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SERVICE DATE - SEPTEMBER 20, 2001

SURFACE TRANSPORTATION BOARD

DECISION

STB Ex Parte No. 586

ARBITRATION—VARIOUS MATTERS RELATING TO ITS USE
AS AN EFFECTIVE MEANS OF RESOLVING DISPUTES
THAT ARE SUBJECT TO THE BOARD’S JURISDICTION

Decided: September 18, 2001

The Board favors private-sector resolutions of disputes outside of our formal process where possible. To that end, we currently have two sets of rules that allow for voluntary arbitration of matters subject to our jurisdiction.

In 49 CFR Part 1109, we have procedures that allow for any formal proceeding at the Board to be held in abeyance at the request of the parties for 90 days (and, upon request, additional 90 day periods) while the parties pursue alternative dispute resolution (ADR) procedures such as mediation or arbitration.¹ And in 49 CFR Part 1108, we have procedures that allow for parties to arbitrate certain disputes involving a railroad that is subject to the Board’s jurisdiction—those disputes where a party seeks monetary damages or specific performance of statutory obligations, including the prescription of reasonable rates, for a period not to exceed 3 years—in lieu of bringing those disputes to the Board in the first place.² 49 CFR 1108.4(a). The

¹ See Use of Alternative Dispute Resolution Procedures, 8 I.C.C.2d 657 (1992). The Part 1109 ADR rules require the written consent of all parties, and, unless binding arbitration has been undertaken, any party that is not satisfied with the progress toward resolution under ADR may notify the Board to reactivate the normal agency procedures for its case at any time. The period while any proceeding is held in abeyance to facilitate ADR will not be counted towards statutory deadlines. Moreover, confidentiality is protected in the ADR process.

In this proceeding, we are making a technical correction to 49 CFR 1109.3 to update the reference to a statutory provision. Specifically, the reference to “5 U.S.C. 584” (relating to the confidentiality of ADR procedures) is changed to “5 U.S.C. 574” to reflect the transfer made by Pub.L. 102-354, §3(b)(2), Aug. 26, 1992, 106 Stat. 944.

² See Arbitration of Certain Disputes Subject to The Statutory Jurisdiction of The STB, STB Ex Parte No. 560 (STB served Sept. 2, 1997). The Part 1108 arbitration procedures may not be used as a substitute for obtaining a license from the Board (such as for authority to construct, acquire, operate over, or abandon a rail line, or to merge or pool resources with another carrier) or an exemption from regulation, or for prescribing for the future any conduct or
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Part 1108 rules, originally suggested by the Rail-Shipper Transportation Advisory Council,³ are designed to encourage parties to resolve disputes, where possible, in a private, informal, and less costly and burdensome way than the formal complaint process permits.

The purpose of this proceeding is threefold: (1) to update the information that we have regarding available, qualified arbitrators; (2) to remind and encourage users and providers of rail transportation to take advantage of our existing procedures; and (3) to explore issues related to requiring, through legislation, binding arbitration of small rail rate disputes.

UPDATING INFORMATION ON AVAILABLE QUALIFIED ARBITRATORS

To update our records on qualified arbitrators that are available, we again seek to be notified, within 45 days from the service date of this decision, by all interested, qualified persons (those experienced in rail transportation or economic issues similar to those arising before the Board) who wish to be placed on our rolls. See 49 CFR 1108.6(a). Those arbitrators who previously submitted their names and qualifications should resubmit this information if they remain available, so that we can provide a current listing. We also remind parties that they are not restricted to arbitrators who may be listed with us at the time, but may select (and have added to our roster) any qualified person (or persons) to arbitrate a particular dispute. 49 CFR 1108.6(b).

STATEMENT IN INDIVIDUAL RAIL COMPLAINT CASES

To serve as a continuing reminder and encouragement to parties to use the Part 1108 rail arbitration rules where appropriate, we propose to add a requirement to our formal complaint procedures in 49 CFR Part 1111 that, in those cases in which the dispute is potentially arbitrable under Part 1108, the complaint must include a statement that the complainant has considered seeking arbitration but decided against it (or could not obtain the agreement of the other party or parties to the dispute).⁴ Arbitration is, of course, voluntary, and while there may be many reasons for parties to decline to pursue arbitration of any given matter, we believe that the proposed requirement may be an effective and reasonable way to remind parties at the appropriate time of the availability of the arbitration alternative and to encourage them to consider the potential benefits of this dispute-resolution mechanism.

We preliminarily certify that this proposed rule would not, if adopted, have a significant effect on a substantial number of small entities. Arbitration is entirely voluntary, and the Part

²(...continued)
rules of general, industry-wide applicability. 49 CFR 1108.2(b).

³ See 49 U.S.C. 726.

⁴ That statement would not preclude parties from later deciding to invoke the ADR procedures that are available under Part 1109.

1108 rules are limited to those types of disputes that lend themselves to arbitration and where the rulings should affect only the immediate parties to the dispute. Moreover, by requiring parties to consider arbitration prior to the filing of formal complaints, the proposed rule could lead to more use of this less expensive dispute-resolution mechanism for such entities. The Board, however, seeks comments on whether there would be other effects on small entities that should be considered.

LEGISLATIVELY PRESCRIBED ARBITRATION FOR SMALL RATE DISPUTES

Finally, we wish to explore whether binding arbitration should be legislatively prescribed for small rail rate disputes and, if so, how such a requirement would work best. Even though we have provided simplified guidelines⁵ for seeking rate relief in those cases where our standard rate guidelines⁶ would be too costly or infeasible, we continue to hear from smaller rail customers—those who do not ship a substantial amount of traffic by rail—that our formal procedures are still impractical for the limited amounts of traffic that they ship, and that they are thus effectively precluded from obtaining relief from what they consider to be unreasonably high rail rates. This concern has also been voiced by Members of Congress, and the use of arbitration for small rail rates cases has been raised in Congressional hearings as a possibility.

Accordingly, we will use this proceeding to assist Congress by providing a record on issues related to requiring, through legislation,⁷ the arbitration of small rail rate disputes.⁸ We invite the public, through comments and accompanying analytical data, to examine all of the

⁵ Rail Guidelines—Non-Coal Proceedings, 1 S.T.B. 1004 (1996), pet. for review dismissed as unripe sub nom. Association of Am. Railroads v. STB, 146 F.3d 942 (D.C. Cir. 1998).

⁶ Coal Rate Guidelines, Nationwide, 1 I.C.C.2d 520 (1985), aff'd sub nom. Consolidated Rail Corp. v. United States, 812 F.2d 1444 (3d Cir. 1987).

⁷ The Board on its own cannot mandate arbitration under the current statute. The statute requires Board adjudication of challenged rail rates, and the Board must take into account the various rail pricing policies articulated in 49 U.S.C. 10701(d)(2).

⁸ A bill has been recently introduced by Senators Rockefeller, Dorgan, and Burns that would make “final-offer” arbitration available for all rail rate disputes. See S.1103, 107th Cong., 1st Sess. § 303 (2001). Our proceeding, which will examine more discretely whether binding arbitration of any form should be legislatively prescribed for small rail rate disputes, is not intended to supplant consideration of the broader use of arbitration proposed in that bill. To the extent that the issues overlap, the record that we compile, we hope, would shed particular light on any efforts related to the issue of providing smaller shippers less costly and effective ways of resolving smaller rail rate disputes over which Congress has previously expressed some concern.

issues raised from the discussion, including: (1) how to identify the small rail shippers for whom arbitration of rate disputes should be required; (2) the types and amounts of traffic that would be embraced; and (3) the form that binding arbitration should take and the extent of the arbitrator's authority.

Definition of a Small Rate Dispute For This Purpose

The threshold issue is how to identify those small shippers that should qualify for mandatory arbitration of their rail rate disputes. To launch a dialogue on this issue, we express our initial belief that eligibility for this special treatment should not be derived from the size of the shipper's own business, but rather from the limited amount of its rail traffic. Nor does it seem to us that arbitration should be prescribed for shippers who have readily available inter- or intramodal competitive alternatives or who are paying less than what Congress has already identified as the floor for regulatory intervention (180% of variable costs). Therefore, logically it would seem that arbitration should be limited to those shippers whose traffic would meet our market dominance test (i.e., shippers paying more than 180% of variable costs and lacking feasible inter- or intramodal alternatives) and who neither originate nor receive more than a certain number of cars per year via the railroad involved. The leverage that a shipper with geographically dispersed facilities can exercise may vary by railroad, depending upon the amount of traffic it has in which a particular railroad can participate. Thus, it would seem that this shipper-size test should be specific to the amount of the shipper's traffic on the particular railroad(s) involved.

It should be relatively easy to determine who is eligible for arbitration under that criterion, as counting the number of cars per year shipped over a particular railroad should be a straightforward mechanical task. This approach would avoid reliance on the dollar amount of freight bills, which can vary significantly by commodity.⁹ Moreover, counting the shipper's traffic from all locations served by the carrier should reserve mandatory arbitration for those shippers who clearly lack sufficient traffic to exercise leverage against the carrier.¹⁰ The challenge, though, is selecting a reasonable dividing line so that the number of carloads would be low enough to exclude higher-volume rail customers who may be able to exert greater pricing leverage, but not so low that the resulting customer group would be too narrow to meet the procedural need that has been expressed.¹¹

⁹ If special treatment was limited to a particular commodity group (such as agricultural commodities), then freight revenues could be a useful measure as well.

¹⁰ It is possible that a shipper's carloads could be decreased by a shift in the responsibility for payment of freight bills to another party. Therefore, it may be appropriate to include all traffic originated or received by a shipper, regardless of who pays the freight bill.

¹¹ Shippers of more homogeneous, standardized products (such as agricultural commodities) may separate more easily between large and small customers than shippers of
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In the abstract, it is difficult for us to suggest an appropriate carload figure to use as a reasonable dividing line. However, for purposes of promoting discussion on this issue, we suggest that a proper figure might be in the 200- to 500-carload-per-year range. We request supporting data on what would be the best figure to use (whether within or outside that range), including the amount and type of traffic that would be embraced by the various cut-off figures that could be selected.¹²

Form of Arbitration and Related Issues

Arbitration is offered increasingly to resolve rail-related disputes. For example, after the Board's wide-ranging examination of rail industry matters in 1998, see Review of Rail Access and Competition Issues, STB Ex Parte No. 575 (STB served Apr. 17, 1998), the National Grain and Feed Association and all of the large (Class I) railroads agreed to binding private-sector arbitration of certain types of rail service-related disputes. In addition, the Board in its recently issued final rules for the consideration of major rail mergers included a provision urging the offer of arbitration by merger applicants as part of their mandated service assurance plans to resolve disputes that arise as a result of post-merger integration service problems.¹³

Further, "final offer"—also known as "baseball-style"—arbitration is available for rail rate disputes in Canada,¹⁴ and has been proposed in legislation for rail rate disputes in this country (see footnote 8). In final offer arbitration—which limits the arbitrator to selecting one of two figures (in this case, either the rate charged by the carrier or the rate proposed by the shipper) and nothing in between—the expectation is that the positions of the parties would tend to draw closer

¹¹(...continued)

other commodities, but issues may exist even there. For example, because of seasonal planting patterns, weather, acreage yields, and other factors, the rail transportation of agricultural commodities in the upper Great Plains (Montana, North Dakota, and South Dakota) and in the western Corn Belt (roughly Iowa, eastern Nebraska, eastern Kansas, and southwestern Minnesota) tends to differ. In the latter region, which supports mainly higher-yielding corn crops, railroads increasingly originate service from very large grain elevators. In contrast, the upper Great Plains, which supports relatively lower-yielding wheat crops, tends to gather grain at, and receive rail service from, more numerous, but smaller elevators that have limited storage capacity (no more than 25 carloads of grain in many instances). It may be that a natural dividing line would distinguish between smaller elevator shippers and larger elevator shippers.

¹² Railroads and others may also wish to address the extent to which the amount and type of traffic embraced by a particular cut-off figure would vary by railroad.

¹³ Major Rail Consolidation Procedures, STB Ex Parte No. 582 (Sub-No. 1) (STB served June 11, 2001) at 40-42, 66 FR 32582 (June 15, 2001).

¹⁴ See Canada Transportation Act, S.C. 1996, c. 10, §§161-69, available at www.tc.gc.ca/actsregs/ct-ltc/ct_a.html.

together as the parties' work to narrow their differences at the outset of the process and each strives to present the figure that would be more likely to be the one selected by the arbitrator.

Regardless of which form of arbitration Congress might consider, there are various issues that need to be explored. One issue is the criteria (if any) the arbitrator should be expected to apply, and in this regard whether uniformity or predictability of results would be desirable or attainable. Another issue is the extent to which arbitration would ease or eliminate litigation burdens. Are there advantages to arbitration even if litigation burdens would not be avoided altogether but shifted to another forum, where each side would still have to present an adversarial case to the arbitrator? Yet another issue to be examined is the role that arbitration could and should serve. Should the arbitrator's determination be final or appealable and, if appealable, to whom and on what basis, and what standards should apply on appeal? Or should Congress authorize and direct the Board itself to apply binding baseball-style arbitration to this small category of cases?

We welcome the view of the parties on these and any other related questions and, after receiving comments and replies, we will report to Congress.

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

List of Subjects in 49 CFR Part 1111
Administrative Practice and Procedure
Authority: 49 U.S.C. 721(a)

It is ordered:

1. An original and 10 copies of written comments on the proposals and issues set forth in this decision are due by November 23, 2001, and an original and 10 copies of replies are due December 24, 2001.¹⁵

2. All interested, qualified persons (those experienced in rail transportation or economic issues similar to those arising before the Board) who wish to be placed on a roster of arbitrators available to arbitrate disputes pursuant to 49 CFR 1108 (including those who previously submitted their names and qualifications in 1997, if they remain available) should submit (or, as relevant, resubmit) an original and 3 copies of their names and qualifications by November 8, 2001.

¹⁵ Copies of the written comments will be available from the Board's contractor, Da-To-Da Office Solutions, 1925 K Street, N.W., Room 405, Washington, D.C. 20423-0001, phone (202) 466-5530. The comments will also be available for viewing and self-copying in the Board's Microfilm unit, Room 755. All pleadings submitted will be posted on the Board's website (www.stb.dot.gov).

2. Notice of this decision will be published in the Federal Register.
3. This decision will be effective on October 20, 2001.

By the Board, Chairman Morgan, Vice Chairman Clyburn, and Commissioner Burkes.

Vernon A. Williams
Secretary

APPENDIX

For the reasons set forth in the preamble, title 49, chapter X, Part 1111 of the Code of Federal Regulations, is proposed to be amended as follows:

PART 1111—COMPLAINT AND INVESTIGATION PROCEDURES

§ 1111.1 Content of Formal Complaints; Joinder

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(a) * * *

(11) For matters for which voluntary, binding arbitration is available pursuant to 49 CFR Part 1108, the complaint shall state that arbitration was considered, but rejected, as a means of resolving the dispute.

* * * *

A technical revision to 49 CFR 1109.3 is made to change the reference to “5 U.S.C. 584” (relating to the confidentiality of ADR procedures) to “5 U.S.C. 574” to reflect the transfer made by Pub. L. No. 102-354, §3(b)(2), Aug. 26, 1992, 109 Stat. 944. The regulation will now read as follows:

PART 1109—USE OF ALTERNATIVE DISPUTE RESOLUTION IN BOARD PROCEEDINGS AND THOSE IN WHICH THE BOARD IS A PARTY

§1109.3 Confidentiality in ADR Matters

In all ADR matters involving the Board, whether under the Administrative Dispute Resolution Act or not, the confidentiality provisions of that Act (5 U.S.C. 574) shall bind the Board and all parties and neutrals in those ADR matters.