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SERVICE DATE – MAY 13, 2013

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. EP 699

ASSESSMENT OF MEDIATION AND ARBITRATION PROCEDURES

Digest:¹ The Surface Transportation Board, after seeking public input, now adopts final rules to increase the use of mediation and arbitration to resolve matters before the Board. To provide greater use of mediation, the Board may order parties to participate in the mediation of certain disputes. The Board also clarifies and simplifies its existing mediation rules. To encourage greater use of arbitration, the Board establishes a new arbitration program under which shippers and carriers may voluntarily agree in advance to arbitrate certain disputes with clearly defined limits of liability, and clarifies and simplifies its existing arbitration rules.

Decided: May 10, 2013

AGENCY: Surface Transportation Board.

ACTION: Final Rules.

SUMMARY: The Surface Transportation Board (Board or STB) adopts regulations that allow the Board to order parties to participate in mediation in certain types of cases and modify and clarify its existing mediation regulations. The Board also establishes a new arbitration program under which carriers and shippers may agree voluntarily in advance to arbitrate certain types of disputes that come before the Board, and clarifies and simplifies its existing arbitration rules.

DATES: These rules are effective on June 12, 2013.

ADDRESSES: Information or questions regarding these final rules 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.

¹ 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).

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.² 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, 2010,³ and published in the Federal Register on August 24, 2010,⁴ we sought input on how to increase the use of mediation and arbitration to resolve matters before the Board.⁵ The Board received comments from 12 parties.⁶

² 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.

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

⁴ Assessment of Mediation and Arbitration Procedures, 75 Fed. Reg. 52,054.

⁵ Assessment of Mediation and Arbitration Procedures, EP 699 (STB served Dec. 3, 2010). The Board served a subsequent notice in this matter on December 3, 2010, 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. 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 and the U.S. Secretary of Transportation are ex officio, nonvoting RSTAC members. (49 U.S.C. § 726.)

⁶ The Board received comments from the U.S. Department of Agriculture (USDA), the Association of American Railroads (AAR), Consumers United for Rail Equity (CURE), the National Grain and Feed Association (NGFA), the National Oilseed Processors Association (NOPA), RSTAC, Transportation Arbitration and Mediation, P.L.L.C. (TAM), the Western Coal Traffic League (WCTL), Dave Gambrel, and Gordon P. MacDougall for the United Transportation Union-New York State Legislative Board (UTU-NY). The American Paper & Forest Association (APFA) and The National Industrial Transportation League (NITL) filed joint comments.

On March 28, 2012, the Board issued a Notice of Proposed Rulemaking (NPRM) incorporating the previous comments and concerns of the parties. The Board proposed regulations that would allow the Board to order parties to participate in mediation in certain types of cases and would modify and clarify its existing mediation rules. The Board also proposed an arbitration program under which carriers and shippers would agree voluntarily to arbitrate certain types of disputes, and proposed modifications to clarify and simplify its existing rules governing arbitration in other disputes.⁷

The Board sought comments on the proposed regulations by May 17, 2012,⁸ and replies by June 18, 2012.⁹ On August 2, 2012, the Board held a public hearing to further explore the NPRM and the comments of the parties. At the public hearing, the Board heard testimony from the NGFA, NITL, WCTL, AAR, NS, UP, UTU-NY, The Tom O'Connor Group (Tom O'Connor), and the Alliance for Rail Competition (ARC).¹⁰

As explained in the NPRM, the Board's arbitration processes have remained largely unused since they were instituted.¹¹ The changes to the Board's arbitration rules are intended to consolidate the separate arbitration procedures in Parts 1108 and 1109, and to encourage greater use of arbitration to resolve disputes before the Board by simplifying the process, identifying specific types of disputes eligible for a new arbitration program, and establishing clear limits on the amounts in controversy.¹² As discussed below, the Board believes that the proposed arbitration program it now establishes will be useful to both shippers and carriers, facilitating the resolution of disputes in a less time-consuming and expensive manner than through the Board's

⁷ Assessment of Mediation and Arbitration Procedures, EP 699 (STB served Mar. 28, 2012).

⁸ The Board received comments from BNSF Railway Company (BNSF), Norfolk Southern Railway Company (NS), Union Pacific Railroad Company (UP), AAR, WCTL, Montana Grain Growers Association (MGGA), NGFA, NITL, National Railroad Passenger Corporation (AMTRAK), USDA, and UTU-NY.

⁹ The Board received replies from AAR, UP, WCTL, NITL, and UTU-NY.

¹⁰ Terry Whiteside appeared on behalf of the following parties: ARC, Montana Wheat & Barley Committee, Colorado Wheat Administrative Committee, Idaho Barley Commission, Idaho Wheat Commission, Nebraska Wheat Board, Oklahoma Wheat Commission, South Dakota Wheat Commission, Texas Wheat Producer Board, and Washington Grain Commission.

¹¹ The Board first adopted arbitration rules in Arbitration of Certain Disputes Subject to the Statutory Jurisdiction of the Surface Transportation Board, EP 560 (STB served Sept. 2, 1997).

¹² The Board has authority to revise its arbitration rules under 49 U.S.C. § 721(a) and under the Alternative Dispute Resolution Act, 5 U.S.C. §§ 571-584.

formal adjudicatory processes. Additionally, as arbitration is potentially less adversarial, it can help the parties to preserve their commercial relationship.¹³

In designing the arbitration program set forth in these final rules, the Board sought to incorporate the suggestions of the commenting parties to the maximum extent possible. The resulting arbitration program is designed to be flexible, party-driven, and functional. Under the new arbitration program, all parties eligible to bring matters before the Board will have the opportunity to opt into the arbitration program before a dispute arises. Parties will also have the option to opt into the arbitration program when a dispute is formally filed with the Board, provided the parties agree to do so in writing. Arbitration-program-eligible matters are limited to demurrage; accessorial charges; misrouting or mishandling of rail cars; and disputes involving a carrier's published rules and practices as applied to particular rail transportation. The parties may also agree in writing, prior to the commencement of arbitration, to arbitrate certain additional matters, subject to the condition that they may only arbitrate matters within the statutory jurisdiction of the Board, and may not arbitrate matters in which the Board is required to grant or deny a license or other regulatory approval or exemption. Furthermore, the monetary award cap under the Board's new program will be set at \$200,000. In response to comments, the final rules provide that parties may agree to a different award level when they opt into the program or by a separate written agreement at the start of an arbitration proceeding.

The changes to the existing mediation rules establish procedures under which the Board may order the parties to participate in mediation in certain types of disputes before the Board, on a case-specific basis, and clarifies and simplifies the existing mediation rules.¹⁴ The Board will assign one or more Board employees, trained in mediation, to conduct the mediation. Mediation periods will last up to 30 days, but can be extended upon the mutual request of the parties. The Board reserves the right to stay underlying proceedings and to toll any applicable statutory deadlines when the parties mutually consent to mediation. However, the Board will not stay proceedings or toll statutory deadlines when at least one of the parties does not consent to mediation. The Board concludes that the revised mediation rules are in the public interest. If a dispute is amicably resolved, it is likely that the parties would incur considerably less time and expense than if they used the Board's formal adjudicatory process.

There are important limitations to the types of matters that can be the subject of the mediation and arbitration program. The mediation and arbitration rules are not available to resolve any matter in which the Board is statutorily required to grant or deny an application or petition for exemption for a license or other regulatory approval, or in matters beyond the

¹³ Alternative Dispute Resolution Act of 1998, Pub. L. 105-315, § 2, 112 Stat. 2993 (1998) (discussing the benefits of alternative dispute resolution).

¹⁴ 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.

statutory jurisdiction of the Board.¹⁵ These rules will also not apply to labor-protection disputes, which have their own arbitration procedures.

The Board's Final Rules and the Comments of the Parties:

Arbitration

Having carefully considered the comments and testimony of the parties, the Board adopts the following rules governing the use of arbitration to resolve disputes before the Board. The Board's arbitration rules will be revised to consolidate the separate arbitration procedures contained in Parts 1108 and 1109, and are intended 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 under the Board's new arbitration program. We discuss below the major issues raised in the comments to our proposed arbitration rules, and our responses to the parties' concerns.

Participation in the Board's Arbitration Program:

The NPRM proposed a new arbitration program in which Class I and Class II rail carriers would have been deemed to agree to participate voluntarily in the Board's proposed arbitration program unless they opted out of the program by filing a notice with the Board. Class III rail carriers and shippers would not have been deemed to agree to participate but instead could have chosen to participate in the arbitration program on a case-by-case basis. Under the proposed rules, there would have been no penalty for opting out of the Board's arbitration program. The option of choosing to participate in the arbitration program on a case-by-case basis was also open to Class I and Class II railroads if they opted out of the arbitration program.

AAR and the participating Class I railroads are unanimous in their objection to the opt-out provision of the NPRM. AAR's position is that the proposed arbitration program was not voluntary, and the parties could not meaningfully consent to arbitration.¹⁶ BNSF¹⁷ and NS¹⁸ echo AAR's concerns. UP challenges the opt-out provision on grounds that Class I and Class II railroads would be treated differently from Class III railroads and shippers.¹⁹

During the public hearing, AAR argued that if the Board moves forward with its proposed rule requiring Class I and Class II railroads to agree in advance to arbitrate certain

¹⁵ Thus, these procedures will not be available in a regulatory proceeding to obtain the grant, denial, stay or revocation of a request for construction, abandonment, acquisition, trackage rights, merger, or pooling authority or an exemption related to such matters.

¹⁶ AAR Comments 6, May 17, 2012.

¹⁷ BNSF Comments 3, May 17, 2012.

¹⁸ NS Comments 3 & 6, May 17, 2012.

¹⁹ UP Comments 4-7, May 17, 2012.

matters, then the requirement should be required of all parties on an equal, reciprocal basis.²⁰ AAR stated that allowing participants to opt into the program would encourage participation.²¹ UP went further stating that the opt-out approach did not facilitate trust between shippers and carriers.²² UP also raised concerns that the proposed rules would create uncertainty because tens of thousands of shippers would have the ability to use a one-sided mechanism to force the Class I railroads to arbitrate disputes.²³ UP speculated that an opt-in arbitration program, where even a few parties on each side are opting in, may result in more voluntary participation.²⁴ In its comments, BNSF proposes altering the program from an opt-out to an opt-in program where the joining party could specify the types of disputes it would be willing to arbitrate.²⁵

The Board found persuasive the concerns and suggestions raised by AAR, UP, BNSF, and NS, and remains committed to establishing a functional arbitration program, which clearly necessitates participation by the Class I and Class II railroads. The record and the testimony of the carriers show that the proposed rule requiring a Class I or Class II railroad to opt out of the program created an unintended perception that the Board's proposed arbitration program would be procedurally biased.

Based on the comments, and to encourage the participation of Class I and Class II railroads in this arbitration program, the final rule eliminates the opt-out procedures in favor of an opt-in requirement for all parties. Under the final rule, all classes of rail carriers, shippers, and other parties eligible to participate in disputes before the Board may voluntarily choose to opt into the Board's arbitration program by filing a notice with the Board. The Board will then maintain a list of program participants on its website. Thus, all parties will be on an equal footing entering into the arbitration program. The Board recognizes that there are many more shippers than there are railroads, making the process of shippers opting in a significant task. The Board's Office of Rail Customer and Public Assistance will engage in outreach with shipper organizations to ensure that they are aware of their options under the arbitration program.

Under the final rules, those parties voluntarily opting into the arbitration program are eligible to select which arbitration-program-eligible matters they are willing to arbitrate. An arbitral award may not exceed a monetary cap of \$200,000, unless the parties to a dispute agree to a different amount, either higher or lower, in writing, on a case-by-case basis, prior to the commencement of arbitration. Both railroads and shippers may voluntarily opt into the program on a case-by-case basis. Parties who have opted into the program may also choose to opt out of the program by filing a notice with the Board. An opt-out notice will take effect 90 days after

²⁰ Public Hr'g Tr., 112, Aug. 2, 2012.

²¹ Id. at 113.

²² Id. at 134.

²³ Id.

²⁴ Id. at 135-36.

²⁵ BNSF Comments 3-4, May 17, 2012

filing. These opt-out procedures may not be used to opt out of an ongoing arbitration proceeding.

Program participants in the new arbitration program will have prior knowledge of the issues to be arbitrated and the maximum amount of a monetary award. The Board's arbitration program is intended to be participant-driven; allowing parties to agree in writing to arbitrate additional matters and change the monetary award cap on a case-by-case basis.

Arbitration-Program-Eligible Matters:

In its proposed rules, the Board suggested matters that would be eligible for arbitration through the program. This list included: (1) demurrage and accessorial charges; (2) misrouting or mishandling of rail cars; (3) disputes involving a carrier's published rules and practices as applied to particular rail transportation; and (4) other rail service-related matters.

The inclusion of the term "other service-related matters" led some commenters to suggest that arbitration program participants, particularly Class I and Class II railroads, would be agreeing in advance to arbitrate matters that were not clearly defined. AAR asserts that, despite the list, the Board failed to define adequately what disputes would be subject to the proposed arbitration program.²⁶ Similarly, UP states that the "other service-related matters" language in the NPRM was overly broad and suggested alternative language.²⁷

Conversely, NITL asks that the Board add to the list of arbitral matters: (1) disputes about loss and damage arising under receipts and bills of lading governed by 49 U.S.C. § 11706; (2) disputes about damage to shipper rail cars; and (3) disputes involving damage as a result of service failures not otherwise covered in the list proposed by the Board.²⁸ NITL justifies these additions by noting that they are generally dollar-determinable, rarely have broad policy or regulatory ramifications, and are common sources of dispute between railroads and shippers.²⁹ UP and AAR oppose an expansion of the list of arbitration-eligible matters.³⁰

Additionally, NITL asks that the Board clarify whether parties could use the Board's arbitration process for contract disputes where all parties to the dispute agree and where the contract does not contain an arbitration clause.³¹ UP opposes this approach on grounds that this type of arbitration would complicate the dispute resolution process and would entangle the Board

²⁶ AAR Comments 7, May 17, 2012.

²⁷ UP Comments 7-8, May 17, 2012.

²⁸ NITL Comments 8, May 17, 2012.

²⁹ Id.

³⁰ UP Reply 5-7, June 18, 2012; and AAR Reply 9-10, June 18, 2012.

³¹ NITL Comments 9, May 17, 2012.

in interpreting contracts, which the Board generally leaves to the courts to resolve.³² UTU-NY also raises jurisdictional concerns and asserts that arbitration should be confined to transactions otherwise subject to the Board's jurisdiction.³³

The MGGA also advocates expanding the scope of subjects that could be arbitrated through the Board's program, requesting that parties be permitted to arbitrate matters that could lead to prospective relief, including freight rates.³⁴ UP counters that rate challenges are complicated and that an arbitrator would lack the expertise or resources to handle such matters.³⁵ Likewise, WCTL agrees that the arbitration program would not be appropriate to resolve complex matters.³⁶

During the public hearing, AAR and the participating Class I railroads urged the Board to remove the catch-all "other rail service-related matters" provision.³⁷ UP stated that adding clarity to the arbitration process by reducing the range and types of disputes would encourage participation.³⁸ AAR expressed the view that the list of arbitration-eligible matters should be limited to specifically enumerated matters that do not rise to a level of policy significance and are essentially factual disputes.³⁹ The NGFA stated that it has no objection to removing the catch-all provision.⁴⁰

The Board's final rule clarifies the types of disputes that are eligible for arbitration under the Board's program, removing the catchall language of "other rail service-related matters" to ensure that the list of program-eligible matters is clearly defined. Matters eligible for arbitration are: demurrage, accessorial charges, misrouting or mishandling of railcars, and disputes involving a carrier's published rules and practices as applied to particular rail transportation. Under the final rules, all parties opting into the arbitration program will have full prior knowledge that these four matters are eligible under the arbitration program.

In response to the comments, the final rules also provide that, when submitting an opt-in notice, parties may further narrow the field of eligible matters that they will agree to arbitrate. At the same time, the final rules reflect the requests of a number of parties for the opportunity to arbitrate additional types of disputes where the parties believe arbitration could be helpful. Thus,

³² UP Reply 8, June 18, 2012.

³³ UTU-NY Comments 9, May 17, 2012.

³⁴ MGGA Comments 2, May 17, 2012.

³⁵ UP Reply 9, June 18, 2012.

³⁶ WCTL Comments 7-8, May 17, 2012.

³⁷ Public Hr'g Tr., 147-53, Aug. 2, 2012.

³⁸ Id. at 148.

³⁹ Id. at 112-13.

⁴⁰ Id. at 95.

to provide parties with maximum flexibility, the final rules specify that parties may agree in writing on a case-by-case basis to arbitrate additional matters, provided that the additional matters are within the Board's statutory jurisdiction to resolve, and that the dispute does not require the Board to grant, deny, stay or revoke a license or other regulatory approval or exemption, and does not involve labor protective conditions.

Monetary Award Cap:

The NPRM proposed that the relief that could be awarded under the arbitration program would be limited to a maximum of \$200,000 per arbitral dispute, unless all parties to the matter agreed at the commencement of arbitration to a higher cap. However, the Board specifically invited comments on whether the proposed monetary award cap should be increased or decreased.

NITL argues that the proposed cap of \$200,000 is too low and is likely to substantially restrict the number of disputes that might be eligible for arbitration.⁴¹ NITL suggests that the cap should be increased to at least \$500,000.⁴² That figure, according to NITL, would better cover the majority of disputes under the proposed arbitration program and would make shipper parties more likely to participate in disputes.⁴³ WCTL endorses the monetary award limit put forward by the Board.⁴⁴ USDA asserts that the proposed \$200,000 cap should be increased, or that there need be no cap at all.⁴⁵

During the public hearing, NGFA stated that its arbitration program currently has a cap of \$200,000, but that its cap is currently under review.⁴⁶ WCTL said that it was generally satisfied with the proposed cap of \$200,000, but that the parties should have the option to mutually agree to increase the amount.⁴⁷ ARC recommended a program award cap of \$1,000,000 to reflect the cost a party might incur in the arbitration process and to open the program up to a larger number of potential users.⁴⁸

UP stated that it would not rule out participating in Board-sponsored arbitration if the monetary award cap is raised from \$200,000 to \$500,000.⁴⁹ NS stated that the cap would be one

⁴¹ NITL Comments 14, May 17, 2012.

⁴² Id.

⁴³ Id.

⁴⁴ WCTL Comments 9, May 17, 2012.

⁴⁵ USDA Comments 3, May 17, 2012.

⁴⁶ Id. at 64-Public Hr'g Tr., 65, Aug. 2, 2012.

⁴⁷ Id. at 104.

⁴⁸ Id. at 55.

⁴⁹ Id. at 138.

of a number of factors it would consider in deciding whether to participate in arbitration and that the higher the cap the more important a factor it would become.⁵⁰ AAR recommended that the Board keep the cap low at least until participants become more familiar and comfortable with the program.⁵¹

The Board will maintain the proposed arbitration program's monetary award cap of \$200,000. We recognize that some parties have concerns about this amount but we believe an award cap of \$200,000 is an appropriate starting point as the arbitration program is introduced. Such an amount is high enough to encompass a wide range of disputes, but should not be so high as to dissuade parties from participating in the arbitration program.⁵² The monetary award cap is per case and not per occurrence. As parties become more familiar with using the arbitration program, the Board may reassess the monetary award cap.

At the same time, the Board recognizes that any monetary award cap placed on the arbitration program may not fully encompass every arbitration-eligible dispute. Thus, the final rules allow parties to agree in writing to arbitrate a dispute with a different award amount. However, no injunctive relief will be available through the Board's arbitration program because matters in which a party seeks 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.

Counterclaims and Affirmative Defenses:

The Board's proposed rules did not expressly provide parties with the option to present counterclaims and affirmative defenses in arbitration proceedings. AAR⁵³ and UP⁵⁴ express concerns about whether the railroads could present counterclaims in the proposed arbitration program and note that the proposed rules create a perception that shippers would hold veto power over any such claim. At the hearing, UP noted that, regardless of whether the railroad or the shipper initiated the arbitration, it would not be cost effective to deal with only part of a dispute through arbitration, leaving related issues unresolved.⁵⁵ NITL suggested that the Board should allow for counterclaims in arbitration if the issue is arbitration-program-eligible and is related to the same transportation events as the primary claim.⁵⁶

⁵⁰ Id. at 139.

⁵¹ Public Hr'g Tr., 138-39, Aug. 2, 2012.

⁵² For example, of 15 recent demurrage cases before the Board, 11 would have been eligible for arbitration under the \$200,000 monetary award cap based on the value of the case asserted in the complaint.

⁵³ AAR Comments 13-14, May 17, 2012.

⁵⁴ UP Comments 4, May 17, 2012.

⁵⁵ Public Hr'g Tr., 148-49, Aug. 2, 2012.

⁵⁶ Id. at 40.

In response to these comments, the final rules will allow a respondent to file a counterclaim against a complaining party when the respondent files its answer to the arbitration complaint, provided the counterclaim arises out of the same set of circumstances or is substantially related to the underlying dispute, and subject to the Board's jurisdiction. An answer shall also contain all affirmative defenses that a respondent wishes to assert against a complainant. If a party fails to assert a counterclaim or affirmative defense in the answer to the complaint, it will forfeit the right to do so at a later date. Counterclaims will not count against the monetary award cap selected by the parties for the initiating complaint, because a counterclaim is a separate claim and will be subject to its own monetary award cap of \$200,000, unless a different cap is selected by the parties.

Arbitrator Panel:

In its proposed rules, the Board did not propose the use of multiple arbitrators to resolve a dispute. It did, however, seek comments on approaches the agency could employ if parties were to utilize a panel of two or three arbitrators. In response, NITL asserts that the parties should have the option of using a panel of three arbitrators.⁵⁷ It claims that, although many disputes might be resolved by a single arbitrator, there are some disputes in which the collective judgment of three persons might be useful.⁵⁸ NITL argues, however, that this option should be used only when all parties to a dispute agree that one arbitrator would be insufficient.⁵⁹ MGGGA claims that a panel of arbitrators would be better than a single arbitrator.⁶⁰ It suggests that, upon agreement by both parties, the Board should appoint the agency's arbitrator, and each party should choose and pay for an additional arbitrator.⁶¹

During the public hearing, NGFA supported a panel of three arbitrators. In the NGFA's experience, this improves the likelihood of well-reasoned decisions, enhances the balance and fairness with which the system is viewed, and reduces the potential for inadvertent errors.⁶² ARC stated that creating a panel of three arbitrators, in which the railroad and shipper are both represented by an arbitrator on the panel, would eliminate the need to find a single arbitrator who would be both neutral and an industry expert.⁶³ NITL believed a single arbitrator to be more cost effective, but that the parties should have the option to select an arbitration panel.⁶⁴ Both NITL⁶⁵

⁵⁷ NITL Comments 13, May 17, 2012.

⁵⁸ Id.

⁵⁹ Id.

⁶⁰ MGGGA Comments 2, May 17, 2012.

⁶¹ Id.

⁶² Public Hr'g Tr., 20, Aug. 2, 2012.

⁶³ Id. at 56 & 72-73.

⁶⁴ Id. at 42.

⁶⁵ Id. at 84-85.

and WCTL⁶⁶ expressed concerns regarding the cost-prohibitive nature of a panel of three arbitrators in light of the \$200,000 monetary award cap, the central concern being that shippers seeking small amounts of damages might be frozen out of the arbitration process if the Board were to mandate a three-member arbitration panel.

UP stated at the hearing that it views three-member arbitration panels as a solution to the problem of finding a single-neutral arbitrator with subject-matter expertise.⁶⁷ UP stated that with three arbitrators, and each of the parties selecting someone it believes is knowledgeable and able to explain the issues, UP might be willing to accept a third-neutral arbitrator with less familiarity of the subject matter.⁶⁸

The Board finds persuasive the comments regarding the respective benefits of both a panel of three arbitrators and the use of a single-neutral arbitrator. The Board further believes that a flexible program will be the most useful to party participants. The parties, and not the Board, are in the best position to determine what will work best in a particular arbitration proceeding. The final rules, therefore, allow the parties to shape individual arbitrations to suit their specific needs rather than creating a one-size-fits-all arbitration program.

Under the final rules, a panel of three arbitrators will be utilized unless the parties agree in writing to the use of a single neutral arbitrator. The Board believes that using a panel of three arbitrators will alleviate the concerns raised about finding a single-neutral arbitrator with subject-matter expertise. The parties in their comments and testimony recognize that it would not be overly difficult to appoint two subject-matter experts as arbitrators who can educate and guide the third-neutral arbitrator.⁶⁹ Thus, establishing a three-member arbitration panel, as a general rule, will help to ensure the integrity and neutrality of the arbitration proceedings.

The Board also recognizes that it can be appropriate to use a single-neutral arbitrator in certain cases as a cost-effective, expeditious choice for resolving a dispute between the parties. Thus, the final rules allow either party to request the single-arbitrator option in either the complaint or the answer. Both parties, however, must consent to the use of a single-neutral arbitrator in writing for the option to be selected. If no agreement is reached, the parties will have the option of utilizing the panel of three arbitrators or bringing the matter formally before the Board and foregoing the arbitration process.

⁶⁶ Id. at 85-86.

⁶⁷ Id. at 141-42.

⁶⁸ Public Hr'g Tr., 142, Aug. 2, 2012.

⁶⁹ The final rules allow each party to appoint one arbitrator who is intended to be a subject-matter expert. The final rules place no restrictions on the selection of this party-appointed arbitrator. A party may appoint any individual that it believes has the requisite qualifications to serve as an arbitrator, including its employee, a choice that could reduce the costs of arbitration.

Selecting Arbitrators and Cost Sharing:

AAR suggests that the Board should reassess how arbitrators will be selected.⁷⁰ If the Board were to maintain the current roster system, AAR asks that the Board initiate a public and transparent process for updating the list.⁷¹ It claims that the Board has no apparent standards of qualifications for arbitrators and no apparent vetting process.⁷² AAR further asserts that the Board should void the existing roster and institute a proceeding to establish a new list of arbitrators.⁷³ In such a proceeding, according to AAR, the Board should establish objective criteria to judge whether an individual could be an effective arbitrator of Board-related disputes.⁷⁴ It proposes that such criteria should include a minimum number of years of transportation experience and demonstrated neutrality.⁷⁵

AAR further suggests that the Board should establish clear procedures for selecting the third-party neutral or single arbitrator in a specific dispute.⁷⁶ It proposes that, if the parties cannot agree on an arbitrator, the Board could establish a “best-final offer” process where each party would submit the name of each arbitrator to the Board with reasons backing that choice.⁷⁷ The Board could then select one of the two.⁷⁸ WCTL and NITL propose a similar process for the Board to select an arbitrator.⁷⁹

At the hearing, UP speculated that one reason why the Board’s arbitration procedures have not been used in the past may be the quality of the available list of arbitrators.⁸⁰ UP noted that, in other arbitration settings, it can quickly assess the qualifications and neutrality of an arbitrator. Typically, UP and the opposing party can each select an arbitrator and then either mutually agree on a third arbitrator or utilize a neutral arbitration organization to supply a list of potential arbitrators complete with extensive background information.⁸¹

⁷⁰ AAR Comments 17-18, May 17, 2012.

⁷¹ Id. at 17.

⁷² Id. at 17.

⁷³ Id.

⁷⁴ Id.

⁷⁵ Id. at 17-18.

⁷⁶ AAR Comments 18, May 17, 2012.

⁷⁷ Id.

⁷⁸ Id.

⁷⁹ WCTL Comments 10, May 17, 2012; and NITL Comments 12, May 17, 2012.

⁸⁰ Public Hr’g Tr., 121, Aug. 2, 2012.

⁸¹ Id. at 122.

The Board recognizes that its current list of arbitrators is outdated and does not provide the type of information the parties have expressed an interest in knowing prior to an arbitrator's appointment. The selection process could also have been made clearer. The Board has incorporated the suggestions and best practices identified by the parties into the final rules to create a streamlined, party-driven arbitrator selection process, and will therefore no longer maintain a roster or list of arbitrators.

The Board will provide the parties with a list of five neutral arbitrators to facilitate the selection of a third-neutral arbitrator, or a single-neutral arbitrator if the parties so agree in writing. The neutral arbitrator is intended to be an arbitration-process expert, rather than a subject-matter expert. When individual arbitration proceedings arise, the Board will obtain a list of potential arbitrators from professional arbitration associations such as the American Arbitration Association, Judicial Arbitration and Mediation Services (JAMS), and the Federal Mediation and Conciliation Service. The Board believes that these professional arbitration associations, with expansive and well-maintained rosters, will be able to provide a list of qualified-neutral arbitrators to the Board upon request. Utilizing the expertise of these organizations should expedite and improve the arbitrator selection process. It was apparent from the comments and testimony that the parties have had experience utilizing arbitrators from these organizations and have been comfortable doing so. The list of neutral arbitrators will be accompanied by a detailed professional history of each arbitrator. Parties to arbitration will split all costs associated with the use of the neutral arbitrator. The Board will pay all costs associated with obtaining a list of arbitrators from professional arbitration associations.

To select the neutral arbitrator, the Board has adopted a "strike" methodology in the final rules. Specifically, after the Board obtains a list of five neutral arbitrators, and provides the list to the parties, the complainant will be responsible for striking one name from the list. The respondent will then have the opportunity to strike another name from the list. The process will repeat until only one name remains on the list: the individual who will be the neutral arbitrator. This selection should be concluded in no more than 14 days from the date the Board sends the arbitrator list to the parties. Each party to arbitration is responsible for conducting its own due diligence on the list of neutral arbitrators. The selection of the neutral arbitrator will not be challengeable before the Board. To permit challenges to the strike methodology would increase litigation costs and lengthen the arbitration process, which would contravene the goals of the Board's arbitration program.

Arbitration Procedures:

To carry out an effective arbitration process for all parties, arbitration proceedings must be conducted in a timely yet thorough manner. The final rules provide that when the parties select a panel of three arbitrators, the neutral arbitrator will establish all arbitration procedures including discovery, the submission of evidence, and the treatment of confidential information, and the evidentiary phase of the arbitration process must be completed within 90 days from the established start date. The neutral arbitrator will be required to issue an unredacted written decision to the parties on behalf of the arbitration panel within 30 days following the completion of the evidentiary phase. The neutral arbitrator must serve a redacted copy of the arbitration decision upon the Board within 60 days of the completion of the evidentiary phase.

Publication of Decisions and Precedential Value:

Under the proposed rules, arbitration decisions would not be made public in order to promote parties' willingness to utilize the arbitration program. The Board received comments and testimony in opposition to this proposal. AAR argues that making arbitration awards public would have three benefits: (1) public decisions that summarize the position of the parties discourage extreme positions and can encourage voluntary settlement; (2) public decisions would create incentives for arbitrators to render thoughtful, well-reasoned decisions; and (3) public decisions would allow parties to make an informed decision in selecting arbitrators based on their prior work.⁸² As such, AAR proposes that arbitrators should be required to render written confidential decisions to the parties involved in disputes and also a shorter public summary of the decision to be submitted to the Board for publication on the Board's website.⁸³ At the public hearing, NITL stated that it believes there are commercial positives to publishing arbitration decisions and that published decisions add a layer of transparency to the arbitration program.⁸⁴ NITL also argued that publishing decisions may ease concerns about the program because parties can see that other parties have gone through the process before.⁸⁵ NGFA stated that arbitration decisions should be published but with confidential materials redacted.⁸⁶ NGFA expressed the view that publishing arbitration decisions would encourage shippers and carriers to resolve disputes prior to arbitration.⁸⁷ UP suggested that the Board should publish arbitration decisions on the Board's website in order to ensure transparency of the arbitration process.⁸⁸

During the hearing, NITL stated that published arbitration decisions should have no precedential value.⁸⁹ MGGA also supports non-precedential arbitration decisions.⁹⁰ NGFA states that, while arbitration decisions offer no precedential value, they provide considerable value as a published guide.⁹¹ UP states that it would support publication of arbitration decisions if they did not disclose confidential information, are not precedential, and are not admissible in future arbitrations.⁹²

⁸² AAR Reply 10-11, June 18, 2012.

⁸³ Id. at 11.

⁸⁴ Public Hr'g Tr., 101, Aug. 2, 2012.

⁸⁵ Id. at 93.

⁸⁶ Id. at 21.

⁸⁷ Id.

⁸⁸ Id. at 124.

⁸⁹ Id. at 43.

⁹⁰ MGGA Comment 2, May 17, 2012.

⁹¹ NFGA Comment 9, May 17, 2012.

⁹² UP Reply 10, June 18, 2012.

Based on the parties' comments, the Board will require the publication of arbitration decisions. The arbitrators shall, with the help of the parties or pursuant to the arbitration agreement, redact from this decision all proprietary or confidential information, and provide the redacted copy to the Board within 60 days of the completion of the evidentiary phase. The Board will then publish the redacted decision on its website. Arbitrators shall be required in all cases to maintain an unredacted copy of their decisions. In the event an arbitration decision is appealed to the Board, the neutral arbitrator shall be required to serve upon the Board an unredacted copy of the decision, but the Board will consider this decision confidential and will not post it on its website. The Board will not publish any proprietary or confidential information. Although arbitration decisions will be available on the Board's website, these decisions will have no precedential value in any proceeding including other mediations, arbitrations, formal Board proceedings, and court appeals of Board decisions.

Standard of Review:

The Board stated in its proposed rules that its standard of review of an arbitral decision would be narrow and that relief would be limited to instances involving a clear abuse of arbitral authority or discretion. BNSF asks the Board to allow appeals on additional grounds including that: (1) the arbitrator has exceeded his or her authority; (2) the arbitration award contravenes statutory requirements; and/or (3) the arbitrator has exhibited partiality.⁹³ BNSF argues that a party is more likely to participate in the arbitration program if it knows that the standard of review is broad enough to allow the Board to review and modify or vacate an award that is clearly in error or is issued under circumstances where the arbitrator is biased or acts outside his or her authority.⁹⁴ BNSF notes that this standard is similar to the standard used to review arbitration awards under the Federal Arbitration Act.⁹⁵

Other parties also support broadening the standard of review. For example, UP argues that one ground for appeal should be that an arbitrator failed to disclose any relationship or dealing between the arbitrator and a party or its counsel.⁹⁶ AAR proposes, at a minimum, that the Board should add the phrase "or contravenes statutory requirements" to the proposed standard of review.⁹⁷ USDA suggests that parties should be able to appeal the initial arbitration decision to a proposed review panel before seeking the Board's review of the arbitration decision, except in instances involving a clear abuse of arbitral authority or discretion.⁹⁸

⁹³ BNSF Comments 5, May 17, 2012.

⁹⁴ Id.

⁹⁵ Id.

⁹⁶ UP Comments 12, May 17, 2012.

⁹⁷ AAR Comments 18, May 17, 2012.

⁹⁸ USDA Comments 3, May 17, 2012.

NITL objects to these attempts to expand the standard.⁹⁹ It claims that the standard should be narrow because a broad standard could lead to frequent and complex appeals and could undercut a prime rationale for arbitration in the first place.¹⁰⁰ NITL does, however, agree that the lack of disclosure of an arbitrator's relevant relationship would be a sound reason for appeal and that the Board should broaden its standard to accommodate that ground.¹⁰¹

Additionally, NGFA claims that, because the proposed 49 C.F.R. § 1115.8(c) would require an arbitrator to be guided by the Interstate Commerce Act and by STB and ICC precedent, on appeal a party could argue that it was an abuse of discretion for an arbitrator to depart from an earlier Board or ICC decision.¹⁰² According to NGFA, this possibility would significantly broaden the standard proposed at § 1108.11(c).¹⁰³ Therefore, NGFA asserts that the Board should not instruct arbitrators to be guided by prior Board or ICC decisions, except for jurisdictional issues.¹⁰⁴ WCTL questions NGFA's suggestion.¹⁰⁵ WCTL notes that, if the Board's decision were to uphold an arbitral award that was contrary to established law, the Board's decision would be subject to challenge in court under the Hobbs Act (28 U.S.C. §§ 2321, 2342).¹⁰⁶

Upon petition by one or more parties to the arbitration, the Board reserves the right to review, modify, or vacate any arbitration award. The final rules clarify that the Board will apply a narrow standard of review, but which is somewhat broader than originally proposed, and will grant relief only on grounds that the award reflects a clear abuse of arbitral authority or discretion, or directly contravenes statutory authority. In response to BNSF's proposed standard of review, the Board notes that, if arbitrators exceed their authority or exhibit partiality, such conduct is within the scope of the adopted standard. The final rules provide that, under this narrow standard of review, arbitrators may be guided by, but need not be bound by, agency precedent.

The Board notes that the review process adopted here is similar to the arbitral review process established by the Federal Energy Regulatory Commission (FERC).¹⁰⁷ FERC, like the

⁹⁹ NITL Reply 21, June 18, 2012.

¹⁰⁰ Id.

¹⁰¹ NITL Reply 22, June 18, 2012.

¹⁰² NGFA Comments 9-10, May 17, 2012.

¹⁰³ NGFA Comments 10, May 17, 2012.

¹⁰⁴ Id.

¹⁰⁵ WCTL Reply 7, June 18, 2012.

¹⁰⁶ Id.

¹⁰⁷ *See generally* Alternative Dispute Resolution, 60 Fed. Reg. 19494, 19499-500 (April 19, 1995) (codified at 18 C.F.R. § 385.605 (Rule 605)) (describing FERC's arbitral review process).

Board, is an independent regulatory agency with a statutory mandate to protect the public interest. We are broadening our proposed standard of review somewhat to help carry out our statutory responsibility by ensuring that arbitration decisions do not directly contravene statutory authority. We decline, however, further broadening the Board's standard of review because such a detailed review process could defeat the purpose of arbitration.

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 of an arbitral decision, 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.

Mediation

In the NPRM, the Board proposed new mediation rules under which the Board could order parties to participate in mediation of certain types of disputes, on a case-specific basis, and sought to clarify and simplify the existing mediation procedures where parties to a proceeding can voluntarily request the Board to institute a mediation process to attempt to resolve a dispute. The Board also proposed to reserve the right to stay underlying proceedings and toll any applicable statutory deadlines for the duration of the mediation.

Comments and testimony from the parties regarding the Board's proposed revisions to its mediation rules at Part 1109 were generally positive, with only one party objecting fully to the revised rules.

At the public hearing, many of the parties expressed their support for the proposed mediation program. NGFA stated that it supports the proposed rules.¹⁰⁸ NITL expressed its support for the Board's proposal to order parties to mediation at the request of one party, or at the Board's own initiative except in matters involving regulatory approvals and for labor disputes.¹⁰⁹ NITL believed the proposed 30-day mediation period and the option to extend the mediation period are reasonable.¹¹⁰ ARC stated that mediation could be one of the most important and useful steps for resolving disputes going forward.¹¹¹ Tom O'Connor stated that he had positive experiences with Board-sponsored mediation in the past, and that he supports continued and expanded use of mediation at the Board.¹¹² NS also expressed its support for voluntary mediation provided it remains confidential and inadmissible in formal Board proceedings.¹¹³

¹⁰⁸ Public Hr'g Tr., 17, Aug. 2, 2012.

¹⁰⁹ Id. at 28.

¹¹⁰ Id. at 29.

¹¹¹ Id. at 54.

¹¹² Id. at 58.

¹¹³ Id. at 115.

In its comments, UP states that it does not object to the new mediation proposals, but it suggests that “applicable statutory deadlines” be clarified to read “statutory deadlines imposed on the Board under the Interstate Commerce Act” so that it is clear that the Board cannot toll limitations and deadlines established by other federal or state statutes.¹¹⁴ Similarly, in its comments AAR expresses concerns that the Board does not have the authority to toll statutes of limitations on the collection of payments in the courts and that such statutes could run while mediation is ordered by the Board without consent of the parties.¹¹⁵ It asks that the Board clarify its authority to toll statutory deadlines while mediation is ongoing. Additionally, AAR questions what authority the Board has to compel mediation without obtaining the consent of the parties.¹¹⁶

WCTL supports many of the mediation regulations proposed by the Board. It does claim, however, that the proposed regulations contain confidentiality provisions that differ somewhat from the confidentiality provisions the Board employs in SAC cases.¹¹⁷ WCTL argues that the existing confidentiality provisions applying to SAC cases have been effective, and that the Board should consider applying those confidentiality provisions as part of its new rules to be applied to all cases, or at least consider eliminating the document-destruction requirement contained in proposed rule §1109.3(f)(1).¹¹⁸

The UTU-NY opposes the proposed changes to the mediation rules. It objects to the scope of the mediation proposal, and argues that mediation should not be available in labor-management disputes because they are better left to other agencies, statutes, or private resolution.¹¹⁹

Having considered the comments and testimony of the parties, the Board revises its rules at Part 1109 to allow the Board to order mediation in certain types of disputes (those in which the Board is not required to grant or deny a license or other regulatory approval or exemption, and those that do not involve labor protection) before the Board. The final rules also permit the Board to institute mediation at the mutual request of all parties to a dispute. The Board may also order the parties to participate in mediation of a dispute when requested by only one party to the proceeding or on the Board’s own initiative. Authority to grant voluntary mediation requests is delegated to the Director of the Board’s Office of Proceedings. The Board may compel mediation or grant a mediation request at any time in an eligible proceeding.¹²⁰ The Board will

¹¹⁴ UP Comments 12, May 17, 2012.

¹¹⁵ AAR Comments 21-22, May 17, 2012.

¹¹⁶ Id. at 21.

¹¹⁷ WCTL Comments 6, May 17, 2012.

¹¹⁸ Id.

¹¹⁹ UTU-NY Comments 8, May 17, 2012.

¹²⁰ Pursuant to 49 C.F.R. § 1109.4, mediation must occur soon after the filing of a complaint in rate reasonable cases.

appoint one or more Board employees with mediation training, unless the parties mutually agree to a non-Board mediator and so inform the Board. If the parties use a non-Board mediator, they shall mutually assume responsibility for paying the fees and/or costs of the mediator. Mediation periods shall last for up to 30 days, although this time may be extended upon the mutual request of the parties. The Board will remove the confidentiality requirement that parties and mediators destroy all mediation related notes at the conclusion of mediation. The Board reserves the right to stay proceedings and toll any applicable statutory deadlines pending the conclusion of a 30-day mediation period when all parties voluntarily consent to mediation. The Board will not stay proceedings or toll applicable statutory deadlines where one or more parties does not voluntarily consent to mediation or as provided in the rules governing rate cases.¹²¹

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

Regulatory Flexibility Act:

The Regulatory Flexibility Act of 1980 (RFA), 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. Under § 605(b), an agency is not required to perform an initial or final regulatory flexibility analysis if it certifies that the proposed or final rules will not have a "significant impact on a substantial number of small entities."

Insofar as the goal of the RFA is to reduce the cost to small entities of complying with federal regulations, the RFA requires an agency to perform a regulatory flexibility analysis of small entity impacts only when a rule directly regulates those entities. In other words, 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). An agency has no obligation to conduct a small entity impact analysis of effects on entities that it does not regulate. United Dist. Cos. v. FERC, 88 F.3d 1105, 1170 (D.C. Cir. 1996).

These final rules clarify and simplify the existing procedures for two alternative dispute resolution processes to formal adjudications before the Board. First, the rules permit carriers and shippers to agree voluntarily to resolve certain kinds of disputes before the Board under a newly-defined arbitration program. Second, the rules permit parties to agree voluntarily, and sometimes could require parties, to mediate certain kinds of disputes before the Board.

Although these alternative dispute resolution processes are available to all rail carriers, including small entities,¹²² these rules will not have a significant impact on a substantial number

¹²¹ See 49 C.F.R. § 1111.

¹²² The Small Business Administration's Office of Size Standards has established a size standard for rail transportation, pursuant to which a line-haul railroad is considered small if its

(continued . . .)

of small entities. For the most part, these final rules provide for voluntary mediation and arbitration. Regulated entities are not required to engage in additional regulatory compliance as the procedures are optional. Even in the case of Board-ordered mediation, there are no additional regulatory compliance requirements as mediation will be conducted pursuant to a formal complaint filed with the Board. Under the final rules, any 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, which is entirely voluntary, that process is designed to consume less time and be less costly than formal complaint proceedings, thus permitting the parties to obtain relief at a greater net value. To the extent that these final rules have any impact, it is expected to result in faster resolution of controversies before the Board at a lower cost. Therefore, the Board certifies under 5 U.S.C. § 605(b) that these rules will not have a significant economic impact on a substantial number of small entities within the meaning of the RFA.

Paperwork Reduction Act

In a supplemental Federal Register notice, published at 77 Fed. Reg. 23208 on April 8, 2012, the Board sought comments pursuant to the Paperwork Reduction Act (PRA), 44 U.S.C. § 3501–3549, and Office of Management and Budget (OMB) regulations at 5 C.F.R. § 1320.11, regarding: (1) whether the collection of information associated with the proposed arbitration program is necessary for the proper performance of the functions of the Board, including whether the collection has practical utility; (2) the accuracy of the Board’s burden estimates; (3) ways to enhance the quality, utility, and clarity of the information collected; and (4) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology, when appropriate. None of the comments received specifically referenced these questions. Several of the comments discussed above, however, could be viewed to argue that requiring opt-in letters would be more practical and less burdensome than requiring opt-out letters and the final rule adopts that change.

The proposed rules were submitted to OMB for review as required under the PRA, 44 U.S.C. § 3507(d), and 5 C.F.R. § 1320.11. No comments were received from OMB, which assigned to the collection Control No. 2140–0020. The display of a currently valid OMB control number for this collection is required by law. Under the PRA and 5 C.F.R. § 1320.11, an agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection displays a currently valid OMB control number. As required, simultaneously with the publication of this final rule, the Board is submitting this modified collection to OMB for review.

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

(. . . continued)

number of employees is 1,500 or less, and a short line railroad is considered small if its number of employees is 500 or less. 13 C.F.R. § 121.201 (industry subsector 482).

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 adopts the final rules as set forth in this decision. Notice of the adopted rules will be published in the Federal Register.
2. This decision is effective 30 days after the day of service.

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

Appendix A

Code of Federal Regulations

For the reasons set forth in the preamble, the Surface Transportation Board amends 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 is amended 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) is also issued under 5 U.S.C. § 5514 and 31 U.S.C. § 3717.

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

§ 1002.2 Filing fees.

* * * * *

(f) * * *

(87) Arbitration of Certain Disputes Subject to the Statutory Jurisdiction of the Surface Transportation Board under 49 C.F.R. § 1108:	
(i) Complaint.....	\$75.
(ii) Answer (per defendant), Unless Declining to Submit to Any Arbitration.....	\$75.
(iii) Third Party Complaint	\$75.
(iv) Third Party Answer (per defendant), Unless Declining to Submit to Any Arbitration	\$75.
(v) Appeals of Arbitration Decisions or Petitions to Modify or Vacate an Arbitration Award.....	\$150.
(88) Basic fee for STB adjudicatory services not otherwise covered.....	\$250.
(89)-(95) [Reserved]	

* * * * *

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 and to extend the mediation period at the mutual request of the parties

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

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

* * * * *

5. Revise Part 1108 to read as follows:

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

Sec.

- 1108.1 Definitions.
- 1108.2 Statement of purpose, organization, and jurisdiction.
- 1108.3 Participation in the Board’s arbitration program.
- 1108.4 Use of arbitration.
- 1108.5 Arbitration commencement procedures.
- 1108.6 Arbitrators.
- 1108.7 Arbitration procedures.
- 1108.8 Relief
- 1108.9 Decisions.
- 1108.10 Precedent.
- 1108.11 Enforcement and appeals.
- 1108.12 Fees and costs.
- 1108.13 Additional parties per side.

Authority: 49 U.S.C. § 721(a) and 5 U.S.C. § 571 *et seq.*

§ 1108.1 Definitions.

As used in this part:

(a) *Arbitrator* means a single person appointed to arbitrate pursuant to these rules.

(b) *Arbitrator Panel* means a group of three people appointed to arbitrate pursuant to these rules. One panel member would be selected by each side to the arbitration dispute, and the parties would mutually agree to the selection of the third-neutral arbitrator under the “strike” methodology described in § 1108.6(c).

(c) *Arbitration program* means the program established by the Surface Transportation Board in this Part under which participating parties, including rail carriers and shippers, have agreed voluntarily in advance, or on a case-by-case basis to resolve disputes about arbitration-program-eligible matters brought before the Board using the Board’s arbitration procedures.

(d) *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; and disputes involving a carrier’s published rules and practices as applied to particular rail transportation.

(e) *Counterclaim* is an independent arbitration claim filed by a respondent against a complainant arising out of the same set of circumstances or is substantially related to the underlying arbitration complaint and subject to the Board’s jurisdiction.

(f) *Final arbitration decision* is the unredacted decision served upon the parties 30 days after the close of the arbitration’s evidentiary phase.

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

(h) *Monetary award cap* means a limit on awardable damages of \$200,000 per case, unless the parties mutually agree to a different award cap. If parties bring one or more counterclaims, such counterclaims will be subject to a separate monetary award cap of \$200,000 per case, unless the parties mutually agree to a different award cap.

(i) *Neutral Arbitrator* means the arbitrator selected by the strike methodology outlined in § 1108.6(c).

(j) *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.

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

§ 1108.2 Statement of purpose, organization, and jurisdiction.

(a) *The Board’s intent.* The Board favors the resolution of disputes through the use of mediation and arbitration procedures, in lieu of formal Board proceedings, whenever possible. This section provides for the creation of a binding, voluntary arbitration program in which parties, including shippers and railroads, agree in advance to arbitrate certain types of disputes with a limit on potential liability of \$200,000 unless the parties mutually agree to a different award cap. The Board’s arbitration program is open to all parties eligible to bring or defend disputes before the Board.

(1) Except as discussed in subsection (b), parties to arbitration may agree by mutual written consent to arbitrate additional matters and to a different amount of potential liability than the monetary award cap identified in this section.

(2) Nothing in these rules shall be construed in a manner to prevent parties from independently seeking or utilizing private arbitration services to resolve any disputes they may have.

(b) *Limitations to the Board's Arbitration Program.* These procedures shall not be available for disputes involving labor protective conditions, which have their own 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. Parties may only use these arbitration procedures to arbitrate matters within the statutory jurisdiction of the Board.

§ 1108.3 Participation in the Board's arbitration program.

(a) *Opt-in procedures.* Any rail carrier, shipper, or other party eligible to bring or defend disputes before the Board may at any time voluntarily choose to opt into the Board's arbitration program. Opting in may be for a particular dispute or for all potential disputes before the Board unless and until the party exercises the opt-out procedures discussed in § 1108.3(b). To opt in parties may either:

(1) File a notice with the Board, under Docket No. EP 699, advising the Board of the party's intent to participate in the arbitration program. Such notice may be filed at any time and shall be effective upon receipt by the Board.

(i) Notices filed with the Board shall state which arbitration-program-eligible issue(s) the party is willing to submit to arbitration.

(ii) Notices may, at the submitting party's discretion, provide for a different monetary award cap.

(2) Participants to a proceeding, where one or both parties have not opted into the arbitration program, may by joint notice agree to submit an issue in dispute to the Board's arbitration program.

(i) The joint notice must clearly state the issue(s) which the parties are willing to submit to arbitration and the corresponding maximum monetary award cap if the parties desire to arbitrate for a different amount than the Board's \$200,000 monetary award cap.

(b) *Opt-out procedures.* Any party who has elected to participate in the arbitration program may file a notice at any time under Docket No. EP 699, informing the Board of the party's decision to opt out of the program or amend the scope of its participation. The notice shall take effect 90 days after filing and shall not excuse the filing party from arbitration proceedings that are ongoing, or permit it to withdraw its consent to participate in any arbitration-program-eligible dispute associated with their opt-in notice for any matter before the Board at any time within that 90 day period before the opt-out notice takes effect

(c) *Public notice of arbitration program participation.* The Board shall maintain a list of participants who have opted into the arbitration program on its website at www.stb.dot.gov. Those parties participating in arbitration on a case-by-case basis will not be listed on the Board's website.

§ 1108.4 Use of arbitration.

(a) *Arbitration-program-eligible matters.* Matters eligible for arbitration under the Board's program are: demurrage; accessorial charges; misrouting or mishandling of rail cars; and disputes involving a carrier's published rules and practices as applied to particular rail transportation. Parties may agree in writing to arbitrate additional matters on a case-by-case basis as provided in paragraph (e) of this section.

(b) *Monetary award cap.* Arbitration claims may not exceed the arbitration program award cap of \$200,000 per arbitral proceeding unless:

(1) The defending party's opt-in notice provides for a different monetary cap or;
 (2) The parties agree to select a different award cap that will govern their arbitration proceeding. The parties may change the award cap by incorporating an appropriate provision in their agreement to arbitrate.

(3) Counterclaims will not offset against the monetary award cap of the initiating claim. A counterclaim is an independent claim and is subject to a monetary award cap of \$200,000 per case, separate from the initiating claim, or to a different cap agreed upon by the parties in accordance with § 1108.4(b)(2).

(c) *Assignment of arbitration-program-eligible matters.* The Board shall assign to arbitration all arbitration-program-eligible disputes 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.

(d) *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 (e) of this section to include additional disputes.

(e) *Other matters.* Parties may petition the Board, on a case-by-case basis, to assign to arbitration disputes, or portions of disputes, not listed as arbitration-program-eligible matters. This may include counterclaims and affirmative defenses. The Board will not consider for arbitration types of disputes which are expressly prohibited in § 1108.2(b).

(f) *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.

§ 1108.5 Arbitration commencement procedures.

(a) *Complaint.* 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 and the respondent are participants in the Board's arbitration program pursuant to §1108.3(a), or that the complainant is willing to arbitrate voluntarily all or part of the dispute pursuant to the Board's arbitration procedures, and the relief requested.

(1) If the complainant desires arbitration with a single-neutral arbitrator instead of a three-member arbitration panel, the complaint must make such a request in its complaint.

(2) If the complainant is not a participant in the arbitration program, the complaint may specify the issues that the complainant is willing to arbitrate.

(3) If the complainant desires to set a different amount of potential liability than the \$200,000 monetary award cap, the complaint should specify what amount of potential liability the complainant is willing to incur.

(b) *Answer to the complaint.* 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 the particular dispute.

(1) If the complaint requests arbitration by a single-neutral arbitrator instead of by an arbitration panel, the answer must contain a statement consenting to arbitration by a single-neutral arbitrator or an express rejection of the request.

(i) The respondent may also initiate a request to use a single-neutral arbitrator instead of an arbitration panel.

(ii) Absent the parties agreeing to arbitration through a single-neutral arbitrator, the Board will assign the case to arbitration by a panel of three arbitrators as provided by § 1108.6(a)-(c). The party requesting the single-neutral arbitrator shall at that time provide written notice to the Board and the other parties if it continues to object to a three-member arbitration panel. Upon timely receipt of the notice, the Board shall set the matter for formal adjudication.

(2) When the complaint specifies a limit on the arbitrable issues, the answer must state whether the respondent is willing to resolve those issues through arbitration.

(i) If the answer contains an agreement to arbitrate some but not all of the arbitration issues in the arbitration 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.

(ii) 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, and provide a list of arbitrators.

(3) When the complaint proposes a different amount of potential liability, the answer must state whether the respondent agrees to that amount in lieu of the \$200,000 monetary award cap.

(c) *Counterclaims.* In answering a complaint, the respondent may file one or more counterclaims against the complainant if such claims arise out of the same set of circumstances or are substantially related, and are subject to the Board's jurisdiction as provided in § 1108.2(b). Counterclaims are subject to the assignment provisions contained in § 1108.4(c)-(e). Counterclaims are subject to the monetary award cap provisions contained in § 1108.4(b)(2)-(3).

(d) *Affirmative defenses.* An answer to an arbitration complaint shall contain specific admissions or denials of each factual allegation contained in the complaint, and any affirmative defenses that the respondent wishes to assert against the complainant.

(e) *Arbitration agreement.* Prior to the commencement of an arbitration proceeding, the parties to arbitration together with the neutral arbitrator shall create a written arbitration agreement, which at a minimum will state with specificity the issues to be arbitrated and the corresponding monetary award cap to which the parties have agreed. The agreement may contain other mutually agreed upon provisions.

(1) Any additional issues selected for arbitration by the parties, that are not outside the scope of these arbitration rules as explained in § 1108.2(b), must be subject to the Board's statutory authority.

(2) These rules shall be incorporated by reference into any arbitration agreement conducted pursuant to an arbitration complaint filed with the Board.

§ 1108.6 Arbitrators.

(a) *Panel of arbitrators.* Unless otherwise requested in writing pursuant to § 1108.5(a)(1), all matters arbitrated under these rules shall be resolved by a panel of three arbitrators.

(b) *Party-appointed arbitrators.* The party or parties on each side of an arbitration dispute shall select one arbitrator, and serve notice of the selection upon the Board and the opposing party within 20 days of an arbitration answer being filed.

(1) Parties on one side of an arbitration proceeding may not challenge the arbitrator selected by the opposing side.

(2) Parties to an arbitration proceeding are responsible for the costs of the arbitrator they select.

(c) *Selecting the neutral arbitrator.* The Board shall provide the parties with a list of five neutral arbitrators within 20 days of an arbitration answer being filed. When compiling a list of neutral arbitrators for a particular arbitration proceeding, the Board will conduct searches for arbitration experts by contacting appropriate professional arbitration associations. The parties will have 14 days from the date the Board provides them with this list to select a neutral arbitrator using a single strike methodology. The complainant will strike one name from the list first. The respondent will then have the opportunity to strike one name from the list. The process will then repeat until one individual on the list remains, who shall be the neutral arbitrator.

(1) The parties are responsible for conducting their own due diligence in striking names from the neutral arbitrator list. The final selection of a neutral arbitrator is not challengeable before the Board.

(2) The parties shall split the cost of the neutral arbitrator.

(3) The neutral arbitrator appointed through the strike methodology shall serve as the head of the arbitration panel and will be responsible for ensuring that the tasks detailed in §§ 1108.7 and 1108.9 are accomplished.

(d) *Use of a single arbitrator.* Parties to arbitration may request the use of a single-neutral arbitrator. Requests for use of a single-neutral arbitrator must be included in a complaint or an answer as required in § 1108.5(a)(1). Parties to both sides of an arbitration dispute must agree to the use of a single-neutral arbitrator in writing. If the single-arbitrator option is selected, the arbitrator selection procedures outlined in § 1108.6(c) shall apply.

(e) *Arbitrator incapacitation.* If at any time during the arbitration process a selected arbitrator becomes incapacitated or is unwilling or unable to fulfill his or her duties, a replacement arbitrator shall be promptly selected by either of the following processes:

(1) If the incapacitated arbitrator was appointed directly by a party to the arbitration, the appointing party shall, without delay, appoint a replacement arbitrator pursuant to the procedures set forth in § 1108.6(b).

(2) If the incapacitated arbitrator was the neutral arbitrator, the parties shall promptly inform the Board of the neutral arbitrator's incapacitation and the selection procedures set forth in § 1108.6(c) shall apply.

§ 1108.7 Arbitration procedures.

(a) *Arbitration evidentiary phase timetable.* Whether the parties select a single arbitrator or a panel of three arbitrators, the neutral arbitrator shall establish all rules deemed necessary for each arbitration proceeding, including with regard to discovery, the submission of evidence, and

the treatment of confidential information, subject to the requirement that this evidentiary phase shall be completed within 90 days from the start date established by the neutral arbitrator.

(b) *Written decision timetable.* The neutral arbitrator will be responsible for writing the arbitration decision. The unredacted arbitration decision must be served on the parties within 30 days of completion of the evidentiary phase. A redacted copy of the arbitration decision must be served upon the Board within 60 days of the close of the evidentiary phase for publication on the Board's website.

(c) *Extensions to the arbitration timetable.* Petitions for extensions to the arbitration timetable shall only be considered in cases of arbitrator incapacitation as detailed in § 1108.6(e).

(d) *Protective orders.* Any party, on either side of an arbitration proceeding, may request that discovery and the submission of evidence be conducted pursuant to a standard protective order agreement.

§ 1108.8 Relief.

(a) *Relief available.* An arbitrator may grant relief in the form of monetary damages to the extent they are available under this part or as agreed to in writing by the parties.

(b) *Relief not available.* No injunctive relief shall be available in Board arbitration proceedings.

§ 1108.9 Decisions.

(a) *Decision requirements.* Whether by a panel of arbitrators or a single-neutral arbitrator, all arbitration decisions shall be in writing and shall contain findings of fact and conclusions of law. The neutral arbitrator shall provide an unredacted draft of the arbitration decision to the parties to the dispute.

(b) *Redacting arbitration decision.* The neutral arbitrator shall also provide the parties with a draft of the decision that redacts or omits all proprietary business information and confidential information pursuant to any such requests of the parties under the arbitration agreement.

(c) *Party input.* The parties may then suggest what, if any, additional redactions they think are required to protect against the disclosure of proprietary and confidential information in the decision.

(d) *Neutral arbitrator authority.* The neutral arbitrator shall retain the final authority to determine what additional redactions are appropriate to make.

(e) *Service of arbitration decision.* The neutral arbitrator shall serve copies of the unredacted decision upon the parties in accordance with the timetable and requirements set forth in § 1108.7(b). The neutral arbitrator shall also serve copies of the redacted decision upon the parties and the Board in accordance with the timetable and requirements set forth in § 1108.7(b). The arbitrator may serve the decision via any service method permitted by the Board's regulations.

(f) *Service in the case of an appeal.* In the event an arbitration decision is appealed to the Board, the neutral arbitrator shall, without delay and under seal, serve upon the Board an unredacted copy of the arbitration decision.

(g) *Publication of decision.* Redacted copies of the arbitration decisions shall be published and maintained on the Board's website.

(h) *Arbitration decisions are binding.* By arbitrating pursuant to these procedures, each party agrees that the decision and award of the arbitrator(s) shall be binding and judicially

enforceable in any court of appropriate jurisdiction, subject to the rights of appeal provided in § 1108.11.

§ 1108.10 Precedent.

Decisions rendered by arbitrators pursuant to these rules may be guided by, but need not be bound by, agency precedent. Arbitration decisions shall have no precedential value and may not be relied upon in any manner during subsequent arbitration proceedings conducted under these rules.

§ 1108.11 Enforcement and appeals.

(a) *Petitions to modify or vacate.* 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). 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(s). 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).

(b) *Board's standard of review.* On appeal, the Board's standard of review of arbitration decisions will be narrow, and relief will be granted only on grounds that the award reflects a clear abuse of arbitral authority or discretion or directly contravenes statutory authority. Using this standard, the Board may modify or vacate an arbitration award in whole or in part.

(1) Board decisions vacating or modifying arbitration decisions under the Board's standard of review are reviewable under the Hobbs Act, 28 U.S.C. §§ 2321 and 2342.

(2) Nothing in these rules shall prevent parties to arbitration from seeking judicial review of arbitration awards in a court of appropriate jurisdiction pursuant to the Federal Arbitration Act, 9 U.S.C. §§ 9-13, in lieu of seeking Board review.

(c) *Staying arbitration decision.* The timely filing of a petition for review of the arbitral decision by the Board will not automatically stay the effect of the arbitration decision. A stay may be requested under § 1115.3(f) of this chapter.

(d) *Enforcement.* Parties seeking to enforce an arbitration decision made pursuant to the Board's arbitration program must petition a court of appropriate jurisdiction under the Federal Arbitration Act, 9 U.S.C. §§ 9-13.

§ 1108.12 Fees and costs.

(a) *Filing fees.* When parties use the Board's arbitration procedures to resolve a dispute, the party filing the complaint or an answer shall pay the applicable filing fee pursuant to 49 C.F.R. Part 1002.

(b) *Party costs.* When an arbitration panel is used, each party (or side to a dispute) shall pay the costs associated with the arbitrator it selects. The cost of the neutral arbitrator shall be shared equally between the opposing parties (or sides) to a dispute.

(c) *Single arbitrator method.* If the single arbitrator method is utilized in place of the arbitration panel, the parties shall share equally the costs of the neutral arbitrator.

(d) *Board costs.* Regardless of whether there is a single arbitrator or a panel of three arbitrators, the Board shall pay the costs associated with the preparation of a list of neutral arbitrators.

§ 1108.13 Additional parties per side.

Where an arbitration complaint is filed by more than one complainant in a particular arbitration proceeding against, or is answered or counterclaimed by, more than one respondent, these arbitration rules will apply to the complainants as a group and the respondents as a group in the same manner as they will apply to individual opposing parties.

6. 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: 49 U.S.C. § 721(a) and 5 U.S.C. § 571 *et seq.*

§ 1109.1 Mediation statement of purpose, organization, and jurisdiction.

The Board favors the resolution of disputes through the use of mediation and arbitration procedures, in lieu of formal Board proceedings, whenever possible. Parties may seek to resolve a dispute brought before the Board using the Board's mediation procedures. These procedures shall not be available in a regulatory proceeding to obtain the grant, denial, stay or revocation of a request for construction, abandonment, purchase, trackage rights, merger, pooling authority 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. The Board's mediation program is open to all parties eligible to bring or defend matters before the Board.

§ 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 the Board's 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 C.F.R. § 1002.2. The Board shall grant any mediation request submitted by all parties to a matter, but may deny mediation where one or more parties to the underlying dispute do not consent to mediation, or where the parties seek to mediate disputes not eligible for Board-sponsored mediation, as listed in § 1109.1.

§ 1109.3 Mediation procedures.

(a) *Mediation model.* The Chairman will appoint one or more Board employees trained in mediation to mediate 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 equally 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 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

(2) If the mediation does not fully resolve all issues in the docket before the Board, the Board employees serving as mediators may not thereafter advise the Board regarding the future disposition of the remaining issues in the docket.

(b) *Mediation period.* The mediation period shall be 30 days, beginning on the date of the first mediation session. 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 mediation proceeding. The Board will not extend mediation for additional periods of time where one or more parties to mediation 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. The mediator(s) shall notify the Board whether the parties have reached any agreement by the end of the 30-day period.

(c) *Party representatives.* 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(s) request that principal to be present.

(d) *Confidentiality.* Mediation is a confidential process, governed by the confidentiality rules of the Administrative Dispute Resolution Act of 1996 (ADRA) (5 U.S.C. § 574). In addition to the confidentiality rules set forth in the ADRA, the Board requires the following additional confidentiality protections:

(1) All parties to Board sponsored mediation will sign an Agreement to Mediate. The Agreement to Mediate shall incorporate these rules by reference.

(2) As a condition of participation, the parties and any interested parties joining the mediation must agree to the confidentiality of the mediation process as provided in this section and further detailed in an agreement to mediate. The parties to mediation, including the mediator(s), 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.

(3) Evidence of conduct or statements made during mediation is not admissible in any Board proceeding. 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 bodies.

(e) *Abeyance.* Except as otherwise provided for in 49 C.F.R. § 1109.4(f) and Part 1111, any party may request that a proceeding be held in abeyance while mediation procedures are pursued. Any such request 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 C.F.R. § 1109.4(g) and Part 1111, the Board may also direct that a proceeding be held in abeyance pending the conclusion of mediation. Where both parties to mediation voluntarily consent to mediation, the period during which any proceeding is held in abeyance shall toll applicable statutory deadlines. Where one or both parties to mediation do not voluntarily consent to mediation, the Board will not hold the underlying proceeding in abeyance and statutory deadlines will not be tolled.

(f) *Mediated settlements.* 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, but the parties, or the mediator(s), shall 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 rights of administrative appeal to the issues resolved by the settlement agreement.

(g) *Partial resolution of mediated issues.* If the parties reach only a partial resolution of their dispute, they or the mediator(s) 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.

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

(a) *Mandatory use of mediation.* 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 C.F.R. Part 1111.

(b) *Assignment of mediators.* Within 10 business days after the shipper files its formal complaint, the Board will assign one or more mediators to the case. Within 5 business days of the assignment to mediate, the mediator(s) shall contact the parties to discuss ground rules and the time and location of any meeting.

(c) *Party representatives.* 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(s) requests that the principal be present.

(d) *Settlement.* The mediator(s) 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(s) may assist in preparing a written settlement agreement.

(e) *Confidentiality.* The entire mediation process shall be private and confidential. No party may use any concessions made or information disclosed to either the mediator(s) or the opposing party before the Board or in any other forum without the consent of the other party. The confidentiality provision of § 1109.3(d) and the mediation agreement shall apply to all mediations conducted under this section.

(f) *Mediation period.* The mediation shall be completed within 60 days of the appointment of the mediator(s). The mediation may be terminated prior to the end of the 60-day period only with the certification of the mediator(s) 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.

(g) *Procedural schedule.* 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 C.F.R. § 1111.8(a).

PART 1111 – COMPLAINT AND INVESTIGATION PROCEDURES

7. The authority citation for Part 1111 continues to read as follows:

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

8. 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

9. The authority citation for Part 1115 continues to read as follows:

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

10. Revise § 1115.8 to read as follows:

§ 1115.8 Petitions to review arbitration decisions.

An appeal of right to the Board 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 STB’s standard of review of arbitration decisions will be narrow, and relief will be granted only on grounds that the award reflects a clear abuse of arbitral authority or discretion or directly contravenes statutory authority. 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).

Appendix B

Surface Transportation Board

Agreement to Mediate

- 1) *Purpose.* The parties agree to engage in mediation under the auspices of the Surface Transportation Board.
- 2) *Commencement.* The mediation process commences once the Board assigns a case for mediation.
- 3) *Termination.* The mediator may stop the mediation at any point if he or she feels that an impasse has been reached. The mediator will stop the mediation if he or she can no longer maintain neutrality or cannot perform his or her role in an ethical or effective manner. The mediator will discuss this decision with the parties.
- 4) *Authority and Representation.* The parties shall ensure that their representatives in mediation sessions are vested with the authority to negotiate and settle the issues presented in the docketed proceeding.
- 5) *Scope.* The parties are not required to reach a settlement on the issues presented in Docket No. _____. The parties may reach an agreement on some or all of the issues. The parties may engage in discussions and agreements on issues not presented in the docketed proceeding as may be necessary to reach resolution on other issues.
- 6) *Procedures.* Mediation will be governed by the rules and procedures set forth at 49 C.F.R. Part 1109 and this agreement. The Board's rules governing mediation found at 49 C.F.R. Part 1109 are expressly incorporated into this agreement by reference.
- 7) *Role of the Mediator.* The parties understand that the mediators are to serve as facilitators of the mediation process and are not to give the parties advice. The parties further understand that the mediators have no authority to decide the case and are not acting as an advocate or attorney for any party. The mediators may, in their best judgment, provide clarification of STB rules and regulations. The parties understand that they have a right to have legal representation present at all mediation proceedings.
- 8) *Confidentiality.* Mediation is a privileged and confidential process, subject to 49 C.F.R. §§ 1109.3(d) and 1109.4(e). The parties agree that statements and documents are to remain confidential.
 - a) *Statements.* The parties and their representatives agree that the mediation sessions are confidential settlement negotiations, which are not subject to discovery. Therefore, the parties and their representatives agree not to introduce in any subsequent forum any statements made during the mediation, unless a statement has been properly obtained through a later discovery process.

- b) *Documents.* The parties and their representatives agree that the mediation sessions are confidential settlement negotiations, which are not subject to discovery. Therefore, the parties and their representatives agree not to introduce in any subsequent forum any documents produced during the mediation, unless a document has been properly obtained through a later discovery process.
 - c) *Discovery Issues.* The parties agree that mediation shall not be used as a shield to discovery in the event a settlement is not reached. Information presented at mediation that is otherwise discoverable shall remain so regardless of the mediation process. The parties agree not to subpoena the mediators or the Board’s mediation program administrator to produce any documents prepared by or submitted to the mediators in any future proceedings. The mediators and the program administrator will not testify on behalf of any party or submit any type of report on the substance of the mediation.
 - d) *Exceptions to Confidentiality.* The only exceptions to confidentiality are those set forth in 5 U.S.C. § 574(a)-(b) of the Administrative Dispute Resolution Act of 1996.
- 9) *Settlement.* No party shall be bound by anything said or done at the mediation unless a written settlement agreement is prepared and signed by all necessary parties. If a settlement is reached on some or all of the issues presented, the agreement shall be reduced to writing. The parties are responsible for reducing their agreements to a written document, though the mediators may assist the parties as necessary to reduce verbal agreements to writing.

By signature we acknowledge that we have read, understand and agree to the foregoing Agreement to Mediate.

Mediation Participant

Date

Mediator

Date

Mediator

Date