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**Comments of the American Chemistry Council**  
on  
Surface Transportation Board Docket No. EP 730  
Revisions to Arbitration Procedures  
Notice of Proposed Rulemaking

June 13, 2016

The American Chemistry Council (ACC) is pleased to provide comments on the Surface Transportation Board's proposed revisions to its arbitration procedures. This rulemaking is an important step forward in implementing the *Surface Transportation Board Reauthorization Act of 2015* and would provide a more workable and effective process to resolve disputes between shippers and railroads. In these comments, ACC offers specific suggestions to strengthen the proposed procedures. We also highlight some significant barriers that limit the potential usefulness of arbitration, and urge the Board to find innovative solutions to make its program as accessible as possible under the law.

ACC represents the leading companies in the business of chemistry. Our members apply the science of chemistry to provide innovative products and services that make people's lives better, healthier and safer. As an \$812 billion enterprise, the business of chemistry is a key element in the nation's economy. It is also one of the largest exporting sectors, with \$189 billion in 2013 exports that accounted for 12 percent of the U.S. total. The chemical industry is one of the largest customers of the U.S. freight rail system. Thanks to the shale gas revolution, our industry is projected to grow significantly in the coming years, with more than \$140 billion in new factories, expansions, and restarts already announced, meaning that our reliance on the U.S. freight rail system will only increase in the future.

Arbitration Offers potential Benefits for Rate Disputes, but Barriers Limit Its Usefulness

ACC strongly supports allowing, for the first time, the use of arbitration for rate disputes, with awardable damages of up to \$25 million. ACC has long supported allowing arbitration as an alternative for resolving rate disputes. The voluntary program called for in the STB Reauthorization Act is an important step to make STB processes more accessible, workable and effective.

However, it must be recognized that chemical and other carload shippers face significant barriers that limit the ability to challenge rail rates before the STB. These barriers include the complexity

of cases involving carload traffic moving between multiple origin/destination pairs, forgoing contracts and paying higher tariff rates while cases are adjudicated over a span of three or more years, market dominance determinations and overly burdensome rate reasonableness methodologies. The limited, voluntary arbitration procedures proposed by STB, while potentially helpful, are unlikely to greatly reduce these barriers for most carload shippers. Rail carriers have little incentive to make the rate case process more efficient for shippers by agreeing to arbitrate and the inability to arbitrate market dominance undermines many of the efficiencies that arbitration otherwise would provide.

If the new arbitration system is not well utilized, it is important to have a record to understand why it is not being used to help inform STB and Congressional oversight of the program. ACC supports the creation of a system at STB to track and create a record of unsuccessful attempts by a single party to enter into arbitration. As a first step, STB should request that parties voluntarily report unsuccessful attempts to use the program.

#### STB Must Allow Arbitrators to Use a Range of Methodologies for Rate Case Decisions

ACC believes that the STB's proposed rules provide appropriate guidance to arbitrators in rate case decisions. As required by the Act, the proposal states that rate case arbitration decisions are to be "consistent with sound principles of rail regulation economics." Furthermore, arbitrators must "consider the Board's methodologies for setting maximum lawful rates, giving due consideration to the need for differential pricing to permit a rail carrier to collect adequate revenues." These provisions seek to balance competing U.S. freight rail policy goals in 49 USC §10101:

(3) to promote a safe and efficient rail transportation system by allowing rail carriers to earn adequate revenues, as determined by the Board;

and

(6) to maintain reasonable rates where there is an absence of effective competition and where rail rates provide revenues which exceed the amount necessary to maintain the rail system and to attract capital.

Consistent with the *STB Reauthorization Act*, the Board's proposal requires arbitrators to *consider* STB's existing rate case methodologies, but appropriately allows arbitrators the flexibility to utilize other methodologies that are consistent with sound economic principles. This flexibility is an essential component of the arbitration procedures. Concerns about existing rate case methodologies, particularly those used in Stand-Alone-Cost (SAC) procedures, are well-known. As was clearly demonstrated in rate recent cases brought by chemical shippers, the cost and complexity of SAC can be staggering. Requiring arbitrators to rely solely on those methodologies would completely eliminate the potential benefit of an arbitration program. Therefore, the Board should explicitly encourage arbitrators to also consider other methodologies, including those utilized in other economic regulatory contexts.

The Board also should continue its pursuit of alternatives to SAC, including options that would be permissible in an arbitration setting. For example, arbitration provides an opportunity to implement the revenue adequacy standard adopted by the Interstate Commerce Commission in the 1985 *Coal Rate Guidelines*. The Guidelines define the revenue adequacy standard, stating that captive shippers “should not be required to continue to pay differentially higher rates than other shippers when some, or all, of that differential is no longer necessary to ensure a financially sound carrier capable of meeting its current and future service needs.” This standard provides an alternative, and potentially more efficient and cost-effective, method to determine the reasonableness of rail freight rates. The principles of the revenue adequacy constraint defined in the Guidelines are consistent with the framework of regulation established by the Staggers Act and the theory of Ramsey pricing upon which the Board’s framework of regulation is built. Arbitration offers a potential laboratory for testing the efficacy of implementing this concept and potentially others.

#### STB Should Allow Parties to Submit a Joint Notice to Commence Arbitration Procedures

ACC supports the Board’s proposal that, as an alternative to filing a written complaint, parties may submit a joint notice to the Board consenting to submit a dispute to the Board’s arbitration program. As noted, this proposal expands, rather than replaces, the current rules under which shippers and carriers may voluntarily agree in advance to arbitrate certain disputes and may encourage greater use of the arbitration program.

#### The Proposed Procedural Timelines are Appropriate for Non-Rate Cases

For complaints other than rate cases, the Board’s proposed procedural timelines are appropriate and consistent with statutory requirements.

#### Market Dominance Determinations May Dissuade Shippers from Pursuing Arbitration

For rate disputes, arbitration is available only if the rail carrier has market dominance, meaning “an absence of effective competition from other rail carriers or modes of transportation” for the traffic at issue. As recognized by the Board, a STB market dominance determination may significantly delay the arbitration process. Bifurcating market dominance from rate reasonableness, which has not been typical of most rate cases, may also impose significant cost on all parties, further reducing the potential value of arbitration as an alternative for resolution of such cases. ACC supports STB’s proposal to give parties the option to concede market dominance when agreeing to arbitrate a rate dispute. If parties in full-fledged rate cases may concede market dominance, there is no reason why parties in arbitration should be prohibited from doing so. This proposal would avoid unnecessary costs and delays in cases where competition is clearly lacking.

It must be recognized, however, that railroads are likely to dispute market dominance in most cases. ACC does not agree that arbitration should be available only when market dominance is conceded.

#### Further Steps Could Help Minimize Barriers Caused by the Market Dominance requirement

As the STB correctly observed in *Total Petrochemicals & Refining USA, Inc. v. CSX Transp., Inc.*, Docket No. NOR 42121, slip op. at 3, (served May 31, 2013), “[t]here is a compelling need for a more objective approach to resolving market dominance given the rapidly escalating complexity of the market dominance inquiry in rate cases.” In particular, STB should establish criteria that would trigger a rebuttable presumption of market dominance. Potential criteria for establishing a rebuttable presumption of market dominance include:

- The shipper site is served by a single Class I railroad that does not offer competitive switching;
- The railroad has been revenue adequate over the previous six years and the challenged rate exceeds the Revenue Shortfall Allocation Methodology, or RSAM;
- Limit Price Methodology; and
- Truck shipping generally is not used for the commodity at the distance(s) of the contested origin/destination pair(s).

#### All Board Members Should Contribute to Compiling and Maintaining the Arbitrator Roster

ACC generally supports the proposed process for creating and maintaining a roster of arbitrators. However, we do not believe that the roster should be compiled and maintained solely by the STB Chairman. ACC proposes that all Board members share in this responsibility, particularly the evaluation of whether an individual meets the qualifications to be added to the roster. While the selection of arbitrators is unlikely to be controversial, opening the process to all Board members increases transparency and reduces potential for bias. Deliberations on potential arbitrators would be facilitated by *STB Reauthorization Act* provisions allowing Board members to discuss pending matters.

ACC supports the proposed qualifications for arbitrators. As required by statute, arbitrators on the roster must be “persons with rail transportation, economic regulation, professional or business experience, including agriculture, in the private sector.” STB also proposes to require arbitrators to have training in dispute resolution and/or experience in arbitration or other forms of dispute resolution. This additional requirement is important to ensure arbitrators have dispute resolution skills in addition to experience in relevant fields.

ACC also supports the proposed rules for the parties' selection of arbitrators. If parties cannot mutually agree on a single arbitrator or lead arbitrator, it is appropriate for the Board to provide parties with a list of not more than 15 arbitrators and for parties to alternately strike names until one name remains. For a panel of arbitrators, we further agree that after the lead arbitrator is chosen, each party to the dispute would select one additional arbitrator from the roster.

#### The STB's Standard for Appeal of Arbitration Decisions is Appropriately Limited

Consistent with the statutory requirements, the arbitration procedures include an appeal of right to the Board. ACC supports the limited standard of review stipulating that relief will only be granted on grounds that "the decision is inconsistent with sound principles of rail regulation economics, a clear abuse of arbitral authority or discretion occurred, the decision directly contravenes statutory authority, or the award limitation was violated." This limited standard appropriately focuses on statutory violations and abuse of discretion, and prevents parties from simply re-litigating an unfavorable ruling. It should be recognized that potential appeals would add significant costs and delay final resolution of matters, and may discourage some parties from agreeing to pursue arbitration

#### Conclusion

ACC commends the STB for proposing revised arbitration procedures as an important step to implement the *STB Reauthorization Act* and provide a more useful arbitration program. We urge the Board to consider our specific recommendations and to continue seeking innovative solutions to minimize barriers and make arbitration as accessible as possible under the law.