8 opting out by the railroads appears reasonable
9 and is similar to the arbitration program
10 establish by the National Grain and Feed
11 Association for disputes between NGFA members
12 and the major railroads.

13 Two, the League agrees with the
14 limited types of matters that would be
15 eligible for arbitration under the proposed
16 program, including disputes involving
17 demurrage charges, assessorial charges,
18 misrouting or mishandling of rail cars,
19 misapplication of published rules and
20 practices to prior shipments and unreasonable
21 practices for past service. These matters are
22 similar to those that railroads and grain

1 shippers have already agreed to arbitrate
2 under the NGFA program and thus should not be
3 objectionable. But the League has also
4 suggested that a proposed arbitration program
5 be modestly expanded to include disputes over
6 cargo loss and damage, damage to a shipper's
7 rail cars, and service failures not covered by
8 other categories of disputes. These matters
9 were identified by members of the League's
10 Rail Committee as those that shippers would be
11 willing to arbitrate. Such matters are common
12 disputes that involve monetary damages and
13 they rarely implicate broad policy or
14 regulatory issues which are properly excluded
15 under the Board's proposal.

16 Three, the League agrees that
17 other matters that fall outside the list
18 established by the Board also should be
19 subject to arbitration at the request of all
20 parties. The League suggested that the Board
21 even consider allowing contract disputes to be
22 arbitrated, where the contract does not

1 already include an arbitration clause.

2 However, because the Board lacks jurisdiction
3 over contracts, the parties would need to
4 consent to arbitration with an understanding
5 that they would not likely have the right of
6 appeal, the right to appeal an arbitration or
7 to the Board.

8 Four, the Board has proposed to
9 cap the relief that may be awarded in
10 arbitration proceedings to \$200,000 per
11 dispute. We believe this proposed cap
12 undercuts the usefulness of the program and
13 should be increased to \$500,000, thus
14 expanding the number of disputes subject to
15 arbitration.

16 Fifth, and finally, the League
17 also proposed that the Board should publish on
18 its website the names of all carriers who
19 consent to participate in the proposed
20 arbitration program so that shippers would
21 know if a dispute with a particular carrier
22 would be eligible for arbitration.

1 Now based on their comments filed
2 in this proceeding, the railroads have taken
3 issue with the fairness of the Board's opt-out
4 proposal because shippers would be allowed to
5 consent to arbitration on a case-by-case
6 basis. While the League is sensitive to their
7 concerns, since it may impact the extent to
8 which railroads exercise their opt-out option,
9 we believe that they are overstated for
10 several reasons.

11 First, the carriers clearly have
12 free choice to opt out of the program which
13 places the control over their consent to
14 arbitrate squarely in their own hands.

15 Second, the scope and size of
16 disputes subject to the program will be
17 limited and the railroads will have clear
18 notice of the types of matters subject to
19 arbitration - subject to their consent to be
20 informed.

21 Third, the carriers currently
22 participate in a similar arbitration program

1 with grain shippers and thus have already
2 agreed to many of the same principles included
3 in the Board's proposal.

4 And fourth, the opt-out approach
5 appears to take into account the vast
6 differences of the number of rail carriers
7 versus shippers that may be involved in a
8 dispute and appropriately establishes rules
9 that could be effectively administered by the
10 Board.

11 And with that, I'd like to thank
12 you for the opportunity to provide this
13 testimony on behalf of the League. I'd be
14 happy to answer questions at the conclusion of
15 all speakers and I'll yield the remainder of
16 the time to Karyn.

17 CHAIRMAN ELLIOTT: Ms. Booth, you
18 have ten seconds.

19 (Laughter.)

20 MS. BOOTH: Done. Good morning.
21 I am Karyn Booth. I'm a partner at the law
22 firm of Thompson Hine and I serve as general

1 counsel to the National Industrial
2 Transportation League. It is a pleasure to
3 appear before you today to provide the views
4 of the League on the important issues raised
5 in this proceeding.

6 My testimony will focus on several
7 legal and technical issues that have been
8 raised in the proceeding regarding the new
9 arbitration program. And I will respond to a
10 number of the concerns about that program
11 raised by the railroads. I think you can see
12 this is a little bit of good cop/bad cop here.

13 The railroads have challenged this
14 Board's authority to adopt the proposed
15 arbitration program. However, the statutory
16 foundation used to establish the program here,
17 namely 49 USC 721(a) provides this Agency with
18 very broad powers to carry out its
19 responsibilities and to promulgate rules.
20 This broad authority set forth in Section
21 721(a) does not include any limitations or
22 conditions that restrict the Board from

1 creating a narrowly defined arbitration
2 program as you have done here to carry out its
3 statutory duties. Indeed, the Board's current
4 arbitration procedures published at 49 CFR
5 Part 1108 were adopted in 1997 pursuant to
6 this exact same statutory authority. The
7 railroads were active participants in that
8 prior arbitration proceeding, but they had no
9 concerns and raised no objections to the
10 Board's reliance on that section at that time.

11 Reduced to its core, the AAR's
12 primary concern is not really with the Board's
13 authority, but with the structure of the
14 proposed opt-out program. The carriers claim
15 that the program denies them the right to
16 voluntarily consent to arbitrate disputes
17 encompassed by the program. And in essence,
18 they're claiming that they're being coerced
19 against their will to arbitrate those disputes
20 as defined.

21 But the AAR is glossing over the
22 transparent and simple procedures that the

1 Board has built into the arbitration program
2 that permit the carriers to freely decide
3 whether to participate or whether to opt out.
4 Presumably, in order to encourage the
5 railroads to arbitrate what are really routine
6 transportation disputes, the program is
7 designed so that the railroads would consent
8 in advance, but provides them with very clear
9 right to revoke that consent by providing
10 written notice within specified time periods.

11 Importantly, even if a railroad
12 initially decides to remain in the arbitration
13 program, it may change its mind and
14 voluntarily decide at any time to opt out via
15 a simple notice. Thus, the railroads alone,
16 with full notice of the Board's procedures,
17 can choose to stay in or opt out of the
18 program which is plainly and obviously a
19 voluntary decision that comprises voluntary
20 consent.

21 Also, the arbitration program is
22 not open ended, but is narrowly defined to

1 cover really five what are run-of-the-mill
2 transportation disputes. The program applies
3 only to money disputes. It caps the potential
4 relief that may be awarded and it excludes
5 disputes involving major policy issues. All
6 of these factors ensure that the railroads
7 have sufficient information to make a
8 voluntary and informed decision whether to
9 participate in the arbitration program.

10 The railroads claim that the
11 program is unfair because shippers can
12 evaluate whether to arbitrate on a case-by-
13 case basis. They also fear that the shipper
14 may seek to prevent a carrier from asserting
15 a counter claim based on the shipper's refusal
16 to consent to arbitrate that claim. These
17 concerns are unfounded.

18 The Board is well aware that there
19 are only seven Class 1 railroads and a
20 reasonable number and a manageable number of
21 Class 2 carriers, as opposed to many thousands
22 of shippers that could be involved in a

1 dispute over demurrage, assessorial charges,
2 railroad practices, or other matters governed
3 by the program. Thus, the opt-out structure
4 was a logical one and is workable as applied
5 to the carriers, but would seemingly be
6 unmanageable if applied to every possible
7 railroad customer.

8 As to the concern over counter
9 claims, this issue can be easily addressed.
10 The League has suggested the Board permit
11 counter claims in an arbitration if they (1)
12 fall within the scope of arbitrable disputes
13 as defined by the Board; and (2) are related
14 to the same transportation events as the
15 primary claim.

16 I will now turn to the issue of
17 the standard of review of arbitration awards.
18 The Board has proposed that an arbitrator is
19 required to be guided by the Interstate
20 Commerce Act and by the STB and ICC precedent
21 in making its decision and that a decision can
22 be overturned if it involves clear abuse of an

1 arbitrator's authority or discretion. The
2 League believes that the standard is sound and
3 it strikes the right balance. The standard
4 provides protection against an arbitrator's
5 clear abuse of authority and it restricts the
6 arbitrator from straying too far away from
7 statutory principles and precedent. However,
8 it also provides appropriate flexibility
9 required by an expedited dispute resolution
10 process.

11 The railroads prefer a broader
12 review standard that would overturn
13 arbitration awards that are contrary to the
14 statute. However, the League urges the Board
15 to avoid adoption of this standard because
16 it's much more likely to lead to frequent
17 appeals and it would undermine the key reasons
18 parties choose to arbitrate in the first
19 place, to resolve disputes faster and cheaper.

20 If the Board was interested in
21 broadening the standard of review, the League
22 supports adoption of the Union Pacific's

1 recommendation to permit an appeal if an
2 arbitrator fails to disclose a conflict of
3 interest based on prior dealings with a party
4 or a party's counsel.

5 Different viewpoints as to the
6 number and selection of arbitrators have also
7 been expressed by the parties in this
8 proceeding. The League believes that a single
9 arbitrator is sufficient and more cost
10 effective, particularly for smaller disputes.
11 But the parties should have the option to
12 agree to use a panel of three arbitrators and
13 to pay for the corresponding increased cost.

14 Another significant issue is the
15 neutrality of the arbitrator and the
16 transparency of his or her qualifications. In
17 this regard, the League encourages the Board
18 to update its list of arbitrators annually to
19 strengthen its arbitrator qualification
20 requirements and to provide a fair arbitrator
21 selection process to ensure impartiality.

22 Regarding the appointment of

1 arbitrators, the League does not support the
2 final offer approach proposed by the AAR, but
3 rather the fair and transparent strike
4 mechanism as proposed in our opening comments.

5 Finally, while the League supports
6 keeping arbitration decisions confidential and
7 not affording them precedential value, other
8 parties have suggested that the Board publish
9 a summary of arbitration decisions on its
10 website. This is a good idea. We have no
11 objection to that suggestion and believe it
12 may even assist the public further in
13 evaluating the Board's arbitration processes.

14 In closing, the League would like
15 to commend your initiative and your creativity
16 in this proceeding and I would be glad to
17 answer any questions you may have. Thank you.

18 CHAIRMAN ELLIOTT: Thank you very
19 much. Now we'll hear from Ms. Archuleta from
20 the Western Coal Traffic League.

21 MS. ARCHULETA: Good morning,
22 Chairman Elliott, Vice Chairman Mulvey,

1 Commissioner Begeman. My name is Stephanie
2 Archuleta. I'm an attorney at Slover & Loftus
3 and I'm here on behalf of the Western Coal
4 Traffic League. WCTL is an association of
5 electric utilities that collectively ship over
6 140 million tons of coal by rail annually. On
7 behalf of WCTL, I'd like to thank the Board
8 for taking comments and holding this important
9 hearing on the proposed revisions to the
10 Board's mediation and arbitration regulations.

11 WCTL believes that the Board's
12 proposed NPRM rules are a serious effort to
13 encourage ADR and to address concerns about
14 the availability and use of ADR. WCTL also
15 believes that the proposed NPRM rules may
16 result in new opportunities for the Board-
17 sponsored alternative dispute resolution of
18 discrete disputes.

19 WCTL supports the STB's efforts to
20 breathe new life into its ADR-related
21 regulations. Nevertheless, WCTL continues to
22 stress that while the Board should continue to

1 seek to promote ADR, it must also recognize
2 that ADR is not a panacea for resolving
3 shipper complaints or addressing the
4 underlying substantive problems that shippers
5 face in obtaining Agency relief.

6 Congress appointed the STB as the
7 expert agency to resolve disputes in a timely
8 manner and shippers need the STB to fulfill
9 this role. In the earlier phases of this
10 proceeding, before the Board issues NPRM, WCTL
11 cautioned the Board to ensure that any
12 proposed ADR rules would protect shippers'
13 statutory right to bring complaints against
14 carrier transgressions. WCTL also urged the
15 Board to avoid adopting any procedures that
16 would lead to complex, costly or uncertain
17 litigation or delay proceedings.

18 WCTL believes that the Board's
19 proposed NPRM rules, generally satisfy its
20 concern and that the proposed rules should not
21 unduly prejudice the rights of WCTL members in
22 seeking resolution of complaints.

1 In its opening and reply comments,
2 WCTL identified certain aspects of the
3 proposed NPRM rules that it believes require
4 clarification and modifications. WCTL
5 respectfully requests that the Board favorably
6 consider these comments when finalizing its
7 rules.

8 The bulk of the participating
9 railroads' criticism of the Board's NPRM rules
10 is directed towards the proposed arbitration
11 rules and in particular the proposed opt-out
12 procedures. These criticisms appear to be
13 largely overblown or off base. The proposed
14 rules only allow for arbitration upon the
15 parties' mutual consent and the proposed
16 procedures ensure that affected railroads have
17 a full opportunity to opt out of arbitration.

18 Affected railroads are
19 sophisticated entities and the opt out
20 procedures are very straight forward. The
21 NPRM establishes the Class 1 or Class 2
22 carrier looking to opt out of the Board's

1 proposed arbitration program can simply file
2 a notice with the Board to that effect. This
3 opt-out provision should not be a cause for
4 concern because individual carriers still have
5 full discretion to opt out of the program and
6 thus the program remains fully voluntary.

7 The railroads also argue that the
8 proposed rules are lopsided, and put them at
9 a substantive disadvantage vis-a-vis shippers
10 by allowing shippers to decide when to pursue
11 arbitration on a case-by-case basis. These
12 arguments appear to be founded upon the
13 mistaken belief that ICCTA affords the
14 railroads the right to bring complaints
15 against shippers for a violation of the law.
16 That's not the case. The proposed rules
17 recognize that shippers have the statutory
18 right to bring a complaint against railroads
19 and have the Board adjudicate that complaint,
20 but not vice versa.

21 The railroads also criticized the
22 proposed NPRM rules for inadequately defining

1 the disputes that would be subject to the
2 proposed arbitration process. However, the
3 proposed rules already provide sufficient
4 notice of dispute eligibility. Arbitration-
5 eligible disputes would include those that
6 possess monetary value, but lack policy
7 significance such as disputes relating to
8 demurrage and assessorial charges;
9 compensation from misrouting or mishandling of
10 rail cars; redress for carriers;
11 misapplication of its published rules; and
12 practices as applied to particular rail
13 transportation and other service-related
14 matters.

15 The proposed rules explicitly
16 provide a proposed Section 1108.7 that rate
17 cases or other complex cases would not be
18 arbitration eligible except on petition.
19 Also, disputes raising novel questions or
20 seeking injunctive or prospective relief would
21 be ineligible. WCTL believes that the Board's
22 proposed NPRM rules reasonably clarify the

1 types of disputes eligible for STB-sponsored
2 arbitration.

3 WCTL also supports the Board's
4 continuing efforts to promote Board-sponsored
5 ADR and private sector resolution of
6 stakeholder disputes. It appreciates the
7 opportunity to participate in this proceeding
8 and the Board's consideration of its comments.
9 Thank you.

10 CHAIRMAN ELLIOTT: Thank you very
11 much. Next, we'll hear from Mr. Whiteside.

12 MR. WHITESIDE: Is this on? Okay.
13 Good morning Mr. Chairman, Vice Chairman
14 Mulvey, Commission Begeman.

15 Thank you for bringing this
16 innovative idea forward. It's an interesting
17 problem in consideration of mediation
18 arbitration to pursue innovative ways for
19 carriers and shippers to resolve disputes.

20 The Alliance for Rail Competition
21 includes many captive shippers, one of them is
22 Montana Wheat & Barley Committee and similar

1 bodies from other states, a lot of Wheat &
2 Barley Commissions throughout the Western
3 United States, but also a number of utilities,
4 manufacturers, and other producers of bulk
5 commodities.

6 ARC continues to believe that
7 alternative dispute resolution mechanisms hold
8 a great promise for simplifying and possibly
9 resolving disputes. ARC has, for example,
10 supported final offer arbitration, the way the
11 Canadian shippers and railroads and carriers
12 are brought to the table in the form of ADR.
13 It's interesting that Vice Chairman Mulvey
14 talked about the final offer. Remember that
15 what the railroads probably don't like is it
16 deals with rates and that's not where this one
17 is going. So this is a system that's utilized
18 and mandated in the United States, however, in
19 a lot of cases in many dispute mechanisms and
20 jurisdictions where one party has dominance in
21 the marketplace. We find it in insurance and
22 things like that.

1 One thing is clear though. No one
2 completely likes any ADR system, but it may
3 provide a place for settling disputes. I
4 quote Frank Schoonover who is one of the board
5 members of the Montana Wheat & Barley
6 Committee. He says it's a tool. It's like if
7 we're going to build a garden, we needs lots
8 of different tools. These provide more tools
9 for starting to resolve resolution of
10 disputes.

11 What is it we should be seeking
12 for the quest of the ADR? The characteristic
13 of this Board should keep as defining when
14 developing an effective ADR is the flexibility
15 and honesty and confidence that comes from
16 looking forward and having the processes.
17 Measuring the process' success may not be
18 because -- may not be centered around how much
19 it's utilized. It may be centered around how
20 much are we getting accomplished in resolving
21 disputes before we ever get there.

22 It's important that the system

1 utilize the experience of mediators and
2 arbitrators. The goal needs to allow the
3 preservation of commercial relationships. One
4 of the things that I think is going forward in
5 Montana that's very, very interesting and
6 revolutionary is the system between the
7 Burlington Northern and the Montana grain
8 growers and Montana Farm Bureau. That came
9 about because both the railroad and the grain
10 producers wanted a system. They respected
11 each other enough to come together and start
12 to work on a system. Is it a panacea of
13 everything, no, but it's a system that has
14 worked and continues to work and it comes
15 about because the single forum addresses
16 multiple issues.

17 We believe it's important for the
18 Office of Public Assistance, Government
19 Affairs, and Compliance which by the way is a
20 mouthful, should continue to be active and
21 engaged in the process. We'd like to see that
22 as being an initial -- providing the initial

1 stage, but also a stair stepping in the ADR
2 process.

3 ARC appreciates the willingness of
4 staffers of the Board's Rail Customer and
5 Public Assistance Service to help. We found
6 when we go over and look at the FMC and what
7 they're doing, that whole process of consumer
8 outreach is embodied in a stair-stepping
9 process throughout all the way to formal
10 cases. However, the RCPA cannot issue a
11 ruling that's binding on the railroads today.
12 That's something we may want to take a look
13 at, at some point.

14 The services should be available
15 to shippers at no charge and the ombudsmans'
16 service should be encouraged in this
17 development. I call it the OPAGAC. It works
18 with people on a confidential basis at the
19 onset and I think that provides another
20 mechanism for the Board to continue to keep
21 exploring.

22 Board staffers who assist in

1 mediation must be neutral and must share the
2 goals of fair outcomes. Mediation to us could
3 be one of the more important and useful steps
4 for the parties going forward. I know we're
5 concentrating on arbitration today, but I
6 think -- remember that what happens is a lot
7 of shippers want to maintain their
8 relationships during and after the dispute and
9 having a mediation process that's maybe
10 informal, but moves the ball is important. So
11 the process developed should allow the parties
12 to utilize mediation in order to maintain
13 existing relationships, but we need to
14 integrate that procedure with arbitration.

15 Finally, arbitration needs to be a
16 quick adjudicative process, but it's important
17 to point out that the USDA and the National
18 Grain and Feed filings all talk about
19 fairness, neutrality, and openness to foster
20 an atmosphere of trust. A transparent system
21 is a must. And that's how it's worked in
22 Montana.

1 Since there are many venues that
2 are utilizing successful mediation and
3 arbitration, ARC urges that the Board
4 proactively reserve the shipper's option to
5 have a disputed mediated arbitration in either
6 its venue or in the venue chosen by the
7 shipper. NGFA, the BNSF Montana system, or
8 any other future mediation that is developed
9 between the shipper and the carrier should be
10 recognized by the Board and not have that
11 process squashed.

12 The Board must choose a cap on
13 relief that reflects true cost for which a
14 party would seek remuneration in order to make
15 the arbitration process available in the
16 widest number of potential users. The
17 disputes quite often exceed the \$200,000. A
18 cap of \$1 million would seem to be reasonable.
19 I'll up the ante \$500,000 over what NITL
20 wanted to talk about, but I think the key is
21 that look at three benchmark. Why shouldn't
22 there be a higher cap there and make this

1 worth the effort?

2 Since arbitration is essentially
3 voluntary despite the opt-out concept, there's
4 no reason to impose low caps on the awards.
5 Arbitration entails its own costs and
6 arbitration awards need to exceed in our minds
7 by two or three times the cost of
8 participation, otherwise, it's not worth it.
9 And otherwise, the shippers might not
10 participate, even if the chances for success
11 are there.

12 So arbitration should involve, we
13 think, three arbitrators at the selection of
14 both sides. If both sides agree to use one,
15 fine. But I think what the three arbitrators
16 do is at least bring one from the shipper with
17 expertise and one from the carriers and then
18 we have one that's neutral. ARC and other
19 members are familiar with and support the
20 arbitration procedures adopted by National
21 Grain and Feed in which they use three
22 arbitrators. It's worked well. Decisions by

1 the -- and getting the three arbitrators is
2 not a process that's turned out to be a
3 detriment or some kind of problem for the ones
4 that they're working with in Montana.

5 Decisions by arbitrators should
6 also be published. We believe this fosters
7 fairness and trust. We also support
8 recommendations of USDA that any appeals
9 process focus on the abuse of the arbitrator's
10 discretion, but also maybe consider outright
11 error, that that may on occasion be a problem.

12 Finally, it must be -- and I think
13 you'll have less error if you have three
14 arbitrators than you will if you have one. It
15 must be recognized that mediation and
16 arbitration will not always be available and
17 advisable. There are many issues that will
18 necessitate the formal proceedings such as
19 complaints and petition for declaratory order
20 even if the STB offers effective mediation.

21 I think, in general, the time has
22 come for working with ADR. The example in

1 Montana between the BNSF and Montana Farm
2 Bureau suggests that carriers can build trust
3 relationships and make it work. When I go
4 back to what Frank Schoonover says in Montana,
5 "We're going to build a garden. We're going
6 to need shovels. We're going to need hoes.
7 We're going to need rakes. We're going to
8 need lots of tools, and these are good tools
9 to start with." Thank you, Mr. Chairman.

10 CHAIRMAN ELLIOTT: Thank you, Mr.
11 Whiteside. Now we'll hear from Mr. O'Connor.

12 MR. O'CONNOR: Thank you very
13 much. I'm glad to be here with you today,
14 Chairman Elliott, Vice Chairman Mulvey, and
15 Commissioner Begeman.

16 I am here basically based on my
17 experience with STB mediation and my
18 experience in arbitration in other venues.
19 And I found the STB mediation to be a very
20 positive addition to the dispute resolution
21 process.

22 We participated, I participated in

1 three mediations, two of them were -- two of
2 those cases, it was resolved, the case was
3 resolved in mediation and the third case we
4 went on to litigation. And the Board ruled
5 and then the Court affirmed that ruling. And
6 then some other issues that were involving the
7 same two parties quickly settled in mediation
8 and negotiation.

9 If I can bring my slides up, there
10 we go, and you have hard copies of these
11 slides and I have additional hard copies for
12 anybody else who would care to pick it up
13 today and I can provide it and include it in
14 the record along with the white paper. I
15 provided a copy of the white paper to the
16 Commissioners and I have copies available for
17 anybody else who would want one. And I'd be
18 happy to have that included in the record as
19 well.

20 To sum up, we've had positive
21 experience with STB mediations in several
22 small ship and reg cases as well as in other

1 applications. I have participated as an
2 expert witness in an arbitration that did
3 resolve quite successfully and it had very
4 limited, if any, appeal as well.

5 The role of the mediator, the role
6 of the STB mediator, in my view and based on
7 this experience, was crucial, and just having
8 the STB at the table proactively involved in
9 seeking the solution helped a great deal. And
10 one of the ways it helped us is it more or
11 less moved us in the direction of principle
12 and fact-based negotiating with partners. And
13 the two choices as I've indicated here, the
14 two choices on strategy are power-based
15 bargaining with adversaries or principle-and-
16 fact based negotiating with partners. And
17 that was vastly preferable.

18 The approach that we recommend is
19 identifying the underlying interests, agreeing
20 on guiding principles which may vary from case
21 to case and generating and evaluating
22 alternatives using agreed criteria which again

1 may vary from case to case.

2 Some of the techniques, if I can
3 go to the next slide, appear counter
4 intuitive. Basically, a good deal of energy
5 was devoted at the outset to asking why. "Why
6 was the position taken?" points us in the
7 direction of understanding something that may
8 not be immediately obvious is what is the
9 underlying interest that that party is seeking
10 to meet? When the underlying interest is
11 identified, then the energy of both parties
12 and the mediator can be redirected to identify
13 alternative positions that can help meet that
14 interest. It's not a matter of shaping the
15 interest. It's a matter of understanding
16 interest and then moving accordingly.

17 Now the two options that we see
18 quite frequently are sketched on the next
19 slide. We have position-based hardline and we
20 have interest-based collaborative. To the
21 extent the Board can move us in the direction
22 of interest-based collaborative in its

1 rulemaking that would be very positive. And
2 that is basically what I've developed in the
3 white paper in a little bit more detail and
4 this is basically what worked, not only in
5 those three mediations, but in any number of
6 negotiations that we've done. In fact, it was
7 actually fairly important in the arbitration
8 as well.

9 So in conclusion, we've had a
10 positive experience with STB mediations. We
11 would urge the STB to encourage continued and
12 expanded use of mediation. And in terms of
13 getting folks to take a chance on arbitration,
14 I think the more flexibility you can build
15 into the process, the more likely you would be
16 to have some use of it.

17 I appreciate the opportunity.
18 Thank you so much.

19 CHAIRMAN ELLIOTT: Thank you, Mr.
20 O'Connor. Now we'll proceed with questions.

21 Vice Chairman?

22 VICE CHAIRMAN MULVEY: Thank you,

1 Dan. I have a few. Many shippers have
2 commented that the \$200,000 cap is too low and
3 we ought to have a higher one -- one suggested
4 half a million dollars, others suggested a
5 million dollars and some in their testimony
6 have suggested no cap at all. The Board
7 looked at a number of past demurrage cases
8 which came before the Board, and one of the
9 things the issue proposal would address is
10 demurrage cases. The range of value of those
11 cases before the Board was between \$19,000 and
12 \$737,000.

13 In fact, of the last 15 cases, 11
14 of them would have been subject to arbitration
15 under the Board's \$200,000 cap, 4 would not
16 have been.

17 My question to you is does that
18 suggest that if the majority of these cases
19 would have come under the Board's arbitration
20 rules that the \$200,000 cap was a reasonable
21 one, or would you feel that the fact nearly of
22 a third of them were not eligible would

1 suggest that the cap was too low.

2 Does anybody wish to take that?

3 Ms. Booth.

4 MS. BOOTH: I'll take a stab at
5 that, Vice Chairman Mulvey. I mean certainly
6 in the example you've given, the vast majority
7 would have fallen under the program as the cap
8 is currently designed. But I think that as
9 the League looked at the cap issue and the
10 utility of the program across more than just
11 demurrage disputes and I think establishing a
12 program that if we could get this one off the
13 ground could get instituted today, but would
14 work in the future, I think a cap of \$200,000
15 is just low when you're covering more than
16 just demurrage as the issue.

17 On top of that, we heard from
18 National Grain and Feed who has a program in
19 place. And what they're seeing in their own
20 program with the current \$200,000 cap that it
21 is becoming inadequate. And so I think that
22 from our perspective and perhaps the League

1 has proposed the proper middle ground, we're
2 hearing \$1 million on one hand and \$200,000 on
3 the other, our proposal is for \$500,000 really
4 to try to capture more disputes, to improve
5 the utility of the program so that it could be
6 used more often rather than less often.

7 VICE CHAIRMAN MULVEY: Anybody
8 else?

9 MR. GORDON: Vice Chairman Mulvey,
10 I'll take a crack at that as well. Our review
11 of our cap right now it actually was initiated
12 at our March convention, so we're still in the
13 process of evaluating that. But one
14 distinction I might want to raise that the
15 Board might want to look at is our cap is
16 \$200,000 right now per the current. So if
17 there's a demurrage incident that is repeated
18 three or four times that's multiple \$200,000
19 potential caps under that kind of a dispute
20 whereas the Board's language, as I understand
21 it, is per arbitrable dispute. So that may be
22 a distinction that needs to be made here to

1 kind of clarify what is meant by the Board.

2 The fact that we do it on a per
3 occurrence basis, we've had nine arbitration
4 decisions. We have reached fruition since our
5 system was created in 1998. Some of those
6 have ranged as high as \$550,000 just because
7 of this per incident type of treatment of it.
8 So that would indicate that perhaps the
9 Board's number is also too low depending on
10 how you define that. And again, with the
11 dramatically-increased value of agricultural
12 commodities in this market and we don't see
13 that going away, given the demand for food and
14 feed and fuel and exports, we're in a new
15 paradigm in terms of value right now on
16 agricultural commodities that we don't think
17 is going to slip back to previous eras. Thank
18 you.

19 VICE CHAIRMAN MULVEY: Thank you.
20 Obviously, you could have multiple occurrences
21 of disputes so therefore the \$200,000 could be
22 a multiple of that, actually, when you take

1 into account all the times that it happened.

2 One of the hopes that the Board
3 had in moving towards more use of ADR is that
4 it could reduce the costs, not only for the
5 shippers and the railroads, but also for the
6 Board itself.

7 What has been your experience with
8 the NGFA and the Montana agreements? Have you
9 found that it's been cheaper to go through
10 arbitration compared to going through
11 litigation? Why would that be? If we had
12 three arbitrators, only the incremental cost
13 would be picked up by the shippers and the
14 railroads, the Board would still be
15 responsible for one arbitrator.

16 And we're not necessarily in
17 agreement that there would be volunteers, that
18 the arbitrators would want to be paid and I
19 don't know what the going rate would be. But
20 this is a town where we have lots of legal
21 talent and the rates for that talent tend to
22 not be low. So we don't know what it would

1 cost, but we'd like to have a sense as to what
2 this process might cost and what the impact
3 might be on the overall costs that the Board
4 faces in resolving disputes.

5 MR. GORDON: Well, I think from
6 NGFA's standpoint, one of the real values of
7 arbitration is the cost component of it of not
8 having to go to litigation through the court
9 system and that applies to grain and feed
10 contracts as well as to our rail arbitration
11 system.

12 The other big benefit is that the
13 decisions are being made by people who
14 understand the issues in the cases, so you're
15 more likely to get a more knowledgeable
16 decision from a panel of arbitrators or
17 whatever system the Board ends up with here
18 than you would in a jury trial or a court
19 system of some sort. I think our experience
20 has been those two factors are ones that
21 really draw people to our regular arbitration
22 system as well as the rail arbitration

1 component of it, but I think the other real
2 value we see in our arbitration system is just
3 having a workable approach here that allows
4 shippers and carriers to discuss their
5 differences in this kind of a forum often
6 means that the vast majority of these cases
7 never even get submitted to an arbitrator just
8 because they know that that system is
9 available if one of the parties is
10 unreasonable. And so that's another real
11 value that we see.

12 VICE CHAIRMAN MULVEY: So it sort
13 of follows Mr. O'Connor's approach that you
14 have a principle rather than an adversarial
15 basis for resolving disputes.

16 MR. GORDON: Yes, and it really
17 helped in our situation, too. The rail
18 carriers were very much at the table when we
19 devised this system in 1998. They were -- our
20 Rail Arbitration Rules Committee which
21 oversees this system is comprised of equal
22 numbers of carriers and shippers. And so

1 there's a 14-member panel and 7 are railroads.
2 By our bylaws seven have to be rail carriers.
3 So that, too, creates a system of fairness
4 that the rules are going to be balanced.

5 VICE CHAIRMAN MULVEY: One final
6 question in this round and that is that the
7 qualifications of the arbitrators has been an
8 issue. As I mentioned in my opening remarks,
9 the Canadian system with the final offer of
10 arbitration process is a problem for the
11 railroads. And as Mr. Whiteside pointed out
12 another problem the railroads have with is
13 that rates are involved, but that would not be
14 the case under our proposal. But the
15 railroads, I also understand, are concerned
16 that some of the arbitrators don't have proper
17 knowledge of the railroad industry and they
18 are chosen to be arbitrators because of their
19 experience with arbitration as opposed to the
20 experience with the needs of the industry.

21 Could you tell me what you
22 consider to be the most important

1 qualifications, say your three most important
2 qualifications that an arbitrator should have
3 and are the railroads correct that industry
4 knowledge is a critical one? And I guess
5 along with that, would you disqualify anybody
6 as an arbitrator who had an active role in the
7 past as a consultant or working with a
8 railroad or with a shipper community. That
9 could leave us only with a few government
10 people or some academics who have not served
11 as consultants. That might be narrowing it
12 too much. But I am interested in this whole
13 qualifications issue for the arbitrator.

14 MR. GORDON: Well, I can tell you,
15 Vice Chairman Mulvey, kind of how our system
16 operates right now. We do use volunteer
17 arbitrators in our rail arbitration system
18 that includes carrier representatives as well
19 as shipper representatives, under our
20 approach, both within our regular arbitration
21 system as well as the rail arbitration system.
22 The parties to the case can object to an

1 arbitrator if they believe that arbitrator has
2 a bias or has a commercial relationship. We
3 take great care in forming an arbitration
4 panel so that doesn't occur at the outset, so
5 we have very -- rarely does an objection
6 occur, but we provide that opportunity so that
7 both the parties are agreeable that the
8 arbitrator or arbitrators considering that
9 case do not have a bias or an informational
10 deficit, if I could say that, phrase it that
11 way in terms of the applicability or the
12 knowledge of the kind of dispute.

13 We do ask that arbitrators within
14 our system be knowledgeable about the type of
15 case being arbitrated and actively seek that
16 kind of expertise. But again, our pool may be
17 much larger than what the Board is able to put
18 together.

19 VICE CHAIRMAN MULVEY: Anybody
20 else want to comment on that? Mr. Whiteside?

21 MR. WHITESIDE: Yes. Vice
22 Chairman Mulvey, if you look the arbitration

1 systems like the one they have in Montana,
2 they have selected arbitrators that they both
3 agreed to ahead of time and then they select
4 from that pool. That's one way to do it. I
5 think -- remember, if you've got an industry,
6 industry being railroad, and then you've got
7 industry being the shipper being represented
8 in a three panel, you don't have the issue
9 maybe that you would with the single finding,
10 the single arbitrator that is all knowing and
11 can walk on water is going to be really tough.
12 And so I think what we have to do is recognize
13 that that's why a three panel sometimes will
14 at least be able to talk about both industries
15 with expertise.

16 It's a toughy because if the
17 railroads come forward and agree like they did
18 in Montana ahead of time, then that issue kind
19 of goes by the wayside. But it also lends
20 itself to a trust level. What's most
21 important to me about this whole process, the
22 innovative process that the Board is taking is

1 developing the trust levels as we go because
2 once the trust levels are there, you can
3 expand on it, get it working, get it going.
4 But I think we have to go back to the
5 expertise is going to have to probably come in
6 a three part instead of a one part.

7 VICE CHAIRMAN MULVEY: Thank you.
8 Mr. O'Connor, did you want to comment?

9 MR. O'CONNOR: Yes. I would agree
10 with the three panel. I think it's well worth
11 the incremental cost, especially if the
12 parties are picking it up. It vastly expands
13 the experience available to you. And the
14 arbitration that I referred to, not that
15 particular sequence, but the prior sequence,
16 Archibald Cox was the main arbitrator and each
17 of the parties chose one. And in the
18 arbitration that I took part in, they were
19 following the same rule. They each agreed on
20 the main arbitrator and then each of the
21 parties chose number two and number three,
22 respectively.

1 MR. WHITESIDE: One more idea.
2 What we're trying to do is get to yes. That's
3 what the whole process is all about. So
4 anything that would promote that process of
5 getting to yes, meaning we never go to
6 arbitration, we always solve it at mediation
7 would be perfect. It's not going to happen
8 that way, but at least that's what the goal is
9 here.

10 VICE CHAIRMAN MULVEY: Thank you.
11 By the way in Washington, we always reduce
12 everything to acronyms so it's called OPAGAC.

13 (Laughter.)

14 VICE CHAIRMAN MULVEY: Thank you.

15 CHAIRMAN ELLIOTT: Thank you, Vice
16 Chairman.

17 Commissioner?

18 MEMBER BEGEMAN: Thank you. Could
19 you tell me if any of you, or any of the folks
20 that you represent, have actually tried to
21 utilize the existing arbitration program and
22 if you have, what ended up being the roadblock

1 and if you haven't, what is the roadblock?

2 MR. WHITESIDE: Commissioner
3 Begeman, we are in the process right now of
4 working with whatever the office is called in
5 a mediation process. They haven't gotten to
6 arbitration yet and hopefully we're going to
7 try to get that mediation just to solve the
8 problem. The one thing that we're noticing is
9 at least at the mediation stage we can explore
10 alternatives or new paradigms or new shifts of
11 where we might go and that process, by having
12 an ombudsman there, can facilitate such
13 things. We wouldn't do that if were filing
14 formal complaints on the issue.

15 MR. O'CONNOR: I just wanted to
16 second Terry's comments earlier on the
17 importance of both building on and maintaining
18 the relationship through this process. The
19 relationship is what's going to get you moving
20 towards the solution and that's really vital.

21 MR. GORDON: Commissioner Begeman,
22 I think from our experience we have not had

1 members that have gone outside our current
2 arbitration system.

3 MR. WARFEL: The League doesn't
4 have any experience. We did back in 2007,
5 2008 we were working on an arbitration
6 mediation process that was similar to what
7 NGFA had. We were working with the AAR and a
8 number of the Class 1 railroads.
9 Unfortunately, we were never able to come to
10 an agreement on it.

11 MEMBER BEGEMAN: So we don't
12 necessarily know what's broken, is that
13 probably fair?

14 MS. BOOTH: I think that's right.
15 I think the question, Commissioner Begeman is
16 such an obvious one, but there's no easy
17 answer and I think the commercial folks in the
18 room can answer better than the lawyers, but
19 perhaps from my perspective the one issue, and
20 this is a hard one to fix, is uncertainty.
21 The fact that no one has ever used the rules,
22 there's no experience with the rules, and it's

1 a little bit of the chicken and the egg of who
2 is going to be first and who is going to test
3 them out.

4 MEMBER BEGEMAN: As would any new,
5 improved program.

6 MS. BOOTH: That's right, but I do
7 think the proposed program and the structure
8 of it which is narrow and defined and has
9 limits, maybe would get folks more comfortable
10 to say well, for these types of disputes,
11 let's give it a try and it might be an easier
12 way to get started than just the broad
13 overarching who is going to be first.

14 MR. WARFEL: I would agree with
15 Karyn. The beauty to the proposal is the
16 specificity. You're actually identifying the
17 types of problems that a shipper could bring
18 and it's not quite as open ended. We were
19 talking at breakfast this morning. The one
20 thing that scares corporate lawyers or
21 chemical engineers is the unknown and this
22 eliminates a little bit of that unknown.

1 MEMBER BEGEMAN: So not to put
2 words in your mouth, but I had always been led
3 to believe, when I've asked other folks during
4 discussions on this issue, that it was that
5 carriers wouldn't agree to arbitrate. But,
6 that has not been anyone's experience, I
7 think, is what you're telling me. All right,
8 thank you.

9 Terry, it was very helpful, and as
10 you discussed the Montana-BN arbitration
11 process it occurred to me that perhaps one of
12 the things that we should be discussing is a
13 per carrier type agreement for participation.
14 I assume that BNSF is comfortable
15 participating with Montana because they have
16 a certain set of issues that they are willing
17 to negotiate.

18 Would it be worth pursuing an
19 approach that perhaps lets the carriers agree
20 on a case-by-case -- not necessarily on a
21 case-by-case -- but issue by issue categories,
22 that they will participate in so it's not a

1 one-size-fits-all, if that gets them to the
2 table?

3 MR. WHITESIDE: Ms. Begeman, I'm
4 not an expert in why the railroad came to the
5 table. My sense is that in Montana they were
6 trying to quell issues that kept bubbling up.
7 And I don't know that that can be duplicated
8 other places although when you look at one of
9 the reasons, I sense that the Board is looking
10 forward on this and looking into this issue is
11 because there was at least a chattering on the
12 Hill over and over about seeing if we can get
13 ADR.

14 What will bring them to the table
15 in many cases, it's going to be unique. The
16 Montana situation may be unique in that
17 situation. On the other hand, it may be that
18 I know we've had discussions with other major
19 railroads about some kind of ADR system and
20 they're not running from it. So this is an
21 evolution that's coming. It's -- as I think
22 Vice Chairman Mulvey, Chairman Elliott talked

1 about, it's in other agencies. They're doing
2 it in almost all the agencies now, some kind
3 of form of ADR. And so I'm hopeful. I don't
4 know that categorizing -- you could categorize
5 the railroad would do this with a particular
6 group of shippers. It may be worth exploring,
7 but I don't think that that's -- I think the
8 Montana situation was really quite unique and
9 I can't speak for them because I wasn't part
10 of that process when it went together, but my
11 guess would be.

12 MEMBER BEGEMAN: Randall, could
13 you sum up how your program was able to
14 pinpoint or develop the issues the parties
15 were willing to participate in?

16 MR. GORDON: Certainly,
17 Commissioner Begeman. At the time that we had
18 discussions with the rail carriers, and I
19 believe that began in about 1996, and it took
20 a year or two to come to fruition in terms of
21 these specific rail arbitration rules, we
22 brought all the carriers including all the

1 Class 1s and a number of the shortline and the
2 association that represents shortline carriers
3 to the table to talk about what kinds of cases
4 should be arbitrable.

5 We, too, were at a teachable
6 moment in terms of potential legislative
7 action at that period of time so there was
8 incentive, I think, from the carriers to come
9 to the table and could we develop a commercial
10 way to resolve a number of these kinds of
11 disputes. And there was a lot of give and
12 take that went back and forth during that
13 process between grain company and feed company
14 representatives and the rail carriers, but it
15 was a good-faith effort on both parties to
16 come to a balanced set of rules. And my sense
17 is and I think it's reflected in some of the
18 comments by some of the carriers to this
19 docket is that they believe that system has
20 worked very well and serves the needs of both
21 shippers and carriers to resolve certain kinds
22 of disputes.

1 And again, I can't over emphasize
2 the fact that this type of a system does
3 result in dialogue between carriers and
4 shippers. It's very early on in the process.
5 If there's a possibility that a case will be
6 brought for NGFO arbitration, again, as I
7 alluded to earlier, the vast majority of those
8 we never see because the cases never get
9 filed. But even those that are where an
10 initial filing is made by one of the parties,
11 very often those disputes are resolved within
12 a couple of months before the case ever gets
13 going into arbitration. That's been our
14 experience. I know there's some concern of
15 some that will we see an onslaught of cases at
16 the STB if you go down this path. That
17 certainly hasn't been our experience.

18 CHAIRMAN ELLIOTT: Just a few
19 questions following up on Vice Chairman
20 Mulvey's questions regarding the three-member
21 panel. From what I'm hearing here, I think
22 I'm hearing that everyone thinks a three-

1 member panel is a better way to go about
2 arbitration or -- we have some shaking heads -
3 - okay, that's exactly why I'm asking the
4 question. Why is that?

5 MS. BOOTH: From the League's
6 perspective, we would like there to be
7 flexibility and we do not see as great a
8 problem as the others, I guess, around the
9 table see in having potentially a one-person
10 arbitration take place. And from our
11 perspective, we're looking at again the
12 utility of the program and to bring in what
13 could be very small disputes. We have some
14 experience with arbitration and when you start
15 having three-panel arbitration, it can
16 actually get expensive just because the cost
17 of the arbitrators themselves. And if you
18 were to mandate that you always have three and
19 that the parties have to pay for the cost of
20 the arbitrator, it's possible that those
21 \$50,000 disputes, some of the small potato
22 issues which it makes sense to arbitrate, have

1 it done in 120 days, and you have your
2 decision and everybody goes home. It just may
3 not work.

4 And so our position is that if
5 we're careful on the qualifications of the
6 arbitrators, it's transparent, the selection
7 process works that one-person arbitration
8 especially for smaller disputes should be
9 available, but you have the option for the
10 parties, as we hear around this table to agree
11 to have three so that you could do that if you
12 want, if everybody felt that was very
13 important.

14 So in response to your question,
15 Mr. Chairman, we might be an anomaly at the
16 table here.

17 MS. ARCHULETA: No, Mr. Chairman,
18 WCTL agrees with NITL on this issue. It's
19 really a cost concern. If you're going to
20 have a cap on the amount that is potentially
21 to be arbitrated over at \$200,000 which we
22 believe is an appropriate amount, then if you

1 have to have each party paying for an
2 additional arbitrator, it might freeze out
3 some people who would really otherwise would
4 want to arbitrate a dispute.

5 CHAIRMAN ELLIOTT: Sure. That
6 makes sense.

7 MR. WHITESIDE: Mr. Chairman?

8 CHAIRMAN ELLIOTT: Mr. Whiteside.

9 MR. WHITESIDE: Just to make sure
10 that there is unanimity on the table, we would
11 agree with that, with those processes. The
12 key is we should be available to have three,
13 especially if the case is going to be a fairly
14 in-depth or complicated one. But I don't know
15 that we would object on starting with one and
16 then having opt out to three if they need to
17 be.

18 CHAIRMAN ELLIOTT: So what I'm
19 hearing is -- well, a mandate of three is not
20 universally wanted, but a possibility of three
21 or one is acceptable.

22 MR. O'CONNOR: It may be the case,

1 too, that it relates to the cap and as the cap
2 goes up, then the cost effectiveness of the
3 three is easier to handle.

4 CHAIRMAN ELLIOTT: Sure.

5 MR. O'CONNOR: The arbitration I
6 was referring to earlier dealt with tens of
7 millions and on going tens of millions.

8 CHAIRMAN ELLIOTT: Sure. That was
9 my easy question. My next question is the
10 carriers' biggest complaint seems to be the
11 opt in and opt out and they're opposed to the
12 opt out part of our plan. And I gave this
13 some thought.

14 If we move to an opt-in program, I
15 mean one of the reasons we didn't do it was
16 because as some of you have mentioned, the
17 manageability of all of the different shippers
18 that would be involved. There's just a lot of
19 shippers. So that would be very difficult.
20 But if we did do an opt in, and you opted in,
21 the second you opt in, you're eligible to
22 arbitrate, I would think that would cover most

1 shippers bringing a case because they could
2 opt in before they brought the case and then
3 proceed by filing their complaint with the
4 Board.

5 Would that be -- and then
6 obviously, we would allow the railroads also
7 to opt in as long as they feel comfortable
8 with it. Would that kind of method work for
9 you or are you kind of pro opt out?

10 MS. BOOTH: It's, I guess, a
11 difficult question to answer without having
12 the opportunity to have consulted with the
13 client and in our case the Rail Transportation
14 Committee on that approach.

15 I thought you were going to say
16 that maybe the shippers were in the same
17 position, but the railroads would just opt in
18 to your program and I think there are pros and
19 cons to each of these approaches and we
20 recognize that if the railroads are as
21 uncomfortable as they presented themselves in
22 their comments that they all may opt out and

1 then where are we? So we do need to look at
2 alternatives.

3 So I mean I'm not going to be able
4 to give you a clear answer on this. I think
5 it's something we would look at and talk about
6 at the League. I think the approach you have
7 presented as the opt out would be preferable,
8 but would that mean that we would be opposed
9 to an opt in? I can't say that that would be
10 the case either. And that trying to establish
11 everyone on equal footing, I understand where
12 you're trying to go with that and it would be
13 a question of is it administratively feasible
14 and what are the other, I guess, processes in
15 the scope of the program that would go along
16 with it.

17 So I'm sorry that's more specific,
18 but --

19 CHAIRMAN ELLIOTT: I kind of
20 sensed that that might happen, especially by
21 the silence.

22 Anybody else?

1 MR. GORDON: Mr. Chairman, I think
2 from NGFA's standpoint, your proposed rule
3 really models what we have done as an
4 association where the carriers, as a condition
5 of membership, are in the arbitration system,
6 have the opt-out capability.

7 You know, I would be a little
8 leery of an opt-in approach, just based on our
9 experience in terms of does that reduce the
10 potential for your system to be operable and
11 working, if you have this opt-in/opt-out
12 metric going on all the time. Or if you do
13 opt in, how long do you opt in for? So those
14 would be some issues I think we'd have -- you
15 know, carriers certainly have the opportunity
16 to opt out of NGFA's system, but we have not
17 had a rail carrier do that. So that's again
18 just our experience. I thought the NITL's
19 argument that they submitted on this issue
20 were persuasive.

21 CHAIRMAN ELLIOTT: If only we
22 could do what you do and have anybody that has

1 to appear before us have to be in, we'd be all
2 set. I don't think that would be legal.

3 I have a couple more questions.
4 It seems like everybody here is more
5 comfortable from what I'm hearing with the
6 strike method of choosing arbitrators as
7 opposed to the railroads. I think they were
8 okay with both, I'll ask them that later, as
9 opposed to the final best offer, is that the
10 general consensus that I'm hearing?

11 MR. WHITESIDE: Mr. Chairman, one
12 thought that you might think about is having
13 a pool of industry -- of shipper and industry
14 and not having that strike capability. They
15 would be able to bring forward their rep, if
16 you had a three-party system.

17 I guess I'm thinking out loud and
18 maybe I shouldn't be, but I think it's one way
19 to solve that problem. What they've done in
20 Montana, for example, is they have a pool of
21 arbitrators that they can pick from and they
22 don't have strike capability. They agreed

1 ahead of time what that pool would be. Now
2 this is very limited system in the sense of
3 dealing with just what they're doing there,
4 but the strike system has worked very well in
5 almost all the arbitrations that I've seen in
6 other places. It's maybe at least a culling
7 process. Because if you get an arbitrator
8 that consistently is off the field somewhere,
9 I think that strike system would make
10 railroads more comfortable and the shippers
11 probably more comfortable having that ability.
12 But again, if you're working with a three-
13 party system and you already have your pool of
14 main arbitrators, I don't know that that's as
15 important as it would be in a wide open we're
16 picking all three kind of thing.

17 CHAIRMAN ELLIOTT: Anyone else?

18 MR. GORDON: Well, again, Mr.
19 Chairman, I think from NGFA's experience, we
20 like the concept that either party to a case
21 can object to an arbitrator and have that
22 arbitrator removed and a third new arbitrator

1 picked. That just works really well.

2 MS. BOOTH: Just very briefly, our
3 position is to -- the League's position is to
4 favor the strike methodology and I think the
5 concern on our part is that the final offer
6 approach has the potential of too much risk.
7 The other person's selection is just
8 automatically picked and you had no process by
9 which to even strike or eliminate folks. It
10 just appears too risky.

11 CHAIRMAN ELLIOTT: One other
12 question. I'm also hearing, I think,
13 generally, that people believe that once the
14 arbitration awards are issued that it would be
15 a good thing to have them published and made
16 public, but without precedential value, is
17 that also what I'm hearing from this panel?

18 MS. BOOTH: Go ahead, please.

19 MR. WARFEL: As a shipper, I would
20 say yes. Knowing that other people have gone
21 before you and that there is actually a
22 process that's working would be invaluable.

1 MR. O'CONNOR: The only other
2 factor -- first of all, I'm in favor of
3 publishing also, but you would want to make
4 sure that you allowed for what is now -- would
5 now could occur and facilitate agreement in
6 the mediation procedures that exist in the
7 small shipment proceeding, is the parties can
8 bring other issues to the table that they can
9 agree on. And those can often break a
10 stalemate. Now those would obviously not want
11 to be published.

12 MR. GORDON: Mr. Chairman, could I
13 interrupt just for a second?

14 CHAIRMAN ELLIOTT: Sure.

15 MR. GORDON: We, too, favor the
16 published decisions for the reasons we
17 articulated before and I believe they really
18 help encourage shippers and carriers resolve
19 the disputes so they don't go to arbitration
20 or don't go through the full process.

21 CHAIRMAN ELLIOTT: I understand,
22 sure. I'm getting near the end here. With

1 respect to the issues that we designated that
2 can be arbitrated, we had a list and then at
3 the end we had kind of a catch all that said
4 other service matters. I know in NITL's
5 comments they said they were, from what I
6 recall, okay with removing that. Is there
7 anybody else that has any objection to
8 removing that last, I guess, catch-all clause?

9 Mr. Wilcox?

10 MR. WILCOX: NGFA does not have an
11 objection. I think their view is that you can
12 be specific. That's the way to go and that
13 clause is a little too broad and could create
14 enough uncertainty to kind of not be helpful
15 in the final regs.

16 CHAIRMAN ELLIOTT: Go ahead, I'm
17 sorry, Karyn, Ms. Booth.

18 MS. BOOTH: The League would be
19 open to refining it and clarifying it and
20 narrowing it, but I think we would not want to
21 exclude the potential for service issues to be
22 covered by arbitration.

1 CHAIRMAN ELLIOTT: Sure.

2 MS. BOOTH: So it's a drafting
3 point.

4 CHAIRMAN ELLIOTT: Final question
5 is for Mr. Gordon. How do you get all these
6 people to volunteer?

7 MR. GORDON: That's a very good
8 question, sir. They view this as a service to
9 the efficiency of the industry. And they know
10 that they may be having a case at some point
11 in the future, too, that's going to require
12 arbitration, so they willingly do arbitrate
13 and spend quite a bit of time and effort in
14 these different cases, knowing that they could
15 be a beneficiary of this process and often are
16 in the future as well when they have a dispute
17 of a commercial nature with another company.

18 CHAIRMAN ELLIOTT: Thank you.
19 Vice Chairman?

20 VICE CHAIRMAN MULVEY: Just
21 briefly, I'm glad that the specificity issue
22 got raised because I was going to raise that.

1 You mentioned, Mr. Warfel, that the proposal
2 was specific, but the railroads are very
3 concerned that it's not specific enough and
4 that the railroads would have a hard time not
5 opting out of something or effectively opting
6 into something when they don't know what it
7 would cover. From what I'm hearing now, you
8 are all pretty much in agreement that it being
9 more specific and as precisely as possible
10 what would be subject to arbitration, if that
11 would help the railroads, in fact, not opt
12 out, you would be in favor of that? Is that
13 generally agreed upon?

14 One thing I wanted to raise was
15 about the standards of review. The Agency's
16 review of arbitration awards are usually
17 fairly narrow, unless some of the issues are
18 relitigated whenever a party is disappointed
19 with the arbitration result. And typically
20 one party or the other will not be happy.

21 The Board's proposed standard, is
22 for review if there is a clear abuse of

1 arbitrator authority or discretion? Can this
2 standard encompass some of the other concerns
3 that have been expressed? For example, BNSF's
4 concern that an arbitrator might contravene
5 the statute? Do you feel that that's covered
6 in our proposal or should we be more specific
7 in our proposal as to what the standards of
8 review are?

9 Ms. Booth?

10 MS. BOOTH: The League believes
11 that
12 the standard you've proposed is adequate. We,
13 I guess, interpreted the guide that the
14 arbitrator is bound or must follow and be
15 guided by the statute to be a little bit more
16 flexible than the standard, however, that the
17 railroads are proposing which is a much
18 stronger -- they cannot contravene the
19 statute. And we think that's a better middle
20 ground that the Board has already struck than
21 going further.

22 So we're comfortable with the

1 standard as currently proposed and would not
2 advocate to broaden it to require the
3 arbitrators to be entirely strict, I guess I
4 would say, with every dotting every I and
5 every t of that precedent. There needs to be
6 some flexibility built in there.

7 VICE CHAIRMAN MULVEY: Anybody
8 else on that?

9 Finally, one of the railroads
10 argued that an arbitrator should be
11 disqualified if the arbitrator has not
12 disclosed any previous relationship. Do you
13 agree that if there was a failure to disclose
14 on the part of the arbitrator that the
15 individual should automatically be
16 disqualified from serving as an arbitrator?

17 MS. BOOTH: To the extent that
18 there's a bias there, yes. Even a potential
19 bias. There needs to be transparency and
20 openness and so that the parties can make the
21 right selection of an arbitrator with full
22 knowledge of their prior dealings.

1 MR. WHITESIDE: I guess I would
2 concur in that. What we're trying to build is
3 trust in the system long term and it's only
4 going to come about with people having full
5 exposure to it. When you're selecting
6 arbitrators it's tough as it is, but I think
7 it would be really important to make sure that
8 everything is on the table.

9 VICE CHAIRMAN MULVEY: Thank you
10 very much.

11 MEMBER BEGEMAN: I just have one
12 question stemming from what the Chairman asked
13 about publishing the decision, but not having
14 precedential value. In a practical sense, how
15 does it actually not have precedential value?
16 Is it that the published version provides such
17 little information, you don't know what the
18 facts were that led to the conclusion? I
19 realize you don't want each case to be a
20 rubber stamp based on a previous case and it
21 really needs to be very case specific on the
22 facts of that case. But if you publish it --

1 and again, we want transparency -- what is the
2 real practical effect of that publication if
3 there is no precedential value?

4 MS. BOOTH: I guess there are some
5 legal implications to your question,
6 Commissioner. The publication of the
7 decisions, I think, has many benefits on the
8 commercial side to see that the program has
9 been useful, get a sense of how decisions are
10 coming, hopefully get the public more
11 comfortable.

12 The thought, however, that there's
13 no precedential value given to the decisions
14 does raise the question of whether the full
15 decision should be released or not because
16 there will be temptation to perhaps use and
17 try to cite to these arbitration decisions
18 even though the rules have said we're not
19 going to give them precedential weight.

20 I think it's a little bit of the
21 potential is there for folks to try to use
22 those decisions, perhaps in a manner to argue

1 future cases based on those, but then it comes
2 down to the weight that would be given. And
3 under these rules there should be no weight.
4 But I just think the temptation would be there
5 to use those decisions.

6 From the League's perspective, we
7 want transparency, but we're comfortable with
8 a summary of the decisions being published as
9 a middle ground, but we would also be okay
10 with the full publication, just recognizing
11 there might be some temptation to try and use
12 them in the future.

13 MR. GORDON: Commissioner Begeman,
14 if I could respond to that, too. I think I
15 might take a little bit different tact on
16 that. In our arbitration decisions, we do
17 have a statement of the case and the facts of
18 the case. And it's very factually based. And
19 we do think that the facts of different
20 decisions can vary, obviously, over the same
21 kinds of cases. And our experience has been
22 that those have tremendous educational value

1 to industry, but the contracts between the
2 parties, the commercial trade practices may
3 evolve over a period of time so that they
4 really aren't precedent setting from that
5 standpoint. Each case stands alone on its own
6 factual basis and even involving the same type
7 of complaint, you can have different facts
8 that tilt the decision one way or the other.

9 By having a more full disclosure
10 of the actual facts of the case, again,
11 redacting confidential business information,
12 we think has good educational value to the
13 industry.

14 MEMBER BEGEMAN: And do each of
15 the two parties get to decide what gets
16 redacted?

17 MR. GORDON: That's a good
18 question and we really haven't briefed on
19 that. I don't have a really good response for
20 you on that one yet. That would probably be
21 an issue the arbitrator would have to decide
22 with the two parties.

1 CHAIRMAN ELLIOTT: Thank you very
2 much.

3 VICE CHAIRMAN MULVEY: Can I just
4 have one clarification?

5 Ms. Archuleta, did I hear you say
6 that WCTL supported the \$200,000 cap?

7 MS. ARCHULETA: That's correct,
8 Vice Chairman Mulvey. We believe that the
9 \$200,000 is an appropriate level and that if
10 parties mutually agree to increase the amount,
11 then they should be allowed to do so.

12 VICE CHAIRMAN MULVEY: Thank you.

13 CHAIRMAN ELLIOTT: Thank you very
14 much, panel. We appreciate your testimony and
15 your answers. They've been very helpful and
16 hopefully moving this forward.

17 I would ask that Panel II come
18 forward.

19 (Pause.)

20 Okay, now we'll hear from Panel
21 II. I believe the AAR was supposed to go
22 first, is that correct? Okay, we'll begin

1 with Mr. Warchot.

2 MR. WARCHOT: Good morning,
3 Chairman Elliott, Vice Chairman Mulvey, and
4 Commissioner Begeman. My name is Louis
5 Warchot. I am Senior Vice President-Law and
6 General Counsel for the Association of
7 American Railroads. I'm also joined on this
8 panel by AAR members, Norfolk Southern
9 Corporation, Mr. Scheib; and Union Pacific
10 Railroad Company, Ms. Rinn.

11 The AAR on behalf of all of its
12 rate members appreciates the opportunity to
13 present its views this morning on the Board's
14 proposed modification of its mediation and
15 arbitration rules. As the AAR stated in its
16 written comments, the Association and its
17 members fully support the Board's efforts to
18 encourage the use of mediation and voluntary
19 arbitration processes in lieu of more formal
20 Board proceedings. Over the years, the STB
21 and the ICC before it have implemented a
22 comprehensive array of ADR programs such as

1 the activities of the Board's Rail Customer
2 and Public Assistance Program which has been
3 bolstered over the years and of course the
4 Board's more formal mediation procedures. And
5 in addition, at issue here the Board has two
6 sets of arbitration rules under 49 CFR Section
7 1108 and 1109.

8 However, while the Rail Customer
9 and Public Assistant Program in mediation
10 proceedings have been successfully used as the
11 Board noted, the arbitration procedures have
12 basically not been utilized.

13 Commissioner Begeman asked why and
14 the answer we are all searching for. In some
15 cases, a ruling from the Board may be seen as
16 by a party preferable to arbitration in view
17 of the Board's expertise, especially if the
18 dispute may turn on interpretations of
19 provisions victa. Also difficulties in
20 identifying qualified neutral arbitrators
21 which has been noted by many parties in the
22 comments of this proceeding may contribute to

1 the lack of arbitration.

2 However, whatever the reason may
3 be as discussed in response to the question
4 from Commissioner Begeman, there is no
5 evidence in this proceeding or any proceeding
6 that I am aware of that the lack of
7 arbitration at the Board is the result of any
8 general reluctance by the railroads to engage
9 in arbitration before the Board or to engage
10 in arbitration for that matter in any context
11 and the railroads, the AAR's Class 1
12 railroads, and many other railroads'
13 participation in the NGFA arbitration process,
14 we believe is evidence of that.

15 This does lead to the concern of
16 the AAR of the Board's proposed arbitration
17 rules that treat Class 1 and Class 2 railroads
18 differently than other parties. The Board's
19 proposal deems Class 1 and Class 2 railroads
20 to have consented to arbitrate a specific
21 dispute if they fail to annually opt out of
22 the proposed program while at the same time

1 allows all other parties to decide whether to
2 arbitrate a specific dispute on a case-by-case
3 basis.

4 The problem here is that first the
5 requirement is unnecessary. There is no basis
6 for the Board to conclude that Class 1 and
7 Class 2 railroads should be treated
8 differently than other parties before the
9 Board. Second, this opt-out approach does not
10 lead to a voluntary agreement to arbitrate a
11 specific dispute. While Class 1 and Class 2
12 railroads would have the opportunity to
13 generally opt out once a year, if a railroad
14 does not opt out, it would be required if a
15 shipper so chooses to arbitrate a specific
16 dispute that the railroad might otherwise
17 prefer to litigate if evaluated on a case-by-
18 case basis.

19 Ms. Booth mentioned that a rail
20 carrier, it is voluntary because a rail
21 carrier any time -- at any time can opt out.
22 That is not the case. If a railroad is in the

1 program and someone brings an arbitration
2 case, it can't opt out. There's a 90-day
3 window for that.

4 Third, the text of the proposed
5 rule states that arbitration-eligible matters
6 include in quotes and thereby by definition
7 are not limited to the certain numerated
8 disputes. A Class 1 or Class 2 railroad that
9 did not opt out would thus have essentially an
10 open ended and unclear commitment subject to
11 the Board's discretion as to what disputes it
12 must arbitrate. As a result, the AAR has
13 fundamental concerns regarding the legality of
14 the opt-out proposal because of the
15 involuntary nature of it and because of the
16 lack of clarity as to what subjects are
17 covered.

18 As more fully discussed in our
19 written comments, the AAR believes that the
20 Board's proposal runs counter to the
21 provisions of the Administrative Dispute
22 Resolution Act and that the Board lacks

1 authority under its general powers pursuant to
2 49 USC 721(a) to create the proposed
3 involuntary opt-out program.

4 The AAR did not object when the
5 earlier arbitration rules were in effect as
6 also mentioned earlier, because that was a
7 voluntary program. While all of these
8 concerns are important though the core problem
9 with the opt-out proposal goes back to what I
10 mentioned first and that is that there is no
11 practical need for it and accordingly likely
12 have little utility.

13 Assume for the sake of argument
14 that the Board does have the legal authority
15 for the opt-out proposal. I can't --
16 certainly, I can't speak for every Class 1 or
17 Class 2 railroad as to whether they would or
18 would not opt out. However, as we state in
19 our written comments, it is likely that some
20 or all Class 1 railroads would opt out and
21 evaluate whether to participate in a specific
22 arbitration on a case-by-case basis the same

1 way a shipper can. In fact, there seems
2 little incentive for a Class 1 or Class 2
3 railroad to do otherwise. If that does turn
4 out to be the case and the railroads opt out,
5 and operate under essentially the same
6 voluntary nature as the current rules, the
7 current proposed rules become essentially
8 irrelevant.

9 Accordingly, rather than
10 attempting to effect an opt-out proposal which
11 may ultimately be counter productive or have
12 little utility for the purpose of encouraging
13 ADR, the AAR continues to believe that the
14 Board's existing voluntary arbitration rules,
15 if modified, as suggested by the AAR's written
16 comments would encourage arbitration. For
17 example, the AAR and other parties noted in
18 the comments a significant concern with the
19 Board's current, as well as proposed
20 arbitration rules and how the arbitrators are
21 selected. The current arbitration roster is
22 essentially dated and inefficient and Ms. Rinn

1 will discuss this in more detail in her
2 testimony.

3 In that regard, the AAR suggests
4 declaring the existing roster void and
5 establishing a new list of arbitrators with
6 required transportation experience, for
7 example, ten years of familiarity with the
8 Interstate Commerce Act and demonstrated
9 neutrality. And alternatively, in lieu of a
10 standing roster, the Board could also adopt a
11 final offer type of the system.

12 However, if the Board concludes
13 that it is necessary to move forward with its
14 proposed rules when it intends Class 1 and
15 Class 2 railroads to be subject to required
16 arbitration for certain disputes in advance,
17 the program should be required of all parties
18 on an equal, reciprocal basis and at least
19 have the following elements.

20 First, there should be a well-
21 defined list of eligible disputes that the
22 arbitration process will cover. This list

1 should be limited to specifically enumerated
2 matters which do not rise to the level of
3 policy significance and are factual disputes
4 relating to the application, not the
5 reasonableness or legality of a rule of
6 practice. In that regard, the Board should
7 also clarify its arbitration program to say
8 that it will not displace or supersede other
9 established arbitration regimes or agreements
10 such as the NGFA suggests.

11 Also, allowing participants to opt
12 into the program in writing and specify what
13 particular types of disputes they would be
14 willing to arbitrate would further encourage
15 participation and ensure the smooth
16 interaction with other arbitration regimes or
17 agreements.

18 The Board should also modify its
19 standard of review. The AAR and other parties
20 have identified problems with the proposed
21 standard of peer reviews of the arbitrator's
22 authority or discretion. The Board should

1 adopt the standard in the AAR's written
2 comments which would require that an
3 arbitration decision does not contravene the
4 statutory requirements to ensure that
5 arbitration results are consistent with the
6 statutory scheme.

7 Lastly, the Board should address
8 the qualifications and neutrality of the
9 arbitrators along the lines I discussed a
10 moment ago.

11 In summary, the AAR fully supports
12 the Board's efforts to encourage parties to
13 voluntarily resolve their disputes and to use
14 the Board's arbitration processes. However,
15 the AAR does not believe that the proposed
16 arbitration rules necessarily further that
17 goal and sees practical concerns with aspects
18 of the Board's proposal, especially the
19 proposed opt- out provisions applicable in
20 Class 1 and Class 2 railroads. Instead, the
21 AAR believes that the Board's current
22 arbitration rules would suggest that

1 modifications can be tailored to encourage
2 more use of the process consistent with the
3 Board's stated rules.

4 I'd be happy to answer any
5 questions that you may have. Thank you.

6 CHAIRMAN ELLIOTT: Mr. Scheib.

7 MR. SCHEIB: Good morning,
8 Chairman Elliott, Vice Chairman Mulvey, and
9 Commissioner Begeman. I'm John Scheib,
10 General Counsel of Commerce and it's my
11 pleasure to represent Norfolk Southern this
12 morning.

13 I'd like to make a few points
14 briefly. First, Norfolk Southern supports a
15 voluntary mediation provided under the Board's
16 auspices. Norfolk Southern suggested
17 mediation in its reasonable practices case
18 with Ag. processing and we've participated in
19 several mediations related to rate cases that
20 were professionally handled by the Board. And
21 we would continue to support voluntary
22 mediation processes at the Board so long as

1 they remain confidential and inadmissable in
2 formal Board proceedings.

3 Second, Norfolk Southern supports
4 a voluntary arbitration program. The Board's
5 current rules provide for such a voluntary
6 arbitration program that allows both parties
7 an opportunity, an equal opportunity, to
8 decide whether arbitration is appropriate in
9 a particular case.

10 Third, Norfolk Southern does not
11 support the proposed rule. Arbitration is a
12 nettlesome issue. Balance and consistency are
13 very important. And Mr. Whiteside, on the
14 prior panel, noted that what we're trying to
15 do is get to yes. I think what we're trying
16 to do is get to yes, even in the concept of an
17 arbitration proposal. But Montana Grain notes
18 at page two that there is a "bit of a stick
19 for the Class 1 railroads" in the opt-out
20 provision. Obviously, we view that as
21 unbalanced and that is a detriment to us in
22 this proposal.

1 In addition, we see that the
2 arbitration really ultimately gets to be
3 whether there will be arbitration is decided
4 by the other side. Once a railroad opts in,
5 it's completely at the discretion of the other
6 side whether an issue is arbitrated. Within
7 the list of topics that are in the rule, a
8 demurrage comes to mind. You can envision an
9 example where the railroad might want to
10 pursue arbitration against a customer who
11 hasn't paid demurrage. It's not clear that
12 that would be possible under the program
13 because none of the shippers are engaged or
14 involved or in the process unless they file a
15 case against the railroads.

16 And in addition, we have concerns
17 about the unpredictability of arbitration
18 results. Congress created an expert agency to
19 deal with matters within the Agency's
20 jurisdiction and frankly we mostly want to
21 have the expert Agency opine because it gives
22 us certainty on what the law is, how the

1 regulations are being applied, and that allows
2 us to advise our business folks and the people
3 within our company so that we can comply and
4 stay within the bounds of the law which is
5 Norfolk Southern's goal at all times.

6 So conceptually, Norfolk Southern
7 is not opposed to a voluntary arbitration
8 program. I would note, however, that the fact
9 that there haven't been many arbitrations may
10 not be a concern. Keep in mind that a
11 substantial amount of rail traffic moves
12 subject to confidential contracts and disputes
13 related to those movements are going to be
14 resolved through contract processes, whether
15 that's at a court or through a contract
16 arbitration clause.

17 In addition, you've heard that the
18 NGFA has a process and that siphons off some
19 number of claims as well. So it's not clear
20 to me that the fact that there hasn't been
21 many arbitrations or any arbitrations really
22 means that there's not an available program.

1 I appreciate your time this
2 morning and look forward to questions.

3 CHAIRMAN ELLIOTT: Thank you, Mr.
4 Scheib. Now we'll hear from Ms. Rinn.

5 MS. RINN: Good morning, Chairman
6 Elliott, Vice Chairman Mulvey, and
7 Commissioner Begeman. I'm Louise Rinn,
8 Associate General Counsel for Union Pacific
9 Railroad. I appreciate this opportunity to
10 discuss ways to improve ADR before the STB.

11 Union Pacific welcomes well
12 designed and properly administered ADR
13 programs as yet another useful tool for the
14 fair, cost effective and expeditious
15 resolution of disputes. We agree with NGFA
16 that fairness and transparency are essential
17 to the successful functioning of an unbiased
18 arbitration system. Only if individual
19 parties have confidence that STB-sponsored
20 arbitration is fair will they be willing to
21 participate.

22 Unfortunately, we believe that the

1 proposals in the March 28th NPR are unclear
2 and unfair, unfair in the sense because they
3 engender distrust rather than encouraging
4 trust. And therefore, they will fail to
5 encourage greater use of STB-sponsored
6 arbitration if adopted without change.

7 There have been several
8 suggestions by many parties that we think, if
9 adopted, could increase the willingness of
10 parties to use STB arbitration, but we think
11 that there are other suggestions on the record
12 that if adopted would discourage the use of
13 arbitration.

14 Our written comments address those
15 in further detail so for the purpose of my
16 prepared remarks, I'm going to focus on two
17 keys to improving the proposed rules from our
18 perspective that we think may, in fact,
19 encourage greater use. And that is selection
20 of arbitrators and clarification of the
21 matters that can be arbitrated.

22 Nothing is more important than

1 parties' confidence that the procedures will
2 assure the selection of qualified, neutral
3 arbitrators, especially if there is a single
4 arbitrator. Parties will be reluctant to
5 participate in arbitration unless they have
6 confidence that the arbitrators will listen to
7 both sides, weigh all relevant facts, consider
8 applicable legal principles with an open mind
9 and an impartial temperament.

10 Comments made by virtually every
11 party in this proceeding confirm that
12 selection of qualified neutrals is of concern.
13 When this proceeding began, if I had had one
14 guess as to why the current STB arbitration
15 procedures weren't being used, my guess would
16 have been the available list of arbitrators.

17 Now I can speak with personal
18 experience. UP and another railroad are
19 involved in an arbitration under STB
20 procedures right now. And out of all of the
21 arbitrations I have been involved with, I have
22 never had a more frustrating experience in

1 attempting to come up with an appropriate
2 arbitrator. Part of that is it is a single
3 arbitrator, so that gets you outside of a
4 comfort zone if you have three. But we have
5 had the ability in other proceedings, not
6 under the STB procedures, to assess relatively
7 quickly whether the arbitrator is neutral and
8 qualified because we either selected our
9 arbitrator, the other party selected an
10 arbitrator and then they agreed on a third or
11 somebody else selected the third or a neutral
12 organization such as the AAA or JAM supplies
13 a list of potential arbitrators with extensive
14 information about their background and
15 experience as arbitrators.

16 In contrast, the STB roster of
17 arbitrators provides no information beyond the
18 name and contact information. And in working
19 through that list we found several have been
20 paid to testify as experts against railroads
21 and do not appear to have any experience
22 whatsoever as arbitrators. We have been able

1 to find little or no information on many of
2 the people who are on that roster and the
3 limited information we have found is often
4 dated. And most of the others where we can
5 find information have either represented or
6 worked only for shippers, only for large
7 railroads or only for small railroads. And
8 again, there is little indication they have
9 had either training or experience as
10 arbitrators.

11 And those concerns get heightened,
12 as I said, if you have a single arbitrator.
13 So given the quality of what's going on there,
14 I mean this has been a real issue for us. So
15 there are numerous suggestions in the record
16 to improve the section process for
17 arbitrators. These include post current
18 information on STB website on arbitrators'
19 qualifications and arbitration experience.
20 Recognize that even well-qualified arbitrators
21 may not be neutral for all disputes for all
22 parties. This isn't a one size fits all type

1 of a test.

2 Accordingly, if an individual is
3 being considered for a particular dispute, the
4 Board's rules should require an arbitrator to
5 disclose any possible conflict of interest or
6 bias or past feelings with the parties and
7 grant the parties the opportunity to strike
8 for cause, and ensure transparency by
9 requiring arbitrators to submit either their
10 decisions or summary of decisions to the STB,
11 and for the STB to post those decisions on
12 their website.

13 We believe that these improvements
14 should be applied to any STB-sponsored
15 arbitration whether solely case by case,
16 voluntary arbitration, or if you were to adopt
17 some type of a pre-dispute subscription model.

18 We also think that it would be
19 helpful if you would clarify the matters that
20 are eligible for arbitration. We think it is
21 particularly important that if you're doing a
22 pre-dispute method that it be reciprocal.

1 That's critical because if potential
2 participants are to perceive the pre-dispute
3 program as fair, it's unreasonable to expect
4 larger railroads to participate in a system
5 where any other party can require them to
6 arbitrate, but the other party must
7 specifically agree to an arbitration. For
8 example, I believe WCTL gets it wrong when
9 they elevate form over substance by saying,
10 well the difference is that shippers can
11 complain that railroads have violated the law
12 and railroads can't complain that shippers
13 violate the law. This is not about violating
14 the law, as other parties pointed out. This
15 is about resolving disputes.

16 So if arbitration affords the
17 opportunity for less expenses and more
18 expeditious resolution of a demurrage dispute
19 does it make sense to require Class 1 or Class
20 2 carrier to sue the shipper in court and then
21 ask to refer the matter to the STB if the
22 point is to save money? We don't think so.

1 We believe that otherwise the Board should be
2 wary about expanding the scope of disputes
3 that would be subject to an automatic type of
4 arbitration because of just the practical
5 difficulty in coming up with rules and a list
6 of arbitrators that can do that, bearing in
7 mind that voluntary arbitration would always
8 be available to the parties if they wanted to
9 pursue that route.

10 Thank you, and I'd be willing to
11 answer any questions later if you want to
12 pursue the discussion. Thank you.

13 CHAIRMAN ELLIOTT: Next we'll hear
14 from Mr. MacDougall.

15 MR. MacDOUGALL: If it please the
16 Board, my name is Gordon MacDougall. I'm hear
17 on behalf of Sam Nasca who is --

18 CHAIRMAN ELLIOTT: Is your mic on,
19 Mr. MacDougall?

20 MR. MacDOUGALL: Now it is. Sam
21 Nasca is the senior UTU legislative director
22 in the UT organization and he participates in

1 many STB cases as do other state directors for
2 the UTU. And we're opposed to any change in
3 the current regulations for mediation and
4 arbitration. We're particularly concerned
5 about arbitration. Arbitration has not been
6 used for 15 years. That was back in 1997.
7 And arbitration was used back in the 1880s.
8 It was the cause, a major cause for the
9 Interstate Commerce Commission in the first
10 place. The basic reason why arbitration does
11 not work is that a lot of the key people
12 affected by arbitration are not before the
13 arbitration panel.

14 For example, if you want to change
15 the rates from Coos Bay, Oregon on lumber to
16 Chicago, you can arbitrate that and get a
17 decision, but those rates have to be lined up
18 with the rates from Hattiesburg, Mississippi.
19 Similarly, if I sell batteries from by
20 Madison, Wisconsin have to be tuned into
21 Dubuque, Iowa. And those of us that have been
22 familiar with the ex parte rate increases

1 since World War II, that's ex parte 148
2 through ex parte 310 know that rates have to
3 be in line. If they're not something happens.
4 Other carriers in other regions are going to
5 have to make adjustments because United States
6 is a common market. And it didn't work and it
7 hasn't been worked for 15 years.

8 In fact, it was the UTU that
9 opposed the arbitration rules if you look back
10 at ex parte 560 to STB 564 it was the Illinois
11 UTU, Joe Szabo, who is now the Federal
12 Railroad Administrator, oppose arbitration.
13 The main reason was the rules would not allow
14 intervention. And we've said that. There
15 have been three decisions since that decision
16 in 1997 involving the Burlington Northern and
17 the General Chairman for the UTU on the BNSF
18 decided in 2003, Docket 42076 and three times
19 he said you can't intervene in an arbitration.
20 An arbitration never got under way. And
21 there's never been any arbitration because the
22 UTU is not necessarily interested in being a

1 direct party in an arbitration, but we are
2 affected by what happens in the arbitration
3 and we have the right to intervene. You said
4 no. You're trying to modify that now by
5 saying well, those parts of the statute that
6 require us to look beyond the immediate folks
7 which have public immediate necessity, you're
8 not going to let them go to arbitration. You
9 should also do the same thing if you do it for
10 public interest which means that your railroad
11 consolidations can't go to arbitration,
12 through routes and joint rates can't go to
13 arbitration, terminal access can't be.
14 Reciprocal switching can't be because all of
15 those statutes require you to look at the
16 public interest. And if you have arbitration,
17 you only look at the interest of the
18 arbitrators. You have held that and nobody
19 has used it for 15 years.

20 I didn't go into this in my
21 prepared statement. It was when two of you
22 Board members mentioned, you wanted to know

1 why arbitration hasn't been tried in 15 years.
2 Well, one of the reasons, the main reason is
3 is because there are interests at stake beyond
4 the two parties in the arbitration and by your
5 intervention rules on top of that you're not
6 going to get a complete record. You're going
7 to be like the situation was before the
8 Interstate Commerce Act was passed in 1887.
9 All the parties aren't before the Commission -
10 - the Board.

11 We had the Cooley Award
12 arbitration, 1984, in the North Atlantic Port
13 differentials. Cooley later became head of
14 the ICC. We have the Volger board,
15 arbitration boards. We had all sorts of
16 arbitration boards. And had you put in your
17 proposed comments tell me why arbitration
18 doesn't work, some of us could have given you
19 a brief on that score, gone to the library and
20 giving the history of arbitration and why it
21 does not and will not work. Thank you. I'll
22 answer any questions.

1 CHAIRMAN ELLIOTT: Thank you, Mr.
2 MacDougall. Now we'll have some questions.
3 Commissioner?

4 MEMBER BEGEMAN: Thank you. Ms.
5 Rinn, are you able to tell us any more about
6 the current arbitration process that you're
7 going through -- did you say it was through
8 the Board's process?

9 MS. RINN: Yes.

10 MEMBER BEGEMAN: Has it just
11 recently started?

12 MS. RINN: It was, I believe it is
13 Docket NOR 42135, Denver and Rock Island v.
14 Union Pacific, and of course, because the
15 procedures are confidential. I can't get into
16 detail. But clearly, it's a small railroad
17 invoking our agreement under the Railroad
18 Industry Agreement to arbitrate using the STB
19 procedures. So it is subject to that and let
20 us just say that we are still trying to see if
21 we can reach agreement on an arbitrator.

22 MEMBER BEGEMAN: Could I hear your

1 comments, whomever would like to offer them,
2 on the concept of opting-in versus opting-out?
3 Now I recognize you all, at least the three of
4 you, have certainly touched on it in some
5 aspect, but I'm sensing you need fairness,
6 which I believe we definitely want to provide
7 and it needs to be voluntary for all parties,
8 on both sides.

9 Would an opt-in provision, sort of
10 just switching the opt-out, such as an annual
11 opting-in, be sufficient or does it have to be
12 on a case-by-case basis?

13 MR. SCHEIB: Well, of course, the
14 current system is on a case-by-case basis. If
15 the Board wanted to modify that, Norfolk
16 Southern's position would be that an opt-in
17 process would at least meet the requirements
18 of the ADRA. It would be an agreement in
19 writing, sets the scope of what's arbitrable
20 and sets limits on what's arbitrable. That is
21 very different from an opt-out process where
22 in the absence of arriving, we're deemed to be

1 in the arbitration program. So from a legal
2 standpoint I think that would, at least, be
3 legal.

4 I think it would be very -- it
5 would be a different situation for us to
6 evaluate if that were the proposed rule. We
7 would see what shipper interest there was
8 based on which shippers decided to opt in.
9 We'd look at the other things that we have an
10 issue with with regard to balance and fairness
11 and we'd make a decision then whether we would
12 opt in.

13 MEMBER BEGEMAN: So the shippers
14 would have to show their cards first? Is that
15 what you're suggesting?

16 MR. SCHEIB: I would suggest that
17 we both would have to show our cards at some
18 point.

19 MS. RINN: Needless to say, I can
20 only speak for Union Pacific, but I would say
21 that there were two points that were made on
22 the Shipper Panel that struck me. And one was

1 that trust is the friend of arbitration and
2 the other one was that uncertainty is the
3 enemy of arbitration. We believe that the
4 current approach which basically drafts only
5 certain carriers and forces them to opt out is
6 the opposite of facilitating trust between
7 shippers and carriers. And it creates
8 uncertainty because you've got seven Class 1
9 railroads. I'm not sure how many Class 2
10 railroads who are in there, but we have no
11 idea out of all the tens of thousands of
12 customers we have who is then going to decide
13 basically the one-sided mechanism to get us to
14 arbitrate.

15 And this is in distinct contrast
16 to the NGFA which people are describing as an
17 opt out and I would say no, in a material
18 sense, it is not an opt out because now we
19 would have to opt out, but we opted in to
20 begin with.

21 We weren't drafted into the NGFA.
22 They provided extensive testimony of how the

1 railroads worked with NGFA members to design
2 a system that was going to be fair and
3 balanced for both. We opted in and now we
4 have the option to opt out and that is the
5 exact opposite of what you're proposing to do.
6 And the uncertainty is made worse because we
7 have tens of thousands of customers and we
8 don't know how many of them would tend to use
9 it and what we would be exposing ourselves to.
10 Under those circumstances, it becomes almost
11 intolerable pressure to choose to opt out and
12 not participate because you don't know what's
13 going on.

14 Now this is hypothetical. I have
15 not had a chance to vet it with my client yet,
16 but if what you're looking for is to develop
17 some certainty, if you're trying to develop
18 some experience so people can do it, if you
19 have an opt-in approach with other appropriate
20 measures, it may be that only a few parties on
21 each side will choose to opt in, but then you
22 may get the experience. And if you have that

1 happen, either you may have other parties more
2 willing to do the voluntary case by case, or
3 you may get other parties who decide to opt
4 in. In other words, it may break the impasse.
5 But something that basically says one party or
6 one side is going to get drafted and the other
7 one gets to choose if and when they're going
8 to play, that's not -- that's not consistent
9 with trust. That's not bilateral. That's not
10 reciprocal.

11 MR. WARCHOT: I'd just like to add
12 that it seems that while it's a valid question
13 as to whether the opt out or opt in approach
14 is more desirable or more acceptable, it
15 really turns on what the rest of the elements
16 of the arbitration program are. If there is
17 an acceptable way of determining who the
18 arbitrator is, if there's a clearly-defined
19 list of the type of issues that are covered,
20 if there is agreement or comfort on the review
21 process, that will lead parties or encourage
22 parties to try the system out. Whether or not

1 they would want to opt in or opt out -- opt in
2 is what we're really talking about here -- at
3 the early stage, is not as important as
4 encouraging somebody to try the system. If
5 people try the system and get more comfort
6 that it is transparent, it is fair, it has the
7 integrity like the NGFA system has of over 100
8 years, then you'll have potentially more
9 opportunity to use it and whether someone opts
10 in or not may not be as critical.

11 MEMBER BEGEMAN: And my last
12 question is the issue of the cap. I don't
13 know that your testimony has really touched on
14 that, at least your oral testimony. Would any
15 of you like to comment on the currently
16 proposed \$200,000 cap?

17 MS. RINN: We consider it relevant
18 in a decision as to whether we're going to be
19 participating. But we believe that it's the
20 shippers should indicate what they're willing,
21 then we would have to evaluate given what the
22 cap is, consistent as Mr. Warchot indicated

1 with all the other elements because there are
2 a lot of moving pieces here, about whether the
3 cap is too high for us to do it on anything
4 other than say a case-by-case basis because if
5 it's an individual case, you're going to have
6 an idea of what the value is. But he would
7 not rule out participating in STB arbitration
8 if the cap were lifted from \$200,000 to say
9 \$500,000, but we would have to evaluate it in
10 the context of all the other circumstances.

11 I would suggest that you may want
12 to get clarity that there may need to be a
13 limit on the overall cap because, for example,
14 the distinction between event versus dispute,
15 if you have a demurrage dispute that involves
16 a lot of cars, the individual events may not
17 be much, but if you've got enough cars, it may
18 get to be enough. And therefore, it may need
19 to be some type of a hybrid of occurrence or
20 event or dispute approach.

21 MR. WARCHOT: Well, the parties
22 can certainly agree on a higher limit if they

1 would want to, but the AAR's position would be
2 to start slowly, as you heard in the first
3 panel, and see and get experience, assuming
4 there was as Ms. Rinn said, a general comfort
5 with the rest of the terms that that number
6 would be where we think the process should
7 start.

8 MR. SCHEIB: Certainly there would
9 be a number of factors in deciding whether or
10 not to participate and the cap is one of them.
11 The higher the cap, the more important a
12 factor it becomes. In my view, starting at a
13 lower level, letting people develop trust in
14 the process is the right approach.

15 VICE CHAIRMAN MULVEY: Thank you.
16 I think both panels had some excellent ideas.
17 I think this really shows the value of these
18 kinds of hearings. We've gotten a lot of
19 input on our proposed suggestions of how to
20 improve it.

21 It does strike me that to some
22 extent "opt-out-opt-in" is really a default

1 model and I was wondering if the Board sort of
2 went to an opt-in approach instead of an opt-
3 out approach, we could see whether or not if
4 none of the railroads chose to opt in,
5 effectively they would all be opting out. So
6 I think a test case of going to an opt-in
7 approach and then seeing what happens. This
8 might be a way of proceeding so that you could
9 see whether or not the railroads are
10 interested in this arbitration program -- a
11 changed STB arbitration program.

12 It is true as Mr. MacDougall
13 pointed out, we've had this arbitration
14 program in place now since 1997, 15 years, and
15 I believe now we have the first time it's
16 actually being tried with a lot of difficulty
17 in finding an arbitrator.

18 My first question is to Ms. Rinn.
19 I appreciate your comments on the current list
20 of arbitrators, but how can we develop a
21 bigger pool given the concerns about
22 neutrality? I mean, after all, people get

1 their expertise on these issues either working
2 with railroads or working with shippers.

3 It strikes me that we're really
4 limiting ourselves to former government
5 people, say former FRA people or even former
6 Board people or for that matter, academics who
7 have never been asked to testify and that's
8 probably a small number if you're also looking
9 for expertise.

10 So how would you go about it?
11 Where do you think we could look for
12 arbitrators with knowledge because one of the
13 problems, as they said in Canada, is you have
14 people who are knowledgeable about
15 arbitrating, but don't necessarily have a
16 background in railroading?

17 Do you have any suggestions as to
18 where we might look?

19 MS. RINN: I do recognize that is
20 a tension to my mind, that tends to be a
21 factor that mitigates towards perhaps
22 considering three member arbitration panels.

1 Now I will say that my experience in
2 arbitration has always been with three-member
3 panels, that I think that if you have three
4 members with each of the parties selecting
5 somebody who they believe is knowledgeable and
6 can explain it, you're willing to accept less
7 familiarity with the particular context of
8 that dispute because you figure that both
9 sides will have an opportunity to educate the
10 neutral member beyond what you can do in the
11 pleadings. I think that, for example, this
12 very hearing, hearing what shipper panel
13 members had to say and now hearing what
14 railroad members, there has been a growth of
15 learning, I think, on both sides and I suspect
16 the same thing happens with the three-member
17 panel.

18 Now I also recognize that three
19 members raises the costs and that is a
20 concern, particularly to the shipper side.

21 I believe that perhaps that you
22 would want to approach either programs that

1 teach arbitration or conversely go to programs
2 of academics or others who may have a
3 background in transportation and encourage
4 them, perhaps, to get arbitration training as
5 a way of developing a pool. Again, you have
6 a chicken and egg problem here because why are
7 they going to go to the time and perhaps the
8 trouble unless they're sure there's a demand.
9 And how is there going to be a demand, unless
10 you're sure you've got qualified arbitrators.
11 This is not an easy nut to crack.

12 VICE CHAIRMAN MULVEY: Gordon, in
13 your testimony, you propose that the Board
14 return to ALJs, Administrative Law Judges, and
15 abandon its arbitration program altogether.
16 But wouldn't using qualified subject matter
17 expert arbitrators on an as-needed basis serve
18 the same purpose as having ALJs and be more
19 cost effective?

20 MR. MacDOUGALL: I don't think so.
21 ALJs are independent. They work for the
22 government. They have 20 or more years'

1 experience. What you're saying is is it
2 better to substitute your staff people that
3 retire and appoint them as the arbitrators.
4 I think it's better not to have former staff
5 people and named arbitrators as opposed to
6 active ALJs.

7 And while I have the floor
8 momentarily, I am saying that I have looked
9 into that Colorado -- the first one using the
10 arbitration program. It's actually the
11 second. The first one was out in Oregon which
12 I described didn't get anywhere and they're
13 asking for trackage rights, terminal rights.
14 Those things have mandatory employee-
15 protective conditions. You can't send that
16 out to arbitration. You can't -- I mean
17 whatever is going to happen, if it does get
18 resolved, it's going to affect employee
19 opportunities and mandatory employee-protected
20 conditions.

21 In fact, my understanding is the
22 Union Pacific has raised that as one of the

1 possible relief trackage rights because
2 trackage rights has employee-protective
3 conditions. And so you're into something
4 which has a history of not working and I think
5 the ALJ approach is the best thing.

6 Now the reason the staff doesn't
7 like the ALJs is because you, members,
8 approach somebody with 20 or 40 years'
9 experience, ask little questions, not part of
10 what they're working on. You ask them because
11 they're experts rather than kids just out of
12 law school coming down here to be your staff
13 people. And the staff doesn't like that.
14 They resent that. But you're going to have to
15 be strong and realize that some of these ALJs
16 which are under your control are far better
17 than your staff people to answer your
18 question.

19 VICE CHAIRMAN MULVEY: Thank you.
20 Although I must say that an awful lot of our
21 staff people are not people fresh out of law
22 school. As Mr. Buttrey used to say that two

1 thirds of our staff are MRTs, May Retire
2 Tomorrow, so we do have a lot of people with
3 a long history of expertise.

4 Mr. Warchot, I have a question for
5 you. I wish that BN were here because they
6 may have more experience with this, but
7 perhaps you know that based upon the
8 experience with arbitrating cases in Montana,
9 do you have any idea or can the AAR working
10 with the BN provide some estimate as to the
11 cost differential of arbitrating a dispute
12 versus defending a formal action at the Board
13 or in the courts?

14 MR. WARCHOT: I'll take this back
15 to BN. I do not have that information.

16 VICE CHAIRMAN MULVEY: I just
17 wondered if maybe they would have it
18 available, just so we can get a sense as to
19 what kinds of savings would be available to us
20 here.

21 One of the issues that's been
22 raised by the AAR and by the railroads is the

1 fact that there's sort of an open-ended list
2 of the number of disputes that could be
3 brought under arbitration, that it wasn't a
4 finite number. Would making the list more
5 definite and more limited specifically saying
6 what could be arbitrated versus a more general
7 statement about some of the issues that could
8 be arbitrated as it is right now, would that
9 combined with strengthening our processes for
10 selecting arbitrators and perhaps even looking
11 at opt in versus opt-out, would all of that be
12 important in determining whether or not the
13 railroads as a group would, in fact, opt in to
14 this program?

15 John or Lou or Louise?

16 MR. SCHEIB: Thank you, Vice
17 Chairman. As I was saying when I answered
18 Commissioner Begeman's questions, there are a
19 host of factors that would go into a decision
20 whether to participate in an arbitration
21 program. She specifically asked about the
22 cap. Certainly, the uncertainty of what

1 issues are covered by this language that uses
2 the word "including", clarity there would
3 help, but also we still have the issues
4 related to the arbitrators. We still have the
5 issues related to whether the arbitrator is
6 bound by the statute and agency precedent and
7 those other factors that I listed.

8 VICE CHAIRMAN MULVEY: Louise.

9 MS. RINN: Again, subject to the
10 caveat, there are a lot of moving pieces.
11 Yes, we believe clarity, in reducing the range
12 and the type of disputes, we think, could help
13 encourage participation.

14 VICE CHAIRMAN MULVEY: It's also
15 the issue, of course, of whether countersuits
16 or whether the railroads could bring issues to
17 arbitration where they were the initiator,
18 they were the complainant, for example,
19 demurrage. If the railroads felt that they
20 were not being paid demurrage by a shipper,
21 they could bring a case to arbitration?

22 MS. RINN: It seems to me to be a

1 false economy to deal with part of a dispute
2 and still leave some of it unresolved and the
3 possibility of bringing counter claims so that
4 you've got the full ball of wax, as it were,
5 makes a great deal of sense, whether it is the
6 railroad who initiates the arbitration or the
7 shipper who initiates the arbitration.

8 VICE CHAIRMAN MULVEY: I suppose
9 the question eventually centers around whether
10 or not then if you made the changes that the
11 railroads are suggesting whether or not the
12 shipping community would be supportive of
13 these changes or not. Thank you.

14 Lou, did you have a response to
15 that?

16 MR. WARCHOT: I would just on that
17 last point, thank you, Vice Chairman. In
18 terms of narrowing the scope, that is
19 obviously critical, but I think that as Ms.
20 Rinn had said before that this is a learning
21 experience or an opportunity for sharing
22 ideas. Union Pacific in their comments

1 suggests that a narrowing of scope and the
2 League in their comments picked up on some of
3 those suggestions. So that type of narrowing
4 of scope, I think, would go a long way toward
5 addressing that issue.

6 VICE CHAIRMAN MULVEY: I must say
7 I did hear an awful lot of give on these
8 issues and there was recognition of the other
9 side's position and so it does look as though
10 it is possible to do something, so I was very
11 pleased with the results of this hearing.
12 Thank you.

13 CHAIRMAN ELLIOTT: Just to follow
14 up on Vice Chairman's question, I recall, and
15 I think I mentioned it in my questions before
16 in Panel I, that NITL was okay and it seemed
17 like the whole entire panel was okay when
18 you're picking the specific issues to take out
19 that last catch-all phrase "service matters."
20 So would that narrow world of issues be
21 satisfactory for the railroads in order to opt
22 in to an arbitration program?

1 MR. SCHEIB: Sorry, Mr. Chairman,
2 just to make sure I understand your question,
3 we're talking specifically about 1108.1(b) and
4 the list of issues that are there --

5 CHAIRMAN ELLIOTT: Correct.

6 MR. SCHEIB: Excluding the word
7 "including" and excluding the word -- or the
8 language about other service-related matters.

9 CHAIRMAN ELLIOTT: Correct.

10 MR. SCHEIB: Certainly that would
11 provide clarity as to what's covered by the
12 arbitration process. Again, this is only one
13 of the factors that we've raised that would go
14 into a determination of whether we would opt
15 in to a process.

16 CHAIRMAN ELLIOTT: And would the
17 railroads feel comfortable with the list
18 stated that way as you just mentioned?

19 MR. WARCHOT: Mr. Chairman, may I
20 address that? I think --

21 CHAIRMAN ELLIOTT: Sure.

22 MR. WARCHOT: What I was speaking

1 to was if we go back to the Union Pacific
2 proposal and a response in the League's
3 comments, in their comments, I believe it was
4 on page 19 of their reply comments, they state
5 that "the arbitration program eligible matters
6 involve" -- so they take out "include" and put
7 in "involve." I'm not reading it verbatim
8 here. But disputes involving demurrage
9 charges as applied by a party, disputes
10 involving assessorial charges as applied to a
11 particular party, disputes involving the
12 misrouting or mishandling of rail cars for a
13 particular party and disputes involving a
14 carrier's misapplication or reasonableness of
15 its published rules or practices as applied in
16 specific circumstances.

17 I think the AAR is okay with those
18 if that is a League proposal with one
19 important caveat and that is we do not believe
20 that the words "or reasonableness" should be
21 in there because as our comments indicated, we
22 believe that the Board's arbitration procedure

1 should be factual oriented and not go toward
2 determining the reasonableness or the legality
3 of any particular issue.

4 And the NGFA rules are the same
5 when you look at those. Those are limited to
6 the application of practices, the application
7 of rules, not anything relating to the
8 reasonableness or legality of the rules
9 themselves.

10 CHAIRMAN ELLIOTT: I think that's
11 where we were kind of trying to go with the
12 whole process ourselves. We weren't trying to
13 get into new legal issues and have arbitrators
14 decide those. I think that's our job.

15 The next question, with respect to
16 the roster of arbitrators, Ms. Rinn mentioned
17 her frustration with finding arbitrators and
18 I would think that there are arbitrators out
19 there with this expertise. Do you have
20 experience with arbitrators pursuant to your
21 private contracts? I assume there are
22 arbitration provisions within certain

1 contracts that you use. And if so, how do you
2 find those arbitrators?

3 MS. RINN: Our experience has been
4 primarily with transportation service
5 contracts. And in that case, basically, you're
6 looking at contract law principles, so you're
7 looking for a lawyer who you think understands
8 contract law. And if they've got some
9 familiarity with railroads and how they
10 operate or utilities and how they operate or
11 whatever the customer might be, then that
12 provides the context.

13 So it's kind of like you begin
14 with the nature of the dispute and then you
15 start thinking about well, who do I know who
16 would be qualified to look at that?

17 Here, you're talking really about
18 a kind of a different set of bodies of
19 disputes and I guess I haven't started looking
20 at it from that perspective, but I think
21 certainly the more you limit the range, the
22 easier it's going to be to try to come up with

1 people who are qualified rather than if you
2 expand the range of subject matters that are
3 just subject to arbitration.

4 MR. SCHEIB: As I sit here, I
5 cannot think of an example where we've had to
6 arbitrate an issue. Most of those issues get
7 worked out through the commercial process.

8 CHAIRMAN ELLIOTT: Thank you.

9 MR. WARCHOT: I want to add one
10 other point, too, please, is that the AAR
11 standpoint, there is not necessarily any one
12 right way to put together the arbitration --
13 arbitrator selection process. The single
14 arbitrator approach we've discussed, the
15 association has no objection to three
16 arbitrators if we can work out the budget and
17 the other issues involved. And the final
18 offer arbitration approach that we suggest
19 that again, as an alternative for
20 consideration, was trying to address the fact
21 that there may not be an identifiable pool in
22 pushing it back on the parties to try to reach

1 agreement on it, just as an option.

2 CHAIRMAN ELLIOTT: And in your
3 final offer proposal, would that -- would the
4 arbitrators that you suggest come from our
5 list or would they just be from the parties'
6 own knowledge and background?

7 MR. WARCHOT: They would not
8 necessarily come from the roster.

9 CHAIRMAN ELLIOTT: Okay.

10 MR. WARCHOT: The concept would be
11 that the parties would hopefully agree on an
12 individual. If they could not, then both
13 parties would submit their choice to the Board
14 with the reasons that they felt that their
15 arbitrator should be chosen or the others
16 should be disqualified. And the Board would
17 decide, based upon criteria of neutrality,
18 impartiality, qualifications, which one should
19 be chosen and the Board, under our proposal,
20 would also have the option of saying these are
21 both terrible, go back to the drawing board
22 and start over.

1 CHAIRMAN ELLIOTT: I guess that
2 would eliminate some of the concerns about the
3 overall roster which would be helpful,
4 apparently.

5 MR. WARCHOT: Let me emphasize
6 this was an alternative to suggest.

7 CHAIRMAN ELLIOTT: I understand.
8 If we didn't adopt that alternative, and we
9 somehow came up with a good list of
10 arbitrators, would you be comfortable with the
11 strike method that was proposed?

12 MR. WARCHOT: I think with the
13 right list of arbitrators, we have not -- we
14 don't have an issue with that, I don't
15 believe. I need to take that back to confirm
16 that.

17 CHAIRMAN ELLIOTT: Okay. With
18 respect to your issues on counter claims and
19 affirmative defenses, I don't really see a
20 huge issue with that. Included in that is
21 your -- if you had -- if you were going to opt
22 in, would you also want the ability to bring

1 a complaint under these, I guess, four
2 categories or five categories?

3 MR. SCHEIB: I think if you go
4 back to the core principles I mentioned in my
5 opening about balance and fairness that in
6 order for us to opt in that would have to be
7 a component. It strikes us that otherwise,
8 it's a one-way street where we're wearing the
9 target on our back and that doesn't strike me
10 as a process that's going to get us to yes, as
11 Mr. Whiteside described.

12 MS. RINN: I would agree with Mr.
13 Scheib. I don't know that we would
14 necessarily use it, but I think that if we're
15 in mediation or if we are in discussions where
16 we are trying to resolve it commercially, the
17 fact that if you're in a situation where one
18 side has that as an alternative, and the other
19 one does not, does not help achieve
20 resolution. If, in fact, it is an opportunity
21 that either side can exercise, I think that
22 can only be conducive to either getting it

1 resolved by agreement or by allowing the
2 parties to get it into our arbitration as
3 opposed to say a more expensive, longer
4 proceeding.

5 CHAIRMAN ELLIOTT: Just coming
6 back to one of the questions I asked the prior
7 panel, I think I recall that you're
8 comfortable with published decisions, but I
9 just wanted to make sure that's correct.

10 MR. WARCHOT: Yes, we are
11 comfortable with publication of a summary of
12 the decision, not the entire decision, but
13 yes, we are.

14 CHAIRMAN ELLIOTT: Great. And
15 then there was one issue that I think NITL
16 proposed that was apparently in the NGFA issue
17 list. It was disputes arising under receipts
18 or bills of lading. Would you be comfortable
19 with that proposal that NITL made?

20 MS. RINN: Union Pacific is
21 already on record as opposing that. As we
22 explained, we really don't have many disputes.

1 Where we do have disputes it involves a matter
2 of law and in that case, basically getting a
3 summary judgment resolution allows us to not
4 only resolve that dispute, but basically avoid
5 a whole future generation of disputes. And
6 therefore forcing those into arbitration
7 would, in fact, we think long term be counter
8 productive.

9 While we have agreed and the NGFA
10 does include freight claims, I'll point out
11 the last time we, in fact, had an NGFA
12 arbitration involving Union Pacific involving
13 a freight claim was in 2005.

14 CHAIRMAN ELLIOTT: Thank you.
15 That's very helpful.

16 MR. SCHEIB: Actually, I'm glad
17 you asked that question, Mr. Chairman, and
18 I'll amend my prior answer. I can't think of
19 one arbitration we're involved in. My
20 understanding is we're involved in one at the
21 NGFA now regarding a freight loss issue. Like
22 Union Pacific, we would oppose adding that to

1 the list of arbitrable issues and frankly,
2 we'll see how it plays out at the NGFA, but
3 that is a field that is highly specialized and
4 finding folks who are expert in the area and
5 in the law there are, I think would be another
6 hurdle.

7 CHAIRMAN ELLIOTT: Final question
8 that I have, I've asked a number of questions
9 about some of your concerns. Obviously, the
10 opt out versus opt in is a large concern and
11 we certainly didn't mean to engender any
12 distrust by putting that out there. We were
13 just trying to look for something that was
14 manageable, and so if we went to the opt-in
15 proposal and we cleaned up the roster or used
16 the final best offer and took some of these
17 other major concerns that you had into
18 consideration, at that point would the
19 railroads be willing to opt in?

20 MS. RINN: We would seriously look
21 at all of the considerations. As I said,
22 there are many, many moving pieces. But we're

1 not going to rule that out and categorically
2 say we won't. We just have to look at what
3 all of the pieces would be.

4 And I want to make one other
5 observation. I found it interesting that a
6 reason given for why opt in would not work and
7 it ought to be opt out was the number of
8 shippers. But as I recall, the shipper panel
9 indicated that NGFA has 1,000 members versus
10 7 Class 1 railroads and yet from our
11 perspective that's an opt-in model. You opt
12 in and then you can opt out.

13 MR. SCHEIB: Like Union Pacific,
14 we would evaluate the totality of the
15 proposal.

16 MR. WARCHOT: And I'd like to go
17 back to what I said earlier that as far as the
18 AAR is concerned, while obviously it will
19 depend upon what the final package and each
20 railroad would have to look at individual, our
21 position again is that you may not need to go
22 so far as an opt-in proposal. If the package

1 works and cases will be brought and handled on
2 an individual basis and the extra layer of
3 work required for an opt-in proposal may not
4 be necessary.

5 CHAIRMAN ELLIOTT: Thank you.

6 Thank you very much for appearing here today.
7 We really appreciate your testimony. And I
8 think this has been a very successful hearing,
9 just hearing what each side has to say about
10 the pluses and minuses of this process and we
11 really do appreciate it.

12 So thank you very much and the
13 hearing is now adjourned.

14 (Whereupon, the above-entitled
15 matter went off the record at 12:09 p.m.)

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AAA 122:12	action 10:8 82:7 146:12	ADR 44:13,14 45:1 45:2,12 49:5	agreeing 60:19	America 1:1 27:11
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C E R T I F I C A T E

This is to certify that the foregoing transcript

In the matter of: Assessment of Mediation
and Arbitration Procedures

Before: Surface Transportation Board

Date: 08-02-12

Place: Washington, DC

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Win-Win Approaches To Mediations

Comments Presented to
The Surface Transportation Board
Ex Parte 699
Assessment of Mediation and Arbitration Procedures

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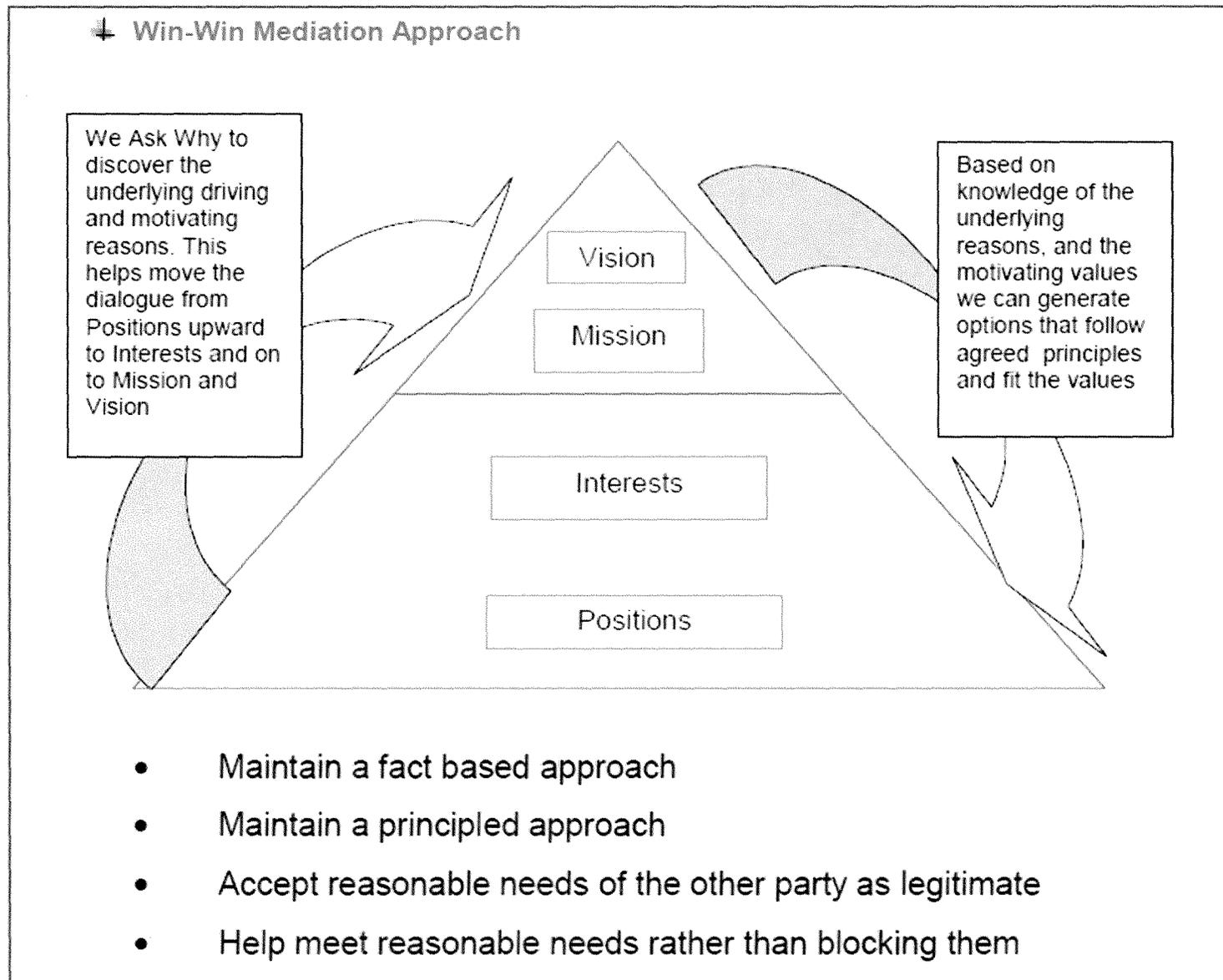
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Summary

- We have had positive experience with STB mediations in several Small Shipment Rate Cases as well as in other applications.
- The mediator has a key role in working with the parties and facilitating solutions. The mediator can help channel and focus the energy
- Decide on strategy:
 - Power-based bargaining with adversaries or
 - Principle and fact-based negotiating with partners
- Approach:
 - Identify Underlying Interests.
 - Agree on Guiding Principles
 - Generate and Evaluate Alternatives.
 - Develop the most promising
- Some of the techniques can appear counter intuitive but they are proven in application. The following charts outline the approach and the accompanying “White Paper” develops it.



↓ **Comparison of Position-Based and Interest-Based Approaches**

<u>Approach:</u>	<u>Position Based</u>	<u>Interest Based</u>
<u>Goal:</u>	Victory over adversary	Problem-solving solution
<u>Techniques:</u>	Extract Concessions Discard relationship if that appears expedient Make threats, offers, counter-offers Focus only on bottom line Strive for one-sided gains Search for a single answer Insist on positions Try to win a contest of wills Apply sufficient pressure to force a win	Attack the problem Support the people Explore mutual interests Include all aspects that help build a solution Develop options for mutual gain Develop and Choose from multiple options Insist on objective criteria Apply mutually agreed principles Follow principles applied to facts
<u>Level of Trust:</u>	Generally Absent	Unnecessary

Source: Adapted from work by Fisher and Ury; Harvard Negotiation Project

Conclusion

- We have had positive experience with STB mediations in several Small Shipment Rate Cases as well as in other applications.
- The mediator has a key role in working with the parties and facilitating solutions. The mediator can help channel and focus the energy
- Decide on strategy:
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↓ About The Tom O'Connor Group

The Tom O'Connor Group assists clients by providing regulatory and litigation support and by offering management consulting services. The firm's regulatory and litigation support activities involve the development, preparation and presentation of expert witness testimony before courts and regulatory agencies. Members of the firm have participated in dozens of proceedings before state commissions and Federal commissions that regulate the transportation industries in both the U.S. and Canada. The Members of the firm have provided litigation support in the form of expert witness or economic research services in antitrust, merger, divestiture, rate and other cases before Federal and state courts.

In the area of management consulting, we assist both government and private clients in developing management information systems, evaluating contract performance and conducting management audits.

The Tom O'Connor Group specializes in the analysis of the operations, costs, revenues and services of enterprises, both public and private, involved in all modes of surface transportation. We have developed an array of transportation and logistics related negotiation planning and financial and management tools, including detailed models for negotiations, litigation, cost allocation, accounting, traffic flow, and carrier operations. These tools have been successfully employed on behalf of clients in well over 500 projects, including merger proceedings, contract negotiations, strategic planning and operational analyses. Our transportation practice extends beyond the U.S. borders throughout North America and into Eastern Europe.

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Aug. 2, 2012

Win-Win Approaches to Mediations
The Tom O'Connor Group, LLC

Selected Prior Testimony Related to Issues Addressed in Ex Parte 699

- **Testimony on STB Rate Guidelines in Small Shipment Cases.** Verified statement was submitted to Surface Transportation Board (STB) on behalf of SK clients in STB Ex Parte 646 in June 2004.
- **Oral Testimony on STB Rate Guidelines in Small Shipment Cases.** Oral Testimony was presented to the full Surface Transportation Board on behalf of SK clients in STB Ex Parte 646 in July 2004.
- **Testimony on STB Stand Alone Costs focusing on alternatives.** Comments submitted to Surface Transportation Board (STB) on behalf of SK in STB Ex Parte 657 in April 2005.
- **Oral Testimony on STB Stand Alone Costs focusing on alternatives.** Presented to Surface Transportation Board (STB) on behalf of SK in STB Ex Parte 657 in April 2005.
- **Oral and Written Testimony on the first ever STB Small Shipment Rate Case.** Comments submitted to Surface Transportation Board (STB) on behalf of BP Amoco in STB Docket NOR 42093 in May-June 2005. The case was resolved successfully through mediation.
- **Oral and Written Testimony on Rail Fuel Surcharges.** Comments were submitted to the Surface Transportation Board (STB) in April 2006 and oral testimony was presented the STB in May 2006 on behalf the American Chemistry Council. The testimony was submitted in STB Ex Parte 661. The issue is under adjudication.
- **Oral and Written Testimony on a second STB Small Shipment Rate Case.** Comments submitted to Surface Transportation Board (STB) on behalf of Williams, Olefins, LLP in STB Docket NOR 42098 in 2006-2007. The case was resolved successfully through mediation.
- **Oral and Written Testimony on a third STB Small Shipment Rate Case.** Comments submitted to Surface Transportation Board (STB) on behalf of US Magnesium in STB Docket NOR 42014 in 2009. The case was decided by the STB in favor of US Magnesium and subsequently affirmed by the Court. In 2010, two additional medium shipment cases were resolved successfully through mediation prior to filing evidence.