

Whiteside & Associates 232577

Transportation & Marketing Consultants

July 19, 2012
Ms. Cynthia Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, SW
Washington, DC 20423

ENTERED
Office of Proceedings
July 19, 2012
Part of
Public Record

Re: Hearing in Ex Parte No. 699, Assessments of Mediation and Arbitration Procedures

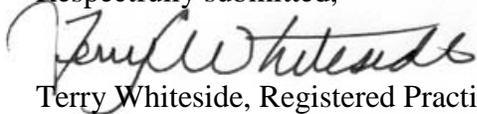
Dear Ms. Brown:

I am writing this letter to notify the STB of my intention to participate in the hearing the Board has scheduled for August 2, 2012 in this proceeding. I request 10 minutes and intend to appear for the following (hereinafter "Montana Wheat & Barley Committee, ARC, et al."):

Montana Wheat & Barley Committee
Alliance for Rail Competition
Colorado Wheat Administrative Committee
Idaho Barley Commission
Idaho Wheat Commission
Nebraska Wheat Board
Oklahoma Wheat Commission
South Dakota Wheat Commission
Texas Wheat Producer Board
Washington Grain Commission

Though Montana Wheat & Barley Committee, ARC, et al. did not file comments in this proceeding, we learned from the Board Staff that this is not a prerequisite for participation in the hearing. To the extent that special leave to participate in the hearing must be requested, Montana Wheat & Barley Committee and ARC, et al. request such leave. A summary of my intended testimony is attached.

Respectfully submitted,



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SUMMARY OF INTENDED TESTIMONY OF TERRY WHITESIDE ON BEHALF OF THE MONTANA WHEAT AND BARLEY COMMITTEE AND ARC, ET AL.

The Montana Wheat & Barley Committee and The Alliance for Rail Competition Et, Al includes many captive rail shippers and similar bodies in other states have as their members and constituents many producers of wheat, barley and other agricultural commodities who are, directly or indirectly, captive rail shippers. The affected entities either ship via railroads with market dominance and pay rail rates based on little or no competition, or they sell commodities to intermediaries, including grain elevators. Because these intermediaries tend to pay for agricultural products after deducting freight rates and charges, the farmers and other producers effectively pay freight rates and charges and are affected by the railroads' terms and conditions of service, including car supply, loading and unloading rules, demurrage, etc.

Given the foregoing, disputes with railroads are inevitable, and there has to be an alternative to formal complaint cases and petitions for a declaratory order to resolve these disputes. In many cases, the issues involved or the financial condition of the shipper or producer cannot justify the costs and delays of formal proceedings, but attempts to negotiate a fair resolution are unsuccessful.

The Montana Wheat & Barley Committee and The Alliance for Rail Competition, et al. appreciates the willingness of Staffers with the Board's Rail Customer and Public Assistance Program to help. However, the RCPA cannot issue a ruling that is binding on a railroad.

We therefore commend the Board for proposing revisions aimed at making more effective mediation and arbitration remedies available. Success in adopting and implementing fair procedures, and experience with fair outcomes, will help reassure shippers and farmers,

particularly smaller and more isolated shippers and farmers, who feel that STB rail regulation too rarely helps them.

The Montana Wheat & Barley Committee and The Alliance for Rail Competition, et al. believe the right to arbitrate is more likely to be effective than the right to mediate in seeking changes in railroad actions. Mediation is like the negotiations that take place between railroads and shippers already, the difference being that STB Staffers participate. Nevertheless, we think mediation should be available. There are shippers for whom even arbitration is burdensome and expensive, and mediation may help such shippers decide whether going on to seek arbitration makes sense.

Of course, Board Staffers who assist in mediation must be neutral and must share the goal of fair outcomes. The costs of mediation should be borne by the STB.

Arbitration should involve three arbitrators, unless both sides agree to use only one. The Montana Wheat & Barley Committee and The Alliance for Rail Competition, et al. and many of our members and constituents are familiar with, and support, the arbitration procedures adopted by National Grain & Feed Association, in which the use of three arbitrators has worked well. Decisions by arbitrators should also be published, as under the NGFA procedures. This fosters fairness and trust. We also support the recommendation of USDA that any appeals process focus on abuse of an arbitrator's discretion, but also consider error.

We believe that the proposed \$200,000 cap on awards by arbitrators is too low. Since arbitration is essentially voluntary, despite the opt-out concept, there is no reason to impose such a low cap on awards. Arbitration entails its own costs, and arbitration awards need to exceed, by at least 2 or 3 times, the costs of participation by shippers. Otherwise, shippers may not participate even if the chances of success are good.

Finally, it must be recognized that mediation and arbitration will not always be available or advisable. There are many issues that will necessitate the use of formal proceedings – complaints and petitions for declaratory order – even if the STB also offers effective mediation and arbitration options.