

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. EP 699

ASSESSMENT OF MEDIATION AND ARBITRATION PROCEDURES

Digest:<sup>1</sup> The Surface Transportation Board (Board), after seeking input regarding measures it might implement to increase the use of mediation and arbitration to resolve matters before the Board, now proposes to modify its rules to require parties to mediate certain matters and proposes to clarify and simplify its existing rules for voluntary mediation. The Board also proposes an arbitration program under which shippers and carriers may voluntarily agree to arbitrate certain types of routine disputes that come before the Board and proposes to clarify and simplify its existing arbitration rules. The Board seeks comments on these proposals.

Decided: March 28, 2012

AGENCY: Surface Transportation Board.

ACTION: Notice of Proposed Rulemaking.

SUMMARY: The Surface Transportation Board (Board or STB) proposes regulations that would require parties to participate in mediation in certain types of cases and would modify its existing regulations that permit parties to engage voluntarily in mediation. The Board also proposes an arbitration program under which carriers and shippers would agree voluntarily to arbitrate certain types of disputes that come before the Board, and proposes modifications to clarify and simplify its existing rules governing the use of arbitration in other disputes. The Board seeks comments regarding these proposed rules.

DATES: Comments are due by May 17, 2012. Replies are due by June 18, 2012.

ADDRESSES: Comments on this proposal may be submitted either via the Board's e-filing format or in the traditional paper format. Any person using e-filing should attach a document and otherwise comply with the instructions at the E-FILING link on the Board's website, at <http://www.stb.dot.gov>. Any person submitting a filing in the traditional paper format should

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<sup>1</sup> The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. Policy Statement on Plain Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

send an original and 10 copies to: Surface Transportation Board, Attn: Docket No. EP 702, 395 E Street, S.W., Washington, DC 20423-0001. Copies of written comments will be available for viewing and self-copying at the Board's Public Docket Room, Room 131, and will be posted to the Board's website. Information or questions regarding this proposed rule should reference Docket No. EP 699 and be in writing addressed to: Chief, Section of Administration, Office of Proceedings, Surface Transportation Board, 395 E Street, S.W., Washington, DC 20423-0001.

FOR FURTHER INFORMATION CONTACT: Amy C. Ziehm at 202-245-0391. [Assistance for the hearing impaired is available through the Federal Information Relay Service (FIRS) at 1-800-877-8339.]

SUPPLEMENTARY INFORMATION: The Board favors the resolution of disputes through the use of mediation and arbitration procedures, in lieu of formal Board proceedings, wherever possible.<sup>2</sup> To that end, the Board has existing rules that encourage parties to agree voluntarily to mediate or arbitrate certain matters subject to its jurisdiction. The Board's mediation rules are set forth at 49 C.F.R. §§ 1109.1, 1109.3, 1109.4, 1111.2, 1111.9, and 1111.10. Its arbitration rules are set forth at 49 C.F.R. §§ 1108, 1109.1, 1109.2, 1109.3, and 1115.8. In a decision served on August 20, 2010,<sup>3</sup> and published in the Federal Register on August 24, 2010,<sup>4</sup> the Board sought input regarding measures it might implement to encourage or require greater use of mediation, and to encourage greater voluntary use of arbitration, including making changes to the Board's existing rules and establishing new rules. The Board also sought input regarding possible changes to its rules to permit the use of Board-facilitated mediation procedures without the filing of a formal complaint. The Board served a subsequent notice in this matter on December 3, 2010,<sup>5</sup> to clarify that any comments filed by the Railroad-Shipper Transportation Advisory Council (RSTAC) would be accorded the same weight as other comments in developing any new rules.<sup>6</sup> The modifications to the Board's rules proposed in this decision are

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<sup>2</sup> Mediation is a process in which parties attempt to negotiate an agreement that resolves some or all of the issues in dispute, with the assistance of a trained, neutral, third-party mediator. Arbitration, by comparison, is an informal evidentiary process conducted by a trained, neutral, third-party arbitrator with expertise in the subject matter of the dispute. By agreeing to participate in arbitration, the parties agree to be bound (with limited appeal rights) by the arbitral decision.

<sup>3</sup> Assessment of Mediation and Arbitration Procedures, EP 699 (STB served Aug. 20, 2010).

<sup>4</sup> Assessment of Mediation and Arbitration Procedures, 75 Fed. Reg. 52,054.

<sup>5</sup> Id., EP 699 (STB served Dec. 3, 2010).

<sup>6</sup> RSTAC is an advisory board established by Federal law to advise the U.S. Congress, the U.S. Department of Transportation, and the Board on issues related to rail transportation policy, with particular attention to issues of importance to small shippers and small railroads. By statute, RSTAC members are appointed by the Board's chairman. Representatives of large and small rail customers, Class I railroads, and small railroads sit on RSTAC. The Board's members

(continued . . . )

intended to increase the use of mediation and arbitration in lieu of formal adjudication to resolve disputes before the Board.

The proposed changes to the existing mediation rules would establish procedures under which the Board could compel mediation in certain types of adjudications before the Board, on a case-specific basis, as well as to grant mediation requests of parties to disputes.<sup>7</sup> As is the current practice, the Board would assign staff from its Rail Customer and Public Assistance (RCPA) program, who are trained mediators, to conduct the mediation process. Mediation periods would last up to 30 days, and could be extended upon the mutual request of the parties. The Board would reserve the right to stay underlying proceedings and toll any applicable statutory deadlines. The Board believes that the proposed mediation rules would be in the public interest. If a dispute is amicably resolved, the parties could do so at considerably less expense and in less time than if they used the Board's formal adjudicatory process, and could better preserve their ongoing commercial relationship.

The proposed changes to the Board's arbitration rules are intended to consolidate the separate arbitration procedures in Parts 1108 and 1109, to encourage greater use of arbitration to resolve disputes before the Board by simplifying the process, and by clarifying the types of disputes that may be submitted for arbitration.<sup>8</sup> Moreover, the Board proposes establishing an "arbitration program" to cover a subset of arbitrable disputes, in which rail carriers may voluntarily participate. The Board believes that the proposed arbitration program would provide value to both carriers and shippers, because disputes can be resolved through arbitration in a more timely and less adversarial fashion than through the Board's formal adjudicatory processes, and arbitration could help the parties to preserve their commercial relationship. It likewise would allow carriers more flexibility in resolving customer-specific disputes because resolution would be confidential and nonprecedential, unless the arbitrator's decision is appealed.

Under the arbitration program, rail carriers would agree, in advance, to submit to binding arbitration certain defined types of disputes, such as complaints related to demurrage and accessorial charges, or the misrouting or mishandling of rail cars, where the complainant seeks monetary damages for past harm, not for injunctive or prospective relief. The Board also proposes to limit the relief that an arbitrator could award to no more than \$200,000, plus interest. Commenters are invited to suggest a different dollar cap that they believe would better capture the majority of such disputes that would be best resolved through arbitration. Arbitration under the arbitration program would be mandatory for the carrier either where the dispute involves only carriers that are participants in the Board's arbitration program, or where the dispute involves at

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( . . . continued)

and the U.S. Secretary of Transportation are ex officio, nonvoting RSTAC members. (49 U.S.C. § 726.)

<sup>7</sup> The Board's authority to revise its mediation rules exists under 49 U.S.C. § 721(a) and under the Alternative Dispute Resolution Act, 5 U.S.C. §§ 571-584.

<sup>8</sup> The Board has authority to revise its arbitration rules under 49 U.S.C. § 721(a).

least one carrier-participant and all other parties to the dispute consent to arbitration pursuant to the arbitration program.

In addition, the proposed rules provide for arbitration of most other types of adjudicatory disputes before the Board where all parties agree, on a case-by-case basis, to participate in binding arbitration. In all arbitrations, the Board would assign an arbitrator from a roster of eligible arbitrators, or could grant a mutual request from the parties to use a particular arbitrator, whether listed on the roster or not.

The proposed mediation and arbitration rules would not be available, however, to resolve any matter in which the Board is statutorily required to determine the public convenience and necessity (PCN). Thus, these procedures would not be available to obtain the grant, denial, stay or revocation of any license, authorization (e.g., construction, abandonment, purchase, trackage rights, merger, pooling) or exemption related to these matters. Should participants in such matters, however, reach a voluntary agreement resolving certain issues pertaining to a license or authorization proceeding, the Board would give due consideration to that resolution in weighing the PCN. These rules would also not be available to arbitrate a labor protection dispute, which has its own procedures; however, voluntary mediation of such disputes under the proposed rules would be available.

#### Comments of Parties

In response to our prior notices, the Board received comments from 12 parties, including railroad and shipper interests, interested individuals, and RSTAC.<sup>9</sup> The parties generally support the increased use of mediation. AAR, TAM, APFA, and NITL argue that the Board should increase its efforts to promote existing informal mediation procedures conducted under the auspices of the Board's RCPA program. APFA, NITL, and CURE also argue that the Board should make its mediation procedures available to parties, even before they have initiated proceedings before the Board, while TAM argues that the Board should implement rules governing pre-complaint mediation. TAM also suggests that the Board establish rules requiring parties to mediate a dispute even if neither party seeks mediation, while CURE advocates mediation, provided at least one party seeks mediation. Only AAR and WCTL voiced objections to expanding opportunities for the use of mediation in Board proceedings. Although AAR encourages the Board to promote its existing alternative dispute resolution procedures, it objects to any rule changes. It argues that the existing rules provide adequate opportunities for willing parties to resolve disputes without resorting to use of the Board's formal procedures. WCTL

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<sup>9</sup> The Board received comments from the Association of American Railroads (AAR), Consumers United for Rail Equity (CURE), Dave Gambrel, Gordon P. MacDougall, the National Grain and Feed Association (NGFA), the National Oilseed Processors Association (NOPA), RSTAC, Transportation Arbitration and Mediation, P.L.L.C. (TAM), the U.S. Department of Agriculture (USDA), and the Western Coal Traffic League (WCTL). The American Paper & Forest Association (APFA) and The National Industrial Transportation League (NITL) filed joint comments.

argues that additional mandatory mediation is undesirable because it could delay and increase the costs of obtaining a final outcome of an adjudicated dispute.

Support for changes to the Board's arbitration rules is more limited. AAR opposes changes to the existing rules and suggests that the limited use of arbitration by parties in Board proceedings is not "due to any deficiency in the Board's current rules . . . but may instead be due to perceived drawbacks of the binding arbitration process vis-à-vis a Board proceeding." AAR Comments 10. It argues that increased use of arbitration may discourage private settlements, that arbitrators may lack the necessary expertise to handle STB matters, and that arbitration outcomes are unpredictable. The USDA also expresses concern that arbitrators may lack necessary STB expertise. Both AAR and CURE also argue that there is no need for the Board to expand its own arbitration procedures, as many potential users of a Board arbitration mechanism already use non-Board sponsored arbitration procedures to resolve matters that could potentially be the subjects of Board-sponsored arbitration. AAR, APFA, NITL, and WCTL further suggest that arbitration does not expedite proceedings or reduce litigation costs, while CURE states that arbitration may simply add another procedural step on the path to final resolution of disputes. WCTL contends that some matters are too complex for resolution through arbitration and seeks assurance that arbitration will remain voluntary and at the election of the shipper only.

Other parties support expanding the use of arbitration in Board proceedings. RSTAC notes that "[a]rbitration has particular value in cases possessing monetary value but lacking policy significance, for example resolution of demurrage disputes." RSTAC Comments 6. RSTAC also gives, as appropriate examples, disputes related to misrouting of cars, application of a carrier's car distribution rules, and mishandling of equipment. Along with NGFA and NOPA, RSTAC advocates adoption of an arbitration program similar to one already used by NGFA and all of the Class I rail carriers to settle certain types of disputes. NGFA's arbitration program includes the following elements: (1) decisions are made by a panel of arbitrators (not a single arbitrator); (2) parties have the right not to participate in the arbitration program; (3) arbitration procedures are simple and streamlined; (4) arbitration is compulsory for some, but not all, matters; (5) arbitration fee structures are simplified, (6) arbitration rules are well defined; (7) arbitrators are unpaid; and (8) decisions must meet certain standards and are made publicly available for review. AFPA and NITL also argue for expanded use of arbitration, and suggest that parties should be able voluntarily to avail themselves of Board arbitration procedures, even where the Board lacks jurisdiction over the underlying matter.

Some parties, while not specifically opposed to expanded arbitration, raise concerns that the Board should address if it expands its use of arbitration. CURE and NGFA express concerns that arbitrators could be biased, and that any biases should be disclosed, while TAM argues that existing arbitration provisions fail adequately to protect confidential information disclosed by the parties during arbitration and that the parties should sign a protective order. The USDA argues that any arbitration under Board auspices should be conducted by a panel rather than a single arbitrator. It suggests that, while a single arbitrator may understand the rail industry, he or she may not understand the shipping industry, thereby creating a need for an additional arbitrator on the panel with shipping industry-related knowledge.

## Proposed Rules

### Mediation

Having considered the comments received, the Board proposes to revise its rules at 49 C.F.R. Part 1109 to give it authority to order mediation in certain types of adjudicatory matters (those in which the Board is not statutorily required to determine the PCN and those that do not involve labor protection) that are the subject of a dispute before the Board. The proposed rule would permit the Board to institute mediation at the mutual request of all parties to these certain matters (and to labor protection disputes), and the Board would reserve the right to order mediation even if requested by only one party to the proceeding or on its own initiative. Authority to grant voluntary mediation requests would be delegated to the Director of the Board's Office of Proceedings. With respect to these certain matters, the Board could compel mediation or grant a mediation request at any time in the pending proceeding. The Board would appoint a Board employee with training as a mediator, unless the parties mutually agree to a non-Board mediator and so inform the Board. If the parties use a non-Board mediator, they would mutually assume responsibility for paying the fees and/or costs of the mediator. Mediation periods would last for up to 30 days, although this time could be extended upon the mutual request of the parties. Except as provided in rules governing rate cases (see 49 C.F.R. § 1111), the Board would reserve the right to stay proceedings and toll any applicable statutory deadlines pending the conclusion of mediation.

We note that there appears to be a consensus among the commenting parties that the Board should take steps to further promote the use of its existing dispute resolution services offered through its RCPA program. Based upon experience, it is clear to the Board that this program offers valuable benefits and can avert the need for parties to initiate formal proceedings, thereby saving considerable time and expense. We see no downside in expanding our efforts to encourage parties to avail themselves of RCPA's services, and we invite comments regarding specific steps the Board can take to further promote RCPA's services. However, we will not include in this proceeding procedures for pre-complaint formal mediation within the RCPA program. While not identical, the RCPA program, is similar in many respects to a mediation program, and is already available to parties prior to the filing of a complaint. It is intended to be less formal than Board-imposed mediation. Moreover, the Board should first have the opportunity to develop experience with the expanded mediation program proposed here before refining or expanding the already successful RCPA process.

### Arbitration

The Board's proposed rules clarify and revise the Board's existing arbitration rules at 49 C.F.R. Part 1108 to establish that most disputes falling within the Board's jurisdiction may be arbitrated before the Board on a voluntary basis.

### Matters Eligible for Arbitration

Under the proposed rules, all types of adjudicatory disputes that do not involve matters in which the Board is statutorily required to determine the PCN, and those related to the implementation of labor protective conditions (which are subject to different rules), could be arbitrated. The Board also proposes to establish an arbitration program in which rail carriers would agree in advance to arbitrate a limited subset of disputes, as described below, when they are the subjects of formal proceedings before the Board, and when all other parties to any such dispute have consented to arbitration. Non-participating parties, i.e., parties that have not already signed up for the program, could use the Board's arbitration procedures voluntarily, on a case-by-case basis.

The Board proposes that the following types of disputes would be subject to arbitration under its arbitration program: demurrage charges; accessorial charges; compensation for misrouting or mishandling of rail cars; redress for a carrier's misapplication of its published rules and practices as applied to particular prior shipments; and compensation for other alleged unreasonable practices and procedures related to past service. Other types of disputes, with the exceptions described above, could be arbitrated on a voluntary basis, provided that all parties consent. All arbitrations conducted pursuant to the Board's arbitration program would be used only to redress alleged past wrongs with monetary compensation, and not to impose prospective or injunctive relief.

As both litigants and the Board gain experience and familiarity with using the arbitration program for the types of proceedings proposed here, we foresee expanding the types of arbitration program-eligible matters. We agree with NGFA that matters subject to arbitration should "possess[] monetary value but lack[] policy significance." The types of disputes listed above generally meet this description. Disputes that raise novel questions would not be suitable for resolution under the Board's proposed arbitration program, and are better resolved either through voluntary arbitration on a case-specific basis or the Board's formal adjudicatory processes.

In addition, under the proposed rules, the Board would reserve the right to require parties to adjudicate a pending matter using our formal procedures where the Board concludes that the specific matter is not suitable for arbitration. Participants in the Board's arbitration program could also petition the Board to reactivate a formal adjudication if they mutually agree that the particular dispute is unsuitable for arbitration. Furthermore, the Board's arbitration procedures and arbitration program would not preempt the applicability of, or otherwise supersede, any new or existing arbitration clauses contained in agreements between shippers and carriers.

### Participation in the Board's Proposed Arbitration Program

Class I and Class II rail carriers would be deemed to agree voluntarily to participate in the Board's proposed arbitration program unless they "opt out." To opt out, any such carrier would be required to file a notice with the Board, under docket number EP 699, notifying the Board of its opt-out decision, no later than 20 days after the effective date of the proposed rules. Any carrier not submitting a notice by this deadline would be deemed to be a participant in the

Board's arbitration program. After the proposed rules take effect, a carrier wishing to opt out of the Board's arbitration program would be required to file notice with the Board no later than January 10 of each calendar year. Carriers not opting out by this deadline would become participants in the Board's arbitration program during that calendar year. Participating carriers could also opt out of the arbitration program at any time by providing 90 days' notice to the Board. Carriers that have opted out would be able to opt back into the arbitration program at any time by filing a notice with the Board that would take effect immediately. They could also participate in arbitration on a case-by-case basis.

If the Board were to apply an opt-out rule to Class III carriers, which are numerous and may not be as familiar with Board rules and procedures as larger carriers, some Class III carriers could unknowingly subject themselves to the Board's arbitration program. Therefore, under the proposed rule, Class III carriers could participate in the Board's arbitration program only if they opt in by filing, in this docket, written notice with the Board. Such notice could be filed at any time and would take effect immediately. A Class III carrier would remain a participant in the arbitration program thereafter unless it were to file an opt-out notice with the Board. Such notice would take effect 90 days after filing. We note that, like Class I and Class II carriers, Class III carriers could also voluntarily agree to participate in arbitration on a case-by-case basis.

An opt-out notice filed by a carrier would not excuse the carrier from arbitration proceedings that are ongoing, or permit it to withdraw its consent to participate in any arbitration program-eligible dispute associated with any matter pending before the Board at any time within the 90-day period before the opt-out notice takes effect.

Shippers would choose to participate in arbitration of the program-eligible disputes on a case-by-case basis. Following the filing of a complaint whose subject matter is arbitration program-eligible, the Board would issue a notice advising other parties to the matter whether the carrier or carriers involved in the disputed matter are participants in the arbitration program. If the carrier or carriers are all participants in the arbitration program, the Board would automatically assign the matter for arbitration upon receiving notice from shippers that they wish to arbitrate. If one or more carriers that are party to a dispute are not participants in the Board's arbitration program, the Board would assign the matter for arbitration only if all parties that are not arbitration program participants consent to arbitrate the dispute. Likewise, if the dispute relates only to a subject matter that does not fall within the arbitration program, the Board would assign the dispute to arbitration only upon the agreement of all parties to the matter.

### Single Arbitrator

The Board proposes that a single neutral arbitrator would be utilized to resolve any arbitration under the Board's rules. The arbitrator would be selected by the Board from a list of arbitrators that the Board would maintain, and which it would update every other year. Interested parties would be free to nominate proposed arbitrators with the requisite subject matter expertise and neutrality for possible inclusion on or addition to the list. The Board encourages thoughtful input on qualified arbitrators to be on the list.

The Board has not proposed to use a panel of multiple arbitrators to resolve a dispute, as some commenters have proposed, insofar as the Board's proposal would entail Board payment of the arbitrator's fees, and a panel could tax the agency's resources. It is hoped that participants would find the use of one arbitrator successful, because all arbitrators on the list maintained by the Board would be neutral (i.e., would not have a conflict of interest with any party to the arbitration), and would have the requisite subject matter expertise. Hence, the proposed rule assumes the use of one arbitrator. However, the Board hopes to encourage use of arbitration in lieu of litigation that may tax both the Board's and the parties' resources to a possibly greater extent. Thus, the Board seeks comments on approaches the Board could employ if parties were to opt for a panel of two, or three, arbitrators, such as having the parties defray the expense of more than one arbitrator.

With regard to selection of the arbitrator, if the parties to a matter mutually agree upon an arbitrator to adjudicate their proceedings, they could petition the Board to appoint that arbitrator to their proceeding. Such arbitrator would not need to be on the Board's list, and could be used on a one-time basis only. The Board also seeks comment on whether the use of a limited "strike" mechanism for appointing arbitrators from the Board's list, as is sometimes used in private arbitration, would encourage the use of a single arbitrator system.<sup>10</sup>

The Board would pay for the cost of any arbitrator assigned to a dispute from its list. Parties would be responsible for paying any other applicable filing fees. If parties select an arbitrator not on the Board's list, the parties would share the fees and/or costs of the arbitrator.

#### Arbitration Period

The Board proposes that the evidentiary phase of the arbitration process must be completed within 90 days from the start date established by the arbitrator. This would ensure a less costly and more efficient dispute resolution process than is possible under the Board's formal adjudicatory proceedings. We also propose that the arbitrator must issue a decision within 30 days following completion of the evidentiary phase. Parties would have the right to appeal any arbitration decision directly to the Board.

#### Relief Available Pursuant to the Board's Arbitration Program

The Board proposes that the relief that could be awarded under the Board's arbitration program would be limited to a maximum of \$200,000 per arbitral dispute, unless all parties to the matter agree at the commencement of arbitration to a higher cap. The Board believes a \$200,000 cap is appropriate because that amount of relief would be sufficient to compensate aggrieved parties for a wide range of past wrongs, and because disputes involving higher amounts of relief

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<sup>10</sup> Under our current regulations at 49 C.F.R. § 1108.6(c), if parties cannot agree on an arbitrator (or panel of arbitrators), each party may strike through the names of any arbitrators on the list to whom they object, and must number the remaining arbitrators on the list in order of preference, submitting that marked roster to the Board. The Board would then designate the arbitrator(s) based on the highest combined ranking of all of the parties to the arbitration.

are generally complex enough to warrant resolution using the Board's formal adjudicatory procedures. However, the Board invites comments on whether a different dollar cap would better cover the majority of disputes under the proposed arbitration program, and whether a larger or smaller limit would make parties more likely to participate in arbitration of such disputes. No prospective or injunctive relief would be available through the Board's arbitration program because matters in which a party seeks prospective or injunctive relief are generally complicated or implicate significant policy or regulatory issues that are better suited for resolution using the Board's formal adjudicatory procedures.

As noted above, the \$200,000 cap would not apply where parties voluntarily agree to a higher cap, and neither a cap nor the exclusion of prospective or injunctive relief would apply to voluntary arbitration of a non-arbitration-program-eligible dispute before the Board.

### Arbitration Awards Availability

In order to promote the parties' willingness to avail themselves of our arbitration process, the Board proposes that the arbitral decisions would not be made public or posted on the Board's website, and that they would have no precedential value.

### Review of Arbitration Awards

Upon petition of one or more parties to an arbitration, the Board would reserve the right to review, and modify or vacate, any arbitration award. The Board's appellate review would be under a standard of review limited to instances involving a clear abuse of an arbitrator's authority or discretion.<sup>11</sup> The Board's decision on review of an arbitration decision would be made public.

Judicial review of the Board's decision reviewing an arbitral decision would be in the federal courts of appeals under the Hobbs Act (28 U.S.C. §§ 2321, 2342) and would apply Administrative Procedure Act standards of review. If the parties do not seek the Board's appellate review, they would have the right to appeal the arbitral award directly to a federal district court, under the Federal Arbitration Act, 9 U.S.C. §§ 9-13. The district court standard for vacating an arbitral award is limited to a showing of clear and convincing evidence of fraud or bias by the arbitrator. 10 U.S.C. § 9.

### Other Matters

Under the proposed rules, 49 C.F.R. §1111.10(b) would be modified to clarify that mandatory mediation would only stay the procedural schedule in rate cases brought under the Board's simplified standards (Simplified Stand-Alone Cost (SAC) and Three-Benchmark methodologies), but would not stay the procedural schedule in full SAC rate cases. As the Board stated in S. Miss. Electric Power Ass'n v. Norfolk S. Ry., FD 42128, slip op. at 3 (STB served

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<sup>11</sup> This standard of review would replace the standards currently set forth at 49 C.F.R. § 1109.2 and 49 C.F.R. § 1108.11(b).

Mar. 14, 2011), the existing rule creates ambiguity as to whether or not the mandatory mediation period in full SAC rate cases stays the procedural schedule.<sup>12</sup>

The proposed rules, which would govern both the use of mediation and arbitration in Board proceedings, are set forth in the Appendix.

## CONCLUSION

The Regulatory Flexibility Act of 1980, 5 U.S.C. §§ 601-612, generally requires a description and analysis of rules that would have significant economic impact on a substantial number of small entities. In drafting a rule an agency is required to: (1) assess the effect that its regulation would have on small entities; (2) analyze effective alternatives that might minimize a regulation's impact; and (3) make the analysis available for public comment. 5 U.S.C. §§ 601-604. In its notice of proposed rulemaking, the agency must either include an initial regulatory flexibility analysis, 5 U.S.C. § 603(a), or certify that the proposed rule will not have a "significant impact on a substantial number of small entities," 5 U.S.C. § 605(b). The impact must be a direct impact on small entities "whose conduct is circumscribed or mandated" by the proposed rule. White Eagle Coop. Ass'n v. Conner, 553 F.3d 467, 480 (7th Cir. 2009).

The Board certifies under 5 U.S.C. § 605(b) that this proposed rule, if promulgated, will not have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act. The proposed rule, if promulgated, would redefine the existing procedures for two alternative dispute processes to formal adjudications before the Board. First, the proposed rule would permit carriers and shippers to agree voluntarily to resolve certain kinds of disputes before the Board under a newly-defined arbitration program. Second, the proposed rule would permit parties to agree voluntarily, and sometimes could require parties, to mediate certain kinds of disputes before the Board.

Although some carriers and shippers may qualify as a "small business" within the meaning of 5 U.S.C. § 601(3), we do not anticipate that our new mediation and arbitration procedures would have a significant economic impact on a large number of small entities. To the extent that the rules have any impact, it would be to provide faster resolution of a controversy at a lower cost. Under the proposed rules, any ultimate resolution reached through mediation would be the result of the mutual agreement of the parties, including small entities, not as a result of a Board-imposed decision. With respect to arbitration, the relief that could be accorded by an arbitrator would presumably be similar to the relief shippers could obtain through use of the Board's existing formal adjudicatory procedures, and at a greater net value considering that the ADR process is designed to consume less time and likely will be less costly. Therefore, we do not believe that a substantial number of small entities would be significantly impacted.

A copy of this decision is being provided to the Chief Counsel for Advocacy, Small Business Administration.

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<sup>12</sup> See current 49 C.F.R. § 1109.4(f) (absent a specific order of the Board, the onset of mediation will not affect the procedural schedule in SAC cost rate cases).

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

This rulemaking will affect the following subjects: Parts 1002.2, 1011.7, 1108, 1109.1, 1109.2, 1109.3, 1111.10, and 1115.8, of title 49, chapter X, of the Code of Federal Regulations. It is issued subject to the Board's authority under 49 U.S.C. § 721(a).

It is ordered:

1. The Board proposes to amend its rules as set forth in this decision. Notice of the proposed rules will be published in the Federal Register.
2. Comments regarding the proposed rules are due by May 17, 2012. Replies are due by June 18, 2012.
3. This decision is effective on the day of service.

By the Board, Chairman Elliott, Vice Chairman Mulvey, and Commissioner Begeman.

**Appendix**

**Code of Federal Regulations**

For the reasons set forth in the preamble, the Surface Transportation Board proposes to amend parts 1002, 1011, 1108, 1109, 1111, and 1115 of title 49, chapter X, of the Code of Federal Regulations as follows:

**PART 1002 – FEES**

1. The authority citation for part 1002 continues to read as follows:

Authority: 5 U.S.C. 552(a)(4)(A) and 553; 31 U.S.C. 9701; and 49 U.S.C. 721. Section 1002.1(g)(11) also issued under 5 U.S.C. 5514 and 31 U.S.C. 3717.

2. Amend § 1002.2 by revising paragraph (f)(87) and by removing and reserving paragraph (f)(88) to read as follows:

**1002.2 Filing fees.**

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(f) \* \* \*

Type of proceeding	Fee
* * * * *	
Part VI: Informal Proceedings	
* * * * *	\$250.
(87) Basic fee for STB adjudicatory services not otherwise covered . . . . .	
(88) [Reserved]	
* * * * *	

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**PART 1011 – BOARD ORGANIZATION; DELEGATIONS OF AUTHORITY**

3. The authority citation for part 1011 continues to read as follows:

Authority: 5 U.S.C. 553; 31 U.S.C. 9701; 49 U.S.C. 701, 721, 11123, 11124, 11144, 14122, and 15722.

4. Amend § 1011.7 by adding paragraphs(a)(2)(xvii), (a)(2)(xviii) and (a)(2)(xix) to read as follows:

**§ 1011.7 Delegations of authority by the Board to specific offices of the Board.**

(a) \* \* \*

(2) \* \* \*

(xvii) To authorize parties to a proceeding before the Board, upon mutual request, to participate in mediation with a Board-appointed mediator, for a period of up to 30 days.

(xviii) To authorize a proceeding held in abeyance while mediation procedures are pursued, pursuant to a mutual request of the parties to the matter.

(xix) To order arbitration of program-eligible matters under the Board’s regulations at 49 CFR Part 1108, or upon the mutual request of parties to a proceeding before the Board.

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**PART 1108 – ARBITRATION OF CERTAIN DISPUTES SUBJECT TO THE STATUTORY JURISDICTION OF THE SURFACE TRANSPORTATION BOARD**

5. The authority citation for part 1011 continues to read as follows:

Authority: 49 U.S.C. 721(a).

6. Revise § 1108.1 to read as follows:

**§ 1108.1 Definitions.**

As used in this part:

(a) *Arbitration program* means a program established by the Surface Transportation Board under which participating rail carriers have agreed voluntarily in advance to resolve certain types of disputes brought before the Board using the Board’s arbitration procedures.

(b) *Arbitration program-eligible matters* are those disputes, or components of disputes, that may be resolved using the Board’s arbitration program and include disputes involving one or more of the following subjects: demurrage, accessorial charges; misrouting or mishandling of rail cars; disputes involving a carrier’s published rules and practices as applied to particular rail transportation; and other service-related matters.

(c) *Arbitrator* means an arbitrator appointed pursuant to these rules.

(d) *Interstate Commerce Act* means the Interstate Commerce Act as amended by the ICC Termination Act of 1995.

(e) *STB* or *Board* means the Surface Transportation Board.

(f) *Statutory jurisdiction* means the jurisdiction conferred on the STB by the Interstate Commerce Act, including jurisdiction over rail transportation or services that have been exempted from regulation.

7. Amend § 1108.2 by revising paragraph (b) and removing paragraph (d) to read as follows:

**§ 1108.2 Statement of purpose, organization, and jurisdiction.**

\* \* \* \* \*

(b) These procedures shall be available for use in the resolution of all matters arbitrated before the Board, other than matters involving labor protective conditions, which are subject to different rules. These procedures shall not be available to obtain the grant, denial, stay or revocation of any license, authorization (e.g., construction, abandonment, purchase, trackage rights, merger, pooling), or exemption related to such matters.

\* \* \* \* \*

8. Revise § 1108.3 to read as follows:

**§ 1108.3 Matters subject to arbitration.**

(a) *Use of arbitration.*

(1) *Arbitration program-eligible matters.* The Board shall assign to arbitration all arbitration program-eligible matters arising in a docketed proceeding where all parties to the proceeding are participants in the Board's arbitration program, or where one or more parties to the matter are participants in the Board's arbitration program, and all other parties to the proceeding request or consent to arbitration.

(2) *Matters partially arbitration program-eligible.* Where the issues in a proceeding before the Board relate in part to arbitration program-eligible matters, only those parts of the dispute related to arbitration program-eligible matters may be arbitrated pursuant to the arbitration program, unless the parties petition the Board in accordance with paragraph (a)(3) of this section to include non-arbitration program-eligible matters.

(3) *Other matters.* Parties may petition the Board, on a case-by-case basis, to assign to arbitration disputes, or portions of disputes, that do not relate to arbitration program-eligible matters, other than matters in which the Board is statutorily required to determine the public convenience and necessity and those involving labor protective conditions.

(4) *Mutual agreement required.* The Board will not assign to arbitration any dispute in which one or more parties is not a participant in the Board's arbitration program and does not otherwise consent to arbitration.

(b) *Participation in the Board's arbitration program.*

(1) *Class I and Class II rail carriers.* Class I and Class II rail carriers are deemed to have agreed in advance to participate in the Board's arbitration program, unless they have opted out of the program. To opt out, a Class I or Class II carrier shall do either of the following:

(i) File a notice, under docket number EP 699, informing the Board of its opt-out decision no later than 20 days following the effective date of these rules, and subsequently, no later than January 10 (or the immediately following business day) of each calendar year. Such notice shall take effect immediately.

(ii) File a notice with the Board, under docket number EP 699, at any time. Such notice shall take effect 90 days after filing and shall not excuse the filing carrier from arbitration proceedings that are ongoing, or permit it to withdraw its consent to participate in any arbitration program-eligible dispute associated with any matter pending before the Board at any time within the 90-day period before the opt-out notice takes effect. Class I and Class II rail carriers that opt out of the arbitration program will be deemed to be participants in the program in subsequent years if they do not file a new notice with the Board each year. A carrier that has opted out of the arbitration program may opt into the arbitration program at any time by notifying the Board. Opt-in notices shall take effect immediately.

(2) *Class III rail carriers.* A Class III rail carrier may participate in the Board's arbitration program by filing a written notice with the Board under docket number EP 699, advising the Board of its intent to participate in the program. Such notice may be filed at any time and shall take effect immediately. A participating Class III carrier shall remain a participant in the Board's arbitration program thereafter, unless it files a notice with the Board under docket number EP 699, advising the Board of its intent to cease participation in the arbitration program. Such notice shall take effect 90 days after filing and shall not excuse the filing carrier from

arbitration proceedings that are ongoing, or permit it to withdraw its consent to participate in any arbitration program-eligible dispute associated with any matter pending before the Board at any time within the 90-day period before the opt-out notice takes effect.

(3) *Shippers and other parties.* Shippers and other parties may participate in arbitration-program eligible arbitrations on a case-by-case basis by filing notice with the Board. Such notice shall be filed under the docket number assigned to the proceeding, indicating agreement to participate in arbitration.

(c) *Arbitrator’s authority.* In resolving any dispute subject to the Board’s arbitration procedures, the arbitrator shall not be bound by any procedural rules or regulations adopted by the STB for the formal resolution of similar disputes, except as specifically provided in this Part 1108. The arbitrator, however, shall be guided by the Interstate Commerce Act and by STB and ICC precedent.

(d) *Arbitration clauses.* Nothing in the Board’s regulations shall preempt the applicability of, or otherwise supersede, any new or existing arbitration clauses contained in agreements between shippers and carriers.

9. Amend § 1108.4 by revising paragraphs (a)(1) and (a)(2) and removing paragraph (b) to read as follows:

**§ 1108.4 Relief.**

(a) \* \* \*

(1) Monetary damages, to the extent available under the Interstate Commerce Act, shall be available through the arbitration. In disputes arbitrated pursuant to the Board’s arbitration program, damages shall not exceed \$200,000, exclusive of interest at a reasonable rate to be specified by the arbitrator. Participants in the Board’s arbitration program shall not be obligated to arbitrate any dispute in which the alleged damages exceed \$200,000.

(2) No prospective or injunctive relief shall be available through the Board’s arbitration program, or through any other arbitration before the Board.

\* \* \* \* \*

10. Revise § 1108.5 to read as follows:

**§ 1108.5 Fees and costs.**

When parties use the Board’s arbitration procedures to resolve a dispute, the party filing the complaint shall pay the applicable filing fee pursuant to 49 CFR Part 1002. The Board shall pay any fees and/or costs charged by the arbitrator, except where parties agree to use an arbitrator not included on the roster of arbitrators maintained by the Board, as described in § 1108.6(a), in which case the parties shall share the fees and/or costs of the arbitrator.

11. Revise § 1108.6 to read as follows:

**§ 1108.6 Arbitrators.**

(a) Arbitration shall be conducted by a single arbitrator selected, as provided herein, from a roster of persons (other than active government officials) experienced in rail transportation or economic issues similar to those capable of arising before the STB. The roster of arbitrators shall be established by the Chairman of the STB with input from interested parties

who may nominate individuals for inclusion on the list. The roster shall thereafter be maintained and updated by the Chairman of the STB on an every other year basis. The roster may also be augmented or revised at any time, and interested parties are encouraged to nominate qualified individuals for addition to the list. The roster shall be available to the public, upon request, and shall be posted on the Board's website at [www.stb.dot.gov](http://www.stb.dot.gov).

(b) Matters arbitrated under these rules shall be resolved by a single neutral arbitrator, selected by the Board, from the roster of qualified arbitrators. If the parties to an arbitration proceeding mutually agree upon an arbitrator (whether listed on the roster or not) to resolve their dispute, they may petition the Board to appoint that arbitrator to the arbitration proceeding.

(c) If, at any time during the arbitration process, a selected arbitrator becomes incapacitated, unwilling, or unable to fulfill his/her duties, or if all parties agree that the arbitrator should be replaced, a replacement arbitrator will be selected promptly under the process set forth in paragraphs (a) and (b) of this section.

12. Revise § 1108.7 to read as follows:

**§ 1108.7 Arbitration commencement procedures.**

(a) Each arbitration under these rules shall commence with a written complaint, which shall be filed and served in accordance with Board rules contained at Part 1104. Each complaint must contain a statement that the complainant is a participant in the Board's arbitration program pursuant to § 1108.3(b), or that the complainant is willing to arbitrate voluntarily all or part of the dispute pursuant to the Board's arbitration procedures. Following the filing of a complaint whose subject matter is arbitration program-eligible, the Board shall issue a notice advising other parties of whether any carrier-parties to the matter are participants in the arbitration program.

(b) Any respondent must, within 20 days of the date of the filing of a complaint, answer the complaint. The answer must state whether the respondent is a participant in the Board's arbitration program, or whether the respondent is willing to arbitrate on a voluntary basis. Where the respondent agrees to arbitrate voluntarily, the answer must identify those issues contained in the complaint that the respondent is willing to resolve through arbitration. The answer must also identify any issues contained in the complaint that the respondent is not willing to resolve through arbitration. If the answer contains an agreement to arbitrate some but not all of the arbitration issues in the complaint, the complainant will have 10 days from the date of the answer to advise the respondent and the Board in writing whether the complainant is willing to arbitrate on that basis. Where the respondent is a participant in the Board's arbitration program, the answer should further state that the respondent has thereby agreed to use arbitration to resolve all of the arbitration program-eligible issues in the complaint. The Board will then set the matter for arbitration, if appropriate, and assign an arbitrator.

13. Revise § 1108.8 to read as follows:

**§ 1108.8 Arbitration procedures.**

The arbitrator shall establish all rules for each arbitration proceeding, including with regard to discovery, the submission of evidence and the treatment of confidential information, subject to the requirements that the evidentiary process shall be completed within 90 days from the start date established by the arbitrator, and that the arbitrator's decision will be issued within 30 days following completion of the evidentiary phase.

14. Revise § 1108.9 to read as follows:

**§ 1108.9 Decisions.**

(a) Decisions of the arbitrator shall be in writing and shall contain findings of fact and conclusions.

(b) The arbitrator simultaneously shall serve a copy of the decision on the parties and upon the Board. The arbitrator may serve the decision via any service method permitted by the Board’s regulations that is consistent with protecting the confidentiality of the decision, if so requested by the parties.

(c) By arbitrating pursuant to these procedures, each party agrees that the decision and award of the arbitrator shall be binding and judicially enforceable in law and equity in any court of appropriate jurisdiction, subject to a limited right of appeal to the STB, as provided below.

15. Revise § 1108.11 to read as follows:

**§ 1108.11 Enforcement and appeals.**

(a) A party may petition the Board to modify or vacate an arbitral award. The appeal must be filed within 20 days of service of a final arbitration decision, and is subject to the page limitations of § 1115.2(d) of this chapter . Copies of the appeal shall be served upon all parties in accordance with the Board’s rules at Part 1104. The appealing party shall also serve a copy of its appeal upon the arbitrator. Replies to such appeals shall be filed within 20 days of the filing of the appeal with the Board, and shall be subject to the page limitations of § 1115.2(d) of this chapter.

(b) The timely filing of a petition will not automatically stay the effect of the arbitration decision. A stay may be requested under § 1115.3(f) of this chapter.

(c) The STB will review, and may modify or vacate, an arbitration award, in whole or in part, only on grounds that such award reflects a clear abuse of arbitral authority or discretion.

16. Revise Part 1109 to read as follows:

**PART 1109–USE OF MEDIATION IN BOARD PROCEEDINGS**

Sec.

1109.1 Mediation.

1109.2 Commencement of mediation.

1109.3 Mediation procedures.

1109.4 Mandatory mediation in rate cases to be considered under the stand-alone cost methodology.

Authority: 5 U.S.C. 571 *et seq.*

**§ 1109.1 Mediation.**

Parties may seek to resolve a dispute brought before the Board using the Board’s mediation procedures. These procedures shall not be available to obtain the grant, denial, stay or revocation of any license, authorization (e.g., construction, abandonment, purchase, trackage

rights, merger, pooling), or exemption related to such matters. The Board may, by its own order, direct the parties to participate in mediation using the Board's mediation procedures.

**§ 1109.2 Commencement of mediation.**

(a) *Availability of mediation.* Mediation may be commenced in a dispute before the Board:

- (1) Pursuant to a Board order issued in response to a written request of one or more parties to a matter;
- (2) Where the Board orders mediation by its own order; or
- (3) In connection with a rate complaint, as provided by § 1109.4 and Part 1111 of this chapter.

(b) *Requests for mediation.* Parties wishing to pursue mediation may file a request for mediation with the Board at any time following the filing of a complaint. Parties that use Board mediation procedures shall not be required to pay any fees other than the appropriate filing fee associated with the underlying dispute, as provided at 49 CFR 1002.2. The Board shall grant any mediation request submitted by all parties to a matter, but may deny mediation where a mediation request is not submitted by all parties to a matter.

**§ 1109.3 Mediation procedures.**

(a) The Board will appoint a Board employee, who is a qualified mediator, to facilitate any dispute assigned for mediation. Alternatively, the parties to a matter may agree to use a non-Board mediator if they so inform the Board within 10 days of an order assigning the dispute to mediation. If a non-Board mediator is used, the parties shall share the fees and/or costs of the mediator. The following restrictions apply to any mediator selected by the Board or the parties:

- (1) No person may serve as a mediator who has previously served as an advocate or representative, in any matter, for any party to the mediation;
- (2) No person serving as a mediator may thereafter serve as an advocate for a party in any other proceeding arising from or related to the mediated dispute, including, without limitation, representation of a party to the mediation before any other federal court or agency; and
- (3) If the mediation does not fully resolve all issues before the Board, the person serving as a mediator may not thereafter advise the Board regarding the future disposition of the dispute.

(b) Parties shall have 30 days from the date of the first mediation session to reach a settlement agreement, or to narrow the issues in dispute, or to agree to stipulations that may be incorporated into any adjudication before the Board if mediation does not fully resolve the dispute. The mediator may assist the parties in preparing a settlement agreement. The mediator shall notify the Board whether the parties have reached any agreement by the end of the 30-day period.

(c) Any settlement agreement reached during or as a result of mediation must be in writing, and signed by all parties to the mediation. The parties need not provide a copy of the settlement agreement to the Board, or otherwise make the terms of the agreement public, provided that the parties, or the mediator, notify the Board that the parties have reached a mutually agreeable resolution, and request that the Board terminate the underlying Board proceeding. Parties to the settlement agreement shall waive all appeal rights as to the issues resolved by the settlement agreement.

(d) If the parties reach only a partial resolution of their dispute, they or the mediator shall so inform the Board, and the parties shall file any stipulations they have mutually reached, and ask the Board to reactivate the procedural schedule in the underlying proceeding to decide the remaining issues.

(e) The Board may extend mediation for additional periods of time not to exceed 30 days per period, pursuant to mutual written requests of all parties to the proceeding. The Board will not extend mediation for additional periods of time where one or more parties to a matter do not agree to an extension. The Board will not order mediation more than once in any particular proceeding, but may permit it if all parties to a matter mutually request another round of mediation.

(f) Mediation is a confidential process except for those limited exceptions permitted by the Administrative Dispute Resolution Act at 5 U.S.C. 574.

(1) All notes taken by participants (including but not limited to the mediator, parties, and their representatives) during the mediation must be destroyed following the conclusion of the matter subject to mediation. As a condition of participation, the parties and any interested parties joining the mediation must agree to the confidentiality of the mediation process. The parties to mediation, including the mediator, shall not testify in administrative or judicial proceedings concerning the issues discussed in mediation, nor submit any report or record of the mediation discussions, other than the settlement agreement with the consent of all parties, except as required by law.

(2) Evidence of conduct or statements made during mediation are not admissible in any Board proceeding. However, if mediation fails to result in a full resolution of the dispute, evidence that is otherwise discoverable may not be excluded from introduction into the record of the underlying proceeding merely because it was presented during mediation. Such materials may be used if they are disclosed through formal discovery procedures established by the Board or other adjudicatory body.

(g) Except as otherwise provided for in 49 CFR 1109.4(f) and Part 1111, the mutual request of all parties that a proceeding be held in abeyance while mediation procedures are pursued should be submitted to the Chief, Section of Administration, Office of Proceedings. The Board shall promptly issue an order in response to such requests. Except as otherwise provided for in 49 CFR 1109.4(f) and Part 1111, the Board may also direct that a proceeding be held in abeyance pending the conclusion of mediation. The period while any proceeding is held in abeyance to facilitate mediation shall not be counted toward any applicable statutory deadlines.

**§ 1109.4 Mandatory mediation in rate cases to be considered under the stand-alone cost methodology.**

(a) A shipper seeking rate relief from a railroad or railroads in a case involving the stand-alone cost methodology must engage in non-binding mediation of its dispute with the railroad upon filing a formal complaint under 49 CFR Part 1111.

(b) Within 10 business days after the shipper files its formal complaint, the Board will assign a mediator to the case. Within 5 business days of the assignment to mediate, the mediator shall contact the parties to discuss ground rules and the time and location of any meeting. At least one principal of each party, who has the authority to bind that party, shall participate in the mediation and be present at any session at which the mediator requests that the principal be present.

(c) The mediator will work with the parties to try to reach a settlement of all or some of their dispute or to narrow the issues in dispute, and reach stipulations that may be incorporated into any adjudication before the Board if mediation does not fully resolve the dispute. If the parties reach a settlement, the mediator may assist in preparing a settlement agreement.

(d) The entire mediation process shall be private and confidential. No party may use any concessions made or information disclosed to either the mediator or the opposing party before the Board or in any other forum without the consent of the other party.

(e) The mediation shall be completed within 60 days of the appointment of the mediator. The mediation may be terminated prior to the end of the 60-day period only with the certification of the mediator to the Board. Requests to extend mediation, or to re-engage it later, will be entertained on a case-by-case basis, but only if filed by all interested parties.

(f) Absent a specific order from the Board, the onset of mediation will not affect the procedural schedule in stand alone cost rate cases, set forth at 49 CFR 1111.8(a).

## **PART 1111 – COMPLAINT AND INVESTIGATION PROCEDURES**

17. The authority citation for part 1111 continues to read as follows:

Authority: 49 U.S.C. 721, 10704, and 11701.

18. Amend § 1111.10 by revising paragraph (b) to read as follows:

### **§ 1111.10 Meeting to discuss procedural matters.**

\* \* \* \* \*

(b) *Simplified standards complaints.* In complaints challenging the reasonableness of a rail rate based on the simplified standards, the parties shall meet, or discuss by telephone or through email, discovery and procedural matters within 7 days after the mediation period ends. The parties should inform the Board as soon as possible thereafter whether there are unresolved disputes that require Board intervention and, if so, the nature of such disputes.

## **PART 1115 – APPELLATE PROCEDURES**

19. The authority citation for part 1115 continues to read as follows:

Authority: 5 U.S.C. 559; 49 U.S.C. 721.

20. Revise § 1115.8 to read as follows:

### **§ 1115.8 Petitions to review arbitration decisions.**

An appeal of right is permitted. The appeal must be filed within 20 days of a final arbitration decision, unless a later date is authorized by the Board, and is subject to the page limitations of § 1115.2(d). The standard of review will be whether there is a showing of a clear abuse of arbitral authority or discretion. The timely filing of a petition will not automatically stay the effect of the arbitration decision. A stay may be requested under § 1115.3(f).