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SERVICE DATE - MARCH 26, 1997

SURFACE TRANSPORTATION BOARD

DECISION

STB Ex Parte No. 560

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

AGENCY: Surface Transportation Board (Board).

ACTION: Notice of Proposed Rulemaking.

SUMMARY: In this proceeding, the Board is seeking public comments on proposed rules recommended by the Railroad-Shipper Transportation Advisory Council (RSTAC) that would provide a means for the binding, voluntary arbitration of certain disputes subject to the statutory jurisdiction of the Board.

DATES: Written comments on the proposed rules must be filed with the Board no later than April 25, 1997.

ADDRESSES: An original and 10 copies of all documents must refer to STB Ex Parte No. 560 and must be sent to the Office of the Secretary, Case Control Unit, ATTN: STB Ex Parte No. 560, Surface Transportation Board, 1925 K Street, N.W., Washington, DC 20423-0001, and serve a copy on each member of the Railroad-Shipper Transportation Advisory Council, as follows:

Mr. Randy G. Craver
Manager of Transportation
Coastal Coal Sales, Inc.
P.O. Box 1871
Roanoke, VA 24008

Mr. Jarvis Haugeberg
General Manager
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P.O. Box 158
Churches Ferry, ND 58325

Mr. Jim Johnson
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P.O. Box 249
162 Gault Street
Akron, OH 44309

Mr. Kevin D. Kaufman
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Mr. John H. Marino
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Fort Worth, TX 76161-0051

Mr. Edwin E. Vigneaux
Manager, Rail Transportation
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Houston, TX 77056

Ms. Sheryl W. Washington
Vice President
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Suite 300
Washington, DC 20003

Mr. Edward Wytkind
Executive Director of the Transportation
Trades Department
AFL-CIO (TTD)
400 North Capitol Street, N.W.

Suite 861
Washington, DC 20001

FOR FURTHER INFORMATION CONTACT: Julia M. Farr, (202) 565-1613.
[TDD for the hearing impaired: (202) 565-1695.]

SUPPLEMENTARY INFORMATION: On February 19, 1997, the RSTAC, which was established pursuant to section 726 of the ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803, to advise the Chairman of the Surface Transportation Board, the Secretary of Transportation, and Congressional oversight committees with respect to rail transportation policy issues of particular importance to small shippers and small railroads,^{1/} recommended that the Board adopt rules providing for informal dispute resolution through arbitration. We agree with this recommendation and propose to adopt formal rules along the lines of those recommended to us by the RSTAC.

The proposed rules will provide an alternative for parties to use binding, voluntary arbitration to resolve certain disputes subject to the statutory jurisdiction of the Board. These procedures shall not be available to grant any license (e.g., construction, abandonment, purchase, trackage rights, merger, pooling) or exemption or to prescribe for the future any conduct, rules, or results of general, industry-wide applicability. These procedures are intended for the resolution of specific disputes between specific parties involving the payment of money or involving rates or practices related to rail transportation or service subject to the statutory jurisdiction of the Board.

We believe that the procedure will increase cost-savings and decrease litigation burdens on the parties. We are proposing these rules with the expectation that their adoption would enable parties to disputes that might otherwise have to be brought to the Board for formal resolution instead to resolve the disputes themselves informally with limited Board involvement.

Request for Comments

We invite comments on all aspects of the proposed regulations. We are proposing nominal filing fees of \$75 for each complaint and answer filed under the proposed arbitration procedure and a filing fee of \$150 for appeals to the Board of arbitration decisions. The proposed filing fee for appeals would be the same as the fee for labor arbitration appeals, appeals to Board decisions, and petitions to revoke. See 49 CFR 1002.2(f)(60) and (61). We encourage commenters to submit comments as computer data on a 3.5-inch floppy diskette formatted for WordPerfect 5.1, or formatted so that it can be readily converted into WordPerfect 5.1. Any such diskette submission (one diskette should be sufficient) should be in addition to the written submission (an original and 10 copies).

Small Entities

^{1/} See Notice of Establishment of Railroad-Shipper Transportation Advisory Council and Request for Recommendation of Candidates for Membership, STB Ex Parte No. 526 (STB served and published Jan. 29, 1996) (61 FR 2866).

The Board preliminarily concludes that these rules, if adopted, would not have a significant economic effect on a substantial number of small entities. Nonetheless, the Board seeks comment on whether there would be effects on small entities that should be considered. If comments provide information that there would be significant effects on small entities, the Board will prepare a regulatory flexibility analysis at the final rule stage.

Environment

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

List of Subjects

49 CFR Part 1002

Administrative practice and procedure, Common carriers, Freedom of information, User fees.

49 CFR Part 1108

Arbitration, Dispute resolution.

Decided: March 12, 1997.

By the Board, Chairman Morgan and Vice Chairman Owen. Chairman Morgan commented with a separate expression.

Vernon A. Williams
Secretary

CHAIRMAN MORGAN, commenting:

The proposed rules on which the Board is seeking public comments in this proceeding provide an important example of the benefits of private-sector efforts to resolve issues of common interest.

As part of the ICC Termination Act of 1995 (ICCTA), Congress established the Railroad-Shipper Transportation Advisory Council (RSTAC) as a private-sector group to be composed principally of representatives of railroads and shippers, both large and small. Its statutory mission is to review issues of particular importance to smaller shippers and smaller railroads, including matters relating to "effective procedures for addressing legitimate shipper and other claims," and to make recommendations

in this regard, as appropriate, to the Surface Transportation Board, the Secretary of Transportation, and Congress.

The rules being proposed in this proceeding represent an initiative by the RSTAC to address the continuing need to ensure that there are appropriate forums for the resolution of disputes within the surface transportation community. The Board likewise remains committed to providing an effective, efficient, and expeditious forum for the resolution of disputes within its jurisdiction, and I applaud the efforts of the RSTAC in this respect. As an ex officio member of the RSTAC, I look forward to the comments on this proposal and to continuing to work with the

Council and the surface transportation community to further facilitate dispute resolution.

For the reasons set forth in the preamble, the Board proposes to amend part 1002 and to add a new part 1108 to title 49, chapter X, of the Code of Federal Regulations to read as follows:

PART 1002--FEES

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

Authority: 5 U.S.C. 552(a)(4)(A) and 553; 31 U.S.C. 9701; and 49 U.S.C. 721(a).

2. Section 1002.2(f) is amended by adding a new paragraph (87) to read as follows:

§ 1002.2 Filing fees.

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(f) * * *

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Part VI * * *

(87) Arbitration of Certain Disputes Subject to the Statutory Jurisdiction of the Surface Transportation Board under 49 CFR part 1108:

(i) Complaint.....	\$75
(ii) Answer (per defendant).....	\$75
(iii) Third Party Complaint.....	\$75
(iv) Third Party Answer (per defendant).....	\$75
(v) Appeals of Arbitration Decisions.....	\$150

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3. A new part 1108 is added 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 Matters subject to arbitration.
- 1108.4 Relief.
- 1108.5 Fees and costs.
- 1108.6 Arbitrators.
- 1108.7 Arbitration commencement procedures.

- 1108.8 Arbitration procedures.
- 1108.9 Decisions.
- 1108.10 Precedent.
- 1108.11 Enforcement and appeals.
- 1108.12 Additional matters.

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

§ 1108.1 Definitions.

(a) "Arbitrator" means an arbitrator appointed pursuant to these provisions.

(b) "ICA" means the Interstate Commerce Act administered by the ICC.

(c) "ICC" means the Interstate Commerce Commission.

(d) "ICCTA" means the ICC Termination Act of 1995, Pub. L. No. 104-88.

(e) "RSTAC" means the Rail-Shipper Transportation Advisory Council established by the ICCTA.

(f) "STB" means the Surface Transportation Board.

(g) "Statutory jurisdiction" means the jurisdiction conferred on the STB by the ICCTA, as amended from time to time, including jurisdiction over rail transportation or services that have been exempted from active regulation.

§ 1108.2 Statement of purpose, organization, and jurisdiction.

(a) These provisions are intended to provide a means for the binding, voluntary arbitration of certain disputes subject to the statutory jurisdiction of the STB, either between two or more railroads subject to the jurisdiction of the STB or between any such railroad and any other person.

(b) These procedures shall not be available to grant any license (e.g., construction, abandonment, purchase, trackage rights, merger, pooling) or exemption or to prescribe for the future any conduct, rules, or results of general, industry-wide applicability.

(c) These procedures are intended for the resolution of specific disputes between specific parties involving the payment of money or involving rates or practices related to rail transportation or service subject to the statutory jurisdiction of the STB.

(d) The alternative means of dispute resolution provided for herein are established pursuant to the authority of the STB to take such actions as are necessary and appropriate to fulfill its jurisdictional mandate and not pursuant to the Administrative Dispute Resolution Act, 5 U.S.C. 571, et seq.

(e) On January 1, 1996, the STB replaced the ICC and the ICCTA replaced the ICA. For purposes of these procedures, it is immaterial whether an exemption from active regulation was granted by the ICC or the STB.

§ 1108.3 Matters subject to arbitration.

(a) Any controversy between two or more parties, subject to resolution by the STB, and subject to the limitations in § 1108.2, may be processed pursuant to the provisions of part 1108, if all necessary parties voluntarily subject themselves to arbitration under these provisions after adequate notice as provided herein.

(b) Arbitration under these provisions is limited to matters over which the STB has statutory jurisdiction and may include disputes arising in connection with jurisdictional transportation, including service being conducted pursuant to an exemption. An Arbitrator should decline to accept, or to render a decision regarding, any dispute that exceeds the STB's statutory jurisdiction. Such Arbitrator may resolve any dispute properly before him/her in the manner and to the extent provided herein, but only to the extent of and within the limits of the STB's statutory jurisdiction. In so resolving any such dispute, the Arbitrator will not be bound by any rules or regulations adopted by the STB for the resolution of similar disputes, except as specifically provided in part 1108.

§ 1108.4 Relief.

(a) Subject to specification in the complaint, as provided in § 1108.7, an Arbitrator may grant the following types of relief:

(1) Monetary damages, with interest at a reasonable rate to be specified by the Arbitrator; and

(2) Specific performance of statutory obligations, but for a period not to exceed 3 years from the effective date of the Arbitrator's award.

(b) A party may petition an Arbitrator to modify or vacate an arbitral award in effect that directs future specific performance, based solely on materially changed factual circumstances.

(1) A petition to modify or vacate an award in effect should be filed with the STB. The petition will be assigned to the Arbitrator that rendered the award unless that Arbitrator is unavailable, in which event the matter will be assigned to another Arbitrator.

(2) Any such award shall continue in effect pending disposition of the request to modify or vacate. Any such request shall be handled as expeditiously as practicable with due regard to providing an opportunity for the presentation of the parties' views.

§ 1108.5 Fees and costs.

(a) Fees will be utilized to defray the costs of the STB in administering this program in accordance with 31 U.S.C. 9701.

The fees for filing a complaint, answer, third party complaint, third party answer, and appeals of arbitration decisions will be as set forth in 49 CFR 1002.2(f)(87). All fees are non-refundable except as specifically provided and are due with the paying party's first filing in any proceeding.

(b) Each party will bear its own expenses, including, without limitation, fees of experts or counsel. The fees of the Arbitrator will be paid by the party or parties losing an arbitration entirely. If no party loses an arbitration entirely (as determined by the Arbitrator), the parties shall share equally (or pro rata if more than two parties) the fees and expenses, if any, of the Arbitrator. Any fees for petitions to modify or vacate an arbitration award, as provided in § 1108.4(b), may be established by the STB and will be assessed against the party filing such petition at the time it is filed.

§ 1108.6 Arbitrators.

(a) Arbitration shall be conducted by a single arbitrator who shall be selected, as provided herein, from a roster of active or retired federal administrative law judges or other senior officials experienced in rail transportation or economic issues similar to those capable of arising before the STB. The roster of Arbitrators shall be established by the RSTAC in consultation with the Chairman of the STB and shall contain not fewer than 12 names. The RSTAC shall update the list of Arbitrators annually. In the event that the RSTAC fails to maintain the roster of Arbitrators, the STB shall do so.

(b) The Arbitrator shall be selected by the Chairman of the STB from the roster established under paragraph (a) of this section on a random basis, so far as is practicable.

(c) The process of selecting an Arbitrator pursuant to this paragraph (c) shall be conducted confidentially following the completion of the Arbitration Commencement Procedures set forth in § 1108.7. Each time the Chairman of the STB is called upon to select an Arbitrator, the nomination promptly shall be transmitted in writing to the parties. Upon receipt of such name, the parties shall have 7 calendar days to notify the Chairman of the STB whether the Arbitrator so nominated is acceptable to that party. If any party finds an Arbitrator to be unacceptable for the arbitration at hand, the Chairman of the STB shall repeat the nomination process. No party may find more than one Arbitrator to be unacceptable in any arbitration, except upon a showing that an Arbitrator nominee is likely to have views highly prejudicial to a party. The name of the Arbitrator finally agreed upon by the Chairman of the STB and the parties shall not be made public until this selection process is complete. Neither a party nor the Chairman of the STB shall identify publicly any party that has found an Arbitrator to be unacceptable.

(d) If, at any time during the arbitration process, a selected Arbitrator becomes incapacitated or unable to fulfill his/her duties, a replacement Arbitrator will be promptly selected under the process set forth in paragraphs (b) and (c) of this section.

(e) If all parties to a dispute agree among themselves on the selection of an Arbitrator from the roster, the parties shall

submit in writing to the Chairman of the STB the name of the Arbitrator agreed to.

§ 1108.7 Arbitration commencement procedures.

(a) Each demand for arbitration shall be commenced with a written complaint. Because arbitration under these procedures is both voluntary and binding, the complaint must set forth in detail the nature of the dispute, the statutory basis of STB jurisdiction, a clear, separate statement of each issue as to which arbitration is sought, and the specific relief sought. Each complaint shall contain a sworn, notarized verification, by a responsible official of the complaining party, that the factual allegations contained in the complaint are true and accurate. Each complaint must contain a statement that the complainant is willing to arbitrate pursuant to these arbitration rules and be bound by the result thereof in accordance with those rules, and must contain a demand that the defendants likewise agree to arbitrate and be so bound.

(b) The complaining party shall serve, by overnight mail or hand delivery, a signed and dated original of the complaint on each defendant (through its legal representatives, if known, or on a responsible official at his or her usual place of business) and on the STB, accompanied by the filing fee prescribed under § 1108.5(a) and set forth in 49 CFR 1002.2(f)(87). Each complaint served on a defendant shall be accompanied by a copy of part 1108.

(c) Any defendant willing to enter into arbitration under these rules must, within 30 days of the date of a complaint, answer the complaint in writing. The answer must contain a statement that the defendant is willing to arbitrate each arbitration issue set forth in the complaint or specify which such issues the defendant is willing to arbitrate. If the answer contains an agreement to arbitrate some but not all of the arbitration issues in the complaint, the complainant will have 10 days from the date of the answer to advise the defendant and the STB in writing whether the complainant is willing to arbitrate on that basis. Upon the agreement of the parties to arbitrate, these rules will be deemed incorporated by reference into the arbitration agreement.

(d) The answer of a party willing to arbitrate shall also contain that party's specific admissions or denials of each factual allegation contained in the complaint, affirmative defenses, and any counterclaims or set-offs which the defendant wishes to assert against the complainant. The right of a defendant to advance any counterclaims or set-offs, and the capacity of an Arbitrator to entertain and render an award with respect thereto, is subject to the same jurisdictional limits as govern the complaint.

(e) A defendant's answer must be served on the complainant, other parties, and the STB in the same manner as the complaint.

(f) A defendant willing to enter into arbitration under these procedures only if it is able to obtain cross-relief against another defendant or a non-party may serve an answer containing an agreement to arbitrate that is conditioned upon the willingness of any such third party to enter into arbitration as a third party defendant. Simultaneously with the service of any

such conditional answer, the defendant making such answer shall serve a complaint and demand for arbitration on the party whose presence that defendant deems to be essential, such complaint and demand to be drawn and served in the same manner as provided in paragraphs (a) and (b) of this section. A defendant receiving such a complaint and demand for arbitration and that is willing to so arbitrate shall respond in the same manner as provided in paragraphs (c), (d), and (e) of this section.

(g) Upon receipt of a complaint and demand for arbitration served by a complainant on a defendant, or by a defendant on a third-party defendant, the STB promptly will notify the parties serving and receiving such documents of any deficiencies, jurisdictional or otherwise, which the STB deems fatal to the processing of the complaint and will suspend the timetable for processing the arbitration until further notice. If the complainant is unwilling or unable to remedy such deficiencies to the satisfaction of the STB within such time as the STB may specify, the complaint shall be deemed to be withdrawn without prejudice and one-half of the complaint filing fee shall be refunded to the complainant. Upon satisfaction that two or more parties have unconditionally agreed to arbitrate under these procedures, the STB will so notify the parties and commence procedures for the selection of an Arbitrator.

(h) An agreement to arbitrate pursuant to these rules will be deemed a contract to arbitrate, subject to limited review by the STB pursuant to § 1108.11(c), for the purpose of subjecting the arbitration award to the provisions of 9 U.S.C. 9, allowing a judgment of a court to be entered upon an arbitration award, and 9 U.S.C. 10, allowing a court to vacate an arbitration award on certain limited grounds.

§ 1108.8 Arbitration procedures.

(a) The Arbitrator will establish rules, including timetables, for each arbitration proceeding.

(1) The evidentiary process will be completed within 90 days from the start date established by the Arbitrator. The Arbitrator's decision will be issued within 30 days from the close of the record.

(2) Discovery will be permitted only with the agreement of the parties or as directed by the Arbitrator.

(b) Evidence will be submitted under oath. Evidence may be submitted in writing or orally, at the direction of the Arbitrator. Hearings for the purpose of cross-examining witnesses will be permitted at the sound discretion of the Arbitrator. The Arbitrator, at his/her discretion, may require additional evidence.

(c) Subject to alteration by the Arbitrator in individual proceedings, as a general rule where evidence is submitted in written form, the complaining party will proceed first, and the defendant will proceed next. The parties will then be given an opportunity to file simultaneous replies. At the discretion of the Arbitrator, argument may be submitted with each evidentiary filing or in the form of a brief after the submission of all evidence. Pagination limits will be set by each Arbitrator for all written submissions of other than an evidentiary nature.

(d) Any written document, such as a common carrier rate schedule, upon which a party relies should be submitted as part of that party's proof, in whole or in relevant part. The Arbitrator will not be bound by formal rules of evidence, but will avoid basing a decision entirely or largely on unreliable proof.

(e) Where proof submitted to an Arbitrator addresses railroad costs, such proof should be prepared in accordance with the standards employed by the STB in ascertaining the costs at issue.

(f) Where the Arbitrator is advised that any party to an arbitration proceeding wishes to keep matters relating to the arbitration confidential, the Arbitrator shall take such measures as are reasonably necessary to ensure that such matters are treated confidentially by the parties or their representatives and are not disclosed by the Arbitrator to non-authorized persons. If the Arbitrator regards any confidential submission as being essential to his/her written decision, such information may be included in the decision, but the Arbitrator will make every effort to omit confidential information from his/her written decision.

§ 1108.9 Decisions.

(a) Decisions of the Arbitrator shall be in writing and shall contain findings of fact and conclusions. All such Decisions shall be served by the Arbitrator by hand delivery or overnight mail on the parties and the STB.

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

§ 1108.10 Precedent.

Arbitration decisions rendered pursuant to these procedures shall have no precedential value.

§ 1108.11 Enforcement and appeals.

(a) An arbitration decision rendered pursuant to these procedures may be appealed to the STB within 20 days of service of such decision. Any such appeal shall be served by hand delivery or overnight mail on the parties and the STB. Replies to such appeals may be filed within 20 days of service of the appeal. An appeal or a reply under this paragraph shall not exceed 20 pages in length. The filing fee for such appeal will be as set forth in 49 CFR 1002.2(f)(87).

(b) The filing of an appeal, as allowed in paragraph (a) of § 1108.11, automatically will stay an arbitration decision pending disposition of the appeal. The STB will decide any such appeal within 30 days of the date on which the reply is due. Such decision by the STB shall be served in accordance with normal STB service procedures.

(c) The STB will only review cases involving issues of general transportation importance. The STB may vacate or amend

an arbitration award, in whole or in part, only on the grounds that such award:

- (1) exceeds the STB's statutory jurisdiction; or
- (2) does not take its essence from the ICCTA.

(d) Effective arbitration decisions rendered pursuant to these procedures, whether or not appealed to the STB, may only be enforced in accordance with 9 U.S.C. 9 and vacated by a court in accordance with 9 U.S.C. 10.

§ 1108.12 Additional matters.

Where an arbitration demand is filed by one or more plaintiffs against one or more defendants, the plaintiffs as a group and the defendants as a group shall be entitled to exercise those rights, with respect to the selection of arbitrators, as are conferred on individual arbitration parties.