

Before the
SURFACE TRANSPORTATION BOARD



Ex Parte No. 730

REVISIONS TO ARBITRATION PROCEDURES

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COMMENTS

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Preliminary Statement

Samuel J. Nasca,^{1/} for and on behalf of SMART/Transportation Division, New York State Legislative Board (SMART/TD-NY), submits these comments in response to the Surface Transportation Board (STB or Board) Notice of Proposed Rulemaking (NPRM), dated May 6, 2016 (served May 12). 81 Fed. Reg. 30229. (May 16, 2016).

Background

The is the fourth attempt by the Board to impose an arbitration scheme for the disposition of some important disputes otherwise subject to the Board's jurisdiction.

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This current proceeding stems from enactment on December 18, 2015 of P.L. 114-110, Surface Transportation Board Reauthorization Act of 2015, 129 Stat. 2228-39, wherein Section 13 (129 Stat. at 2235-37) provides for "Arbitration of Certain Rail Rates and Practices Disputes." 49 U.S.C. is amended by adding, at the end of Chapter 117, a new section 11708, titled, Voluntary arbitration of certain rail rates and practices disputes. (49 U.S.C. 11708).

The instant rulemaking seeking to revise the STB's arbitration regulations is claimed to arise in light of the foregoing December 18, 2015 legislation.

1. The Board's first effort to impose a voluntary arbitration regime arose in 1997, shortly after enactment of ICCTA December 29, 1995, with establishment of Rail Shipper Transportation Advisory Council (RSTAC), announced January 29, 1996, but without appointment of RSTAC membership until sometime later. 61 Fed. Reg. 2866 (Jan. 29, 1996). RSTAC has not been subject to the Federal Advisory Committee Act. 49 U.S.C. at 1325(a)(4). The RSTAC meetings are unannounced to the public, and are private. There are 19 members, 15 appointed by the

STB Chairman, but only 9 entitled to vote, with 4 from small shippers and 4 from small railroads. The remaining 6 of the 15 members are 3 non-voting members from 3 Class I rail carriers, and 3 non-voting members from 3 large shipper organizations. Each of the 6 non-voting members can participate in the deliberations. The Secretary of Transportation, and the 3 STB members serve as 4 ex officio members of RSTAC, without vote, and when unable to attend, are able to designate an alternate from individuals who exercise significant decision-making authority in the Federal agency involved. 49 U.S.C. 1325(a). The function and duties of RSTAC are to advise the DOT, STB, and Congressional committees with respect to significant rail transportation policy issues of importance to small shippers and small railroads. RSTAC proposes and comments on legislation directly to the Congress, without approval from the STB. Indeed, on May 13, 2015, RSTAC transmitted a resolution in support of S. 808, concerning the arbitration provisions proposed in the STB reauthorization legislation. Annual dues for RSTAC small shipper/railroads \$375, that for large shipper/railroad is \$700.

RSTAC is important to the STB's efforts to impose arbitration. One of the first actions taken in 1997 by RSTAC was to formulate arbitration rules for small shippers. RSTAC urged its proposed arbitration rules be adopted by the STB. The STB in August 1997 proceeding promulgated the arbitration rules along the lines of those recommended by RSTAC. Ex Parte 560, Arbitration of Disputes Subject to Stat. Juris. Of the STB, 2 S.T.B. 564 (1997). There was some opposition to the rules, including objection by railroad employees. (ID 179477 Joseph C. Szabo, Ill. UTU).

2. The STB in 2001 sought proposals to make arbitration mandatory for small rate disputes, along with certain technical revisions to its rules. However, in its 2002 decision, the agency was unable to find sufficient support for mandatory arbitration. Ex Parte 586, Arbitration-Resolving Disputes Subject to STB's Jurisdiction, 6 S.T.B. 232 (2002). There were objections to mandatory arbitration, including railroad employees, the latter setting forth history of arbitration during the period of the former Interstate Commerce Commission. (ID 203940, 204274 John D. Fitzgerald, Gen. Chmn.,

UTU, BNSF).

3. The STB on May 13, 2013 established a new arbitration program, along with a revision of arbitrable disputes, and other details. Controversy arose concerning the role of RSTAC. Ex Parte No. 699, Assessment of Mediation and Arbitration Procedures (2013). Again, opposition was voiced by railroad employees. (ID 232330, Samuel J. Nasca, NY UTU).

I. ARBITRATION IS NOT FAVORED
BY THE TRANSPORTATION INDUSTRY

Some 20 years have passed since RSTAC and STB provided for small rate case arbitration, and expanded the scope to embrace many types and classes of disputes, yet there has failed to be even a single case decided by the process. See: Ex Parte 699, ID 227924 TA&M at 7,9).

It would appear the STB's quest for arbitration is premised upon utilizing arbitration as a substitute for the employment of the Administrative Law Judge (ALJ). The STB's staff since dissolution of the ICC has shed the independent initial decision process with the ALJs in favor of its own initial and/or final case decisions. Moreover, where staff expertise is lacking, the STB

staff is now referring initial decision-making to ALJs at other agencies, thus allowing STB staff control over the outside process, rather than STB members being influenced by their own internal ALJs. Cf. Docket No. 42144, Northern America Ft. Car Assn. V. Union Pacific Railroad Company; Finance Docket No. 35842, New England Railroad, Inc.-Trackage Rights Order-Pam Am Southern LLC. The use of outside arbitrators would be a process somewhat similar to that of utilizing outside ALJs, and without the decision-maker having the qualifications of the federal ALJ appointment process, or the proceeding being subject to the APA hearing and decision standards.

II. LACK OF INTERVENTION IN ARBITRATION UNDER STB NPRM

The STB has decided under its present arbitration rules that persons may not intervene in arbitration proceedings. This action was taken in Ex Parte 560, Arbitration of Disputes Subject to Stat. Juris. of the STB, 2 S.T.B. 564,574 (1997), and more specifically with respect to railroad employees in Docket No. 42076, Albany & Eastern Railroad Company v. The Burlington Northern and Santa Fe Railway Company, 1-2 (2/11/03); Ibid., 2-3

(7/17/03); Ibid., 2-3 (11/5/03). The STB should change its non-intervention policy if, despite opposition to this rulemaking in general, the agency nevertheless concludes to amend its arbitration rules at this time.

The STB and its predecessor ICC, have a lenient policy of allowing intervention in its proceedings. For examples, see: Sharfman, I.L.: The Interstate Commerce Commission, Part IV, 191-94 (1937). The United States is a large common market, with many commodities moving in competition between different origins and destinations, such that disputes between two parties may have important repercussions in other areas and markets. This common market competition suggests the STB become aware of the ramifications of one proceeding upon the public interest in other transportation origins or destinations. Employee considerations are important to the transportation network.

If STB should adopt amendments to its arbitration regulations in this proceeding, it should provide for intervention. The suggestion in Ex Parte 560 for cross-defendant participation, 2 S.T.B. at 574, is unsatisfactory and unworkable, particularly for railroad

employees.

III. THE NPRM SHOULD DELETE
PROPOSED STANDARD FOR
LABOR ARBITRATION DECISIONS

The NPRM amends appellate procedures of 49 CFR 115.8 to mandate a standard for review and stay of labor arbitration decisions. The STB's new sentence in section 115.8 should be deleted (NPRM, 15):

For labor arbitration decisions, the Board's Standard of review is set forth in Chicago and North Western Transportation Company- Abandonment near Dubuque & Oelwein, Iowa, 3 I.C.C.2d 79 (1987), aff'd sub nom. International Brotherhood of Electrical Workers v. Interstate Commerce Commission, 862 F.2d 330 (D.C. Cir. 1988).

There is no basis for the above in the NPRM. Labor disputes are expressly not included as an eligible matter. NPRM, pp. 2, 10. Labor arbitration is expressly excluded in the statute. 49 U.S.C. 11708(b)(2). Labor arbitration is expressly excluded by language in the Senate Committee report on S. 808. S. Rept. 114-52, at 13. (May 12, 2015).

The Board should not tie its hands to any specific case-mentioned vintage standard. Moreover, the STB's employee protective conditions involve arbitration under

Article I, Section 11, but also referee decisions under Article I, Section 4. The NPRM's amendment to 49 CFR 1115.8 indicates the Board's lack of expertise in labor relations matters, which it has conceded many times in prior decisions.

Respectfully submitted,



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