



ASSOCIATION OF AMERICAN RAILROADS

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Ms. Cynthia T. Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, S.W.
Washington, DC 20423

Re: EP 730, *Revisions to Arbitration Procedures*

Dear Ms. Brown:

Pursuant to the Notice of Proposed Rulemaking served in the above docketed proceeding on May 12, 2016, the Association of American Railroads respectfully submits the attached reply comments.

Sincerely,

Timothy J. Strafford
Counsel for the Association
of American Railroads

BEFORE THE
SURFACE TRANSPORTATION BOARD

STB Ex Parte No. 730

REVISIONS TO ARBITRATION PROCEDURES

REPLY COMMENTS OF THE
ASSOCIATION OF AMERICAN RAILROADS

Pursuant to the Notice of Proposed Rulemaking (“NPRM”) served on May 12, 2016 by the Surface Transportation Board (“STB” or “Board”) in this proceeding, the Association of American Railroads (“AAR”), respectfully submits these reply comments in response to comments filed by the American Chemistry Council (“ACC”), National Industrial Transportation League (“NITL”), National Grain and Feed Association (“NGFA”) and the Rail Customer Coalition (“RCC”).¹

In opening comments filed on June 13, 2016, the AAR continued to support the Board’s efforts to encourage the use of voluntary arbitration for disputes subject to the jurisdiction of the Board. The AAR comments offered suggestions to improve the proposed rules and sought to remedy aspects of the rules that are ambiguous or appear to give the Board or Board staff overbroad discretion that could be perceived as undermining neutrality.

¹ The AAR notes that ACC and RCC appear to have filed comments in this proceeding without a signatory. There is no indication in their comments who was responsible for the pleadings, in violation of 49 CFR §§1104.4 and 1103.4. Though there is nothing in the comments filed in this proceeding that gives rise to any notion of impropriety, the Board should be mindful of ensuring that it maintains the integrity of its processes in this proceeding and others.

Comments

I. The AAR Agrees with Shipper Interests' Comments that Reflect the Fundamental Principle that Arbitration Must Be Voluntary

The areas of consensus between the comments filed by the railroad industry and shipper interests in this proceeding were driven by a recognition that the Board's rules should be shaped by an understanding that arbitration is fundamentally voluntary. *See, e.g.*, NGFA Comments at 4. Specifically, the AAR and shippers agree with the Board's proposal to allow an arbitration proceeding to be initiated by relevant parties through the filing of a joint notice in situations in which participants have not opted into the STB's arbitration program. NGFA Comments at 5; ACC Comments at 3. This common sense proposal will allow parties to initiate arbitration at the Board in appropriate cases without an unduly cumbersome complaint and answer process.

The AAR also agrees with NGFA "that arbitration of rail rates should be limited to cases where market dominance is not contested." NGFA Comments at 4. As explained in the AAR's opening comments, requiring a bifurcated market dominance determination would add unnecessary complexity to what should be a fully agreed-upon, straightforward process. AAR Comments at 3. *See also* NGFA Comments at 3 (stating that market dominance determinations in rail rate arbitration proceedings would hamper the arbitration process by increasing its complexity).

II. Arbitration Rules Should Not Be Used to Create Substantive Advantages for One Party or Another

Despite the fact that arbitration must be seen as neutral and fair to be attractive to stakeholders, several of the opening comments filed by shipper interests seek to gain a substantive advantage for their members in future arbitration proceedings. Such calls undermine the prospects that parties will voluntarily engage in arbitration of disputes subject to the Board's jurisdiction. The benefits of arbitration are that parties can structure a process that meets their

unique needs with less time and expense than traditional adjudication. But arbitration rules that would place one party or the other in a position superior than they would otherwise be diminishes the likelihood that arbitration would be agreed to.

The Surface Transportation Board Reauthorization Act of 2015, P.L. 114-110 (“Reauthorization Act”) includes disputes as to the reasonableness of a rail carrier’s rates as one of the types of disputes for which arbitration is available through the Board’s processes.² The Board should foster voluntary, agreed-upon arbitration in all matters, including rate disputes. In arbitrations regarding the reasonableness of a rail carrier’s rates, the Board’s rules should respect the contours laid out in the Reauthorization Act that decisions be economically sound and that arbitrators “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 (as determined under section 10704(a)(2))”. 49 U.S.C. §§ 11708(c)(3) and 11708(d). As such, the Board should not impose on arbitrators a responsibility to create new methodologies out of whole cloth or to resolve thorny policy issues that the Board has yet to decide. Arbitration should most certainly not serve as a “laboratory for testing the efficacy of implementing revenue adequacy.” ACC Comments at 3.

While the AAR agrees that the Board should make its program “as accessible as possible,” ACC Comments at 1, “accessible” does not mean creating a substantive advantage for

² See 49 U.S.C. § 11708(b). Contrary to the language used by RCC, the Reauthorization Act does not require rate cases to be arbitrated. Instead, the Reauthorization Act includes rate cases as a delineated dispute that parties may agree to arbitrate. As parties were free to arbitrate disputes other than those “eligible disputes” listed in the Board’s existing arbitration rules, the arbitration of rate disputes was already available to parties prior to the Reauthorization Act. See EP 699, slip op. at 4 (“The parties may also agree in writing, prior to the commencement of arbitration, to arbitrate certain additional matters, subject to the condition that they may only arbitrate matters within the statutory jurisdiction of the Board, and may not arbitrate matters in which the Board is required to grant or deny a license or other regulatory approval or exemption.”).

one party or the other through untested methodologies. Nor does it mean that the Board should allow arbitrators to engage in decision methodologies rejected by the agency and the courts. NGFA's suggestion that arbitrators engage in "straight revenue-to-variable cost ratio comparison of an agreed-upon traffic group, or the rate methodology proposed by the NGFA for grain rail rates under EP 665 (Sub-No. 1), among others," NGFA Comments at 5, should be dismissed out of hand for failing to meet the statutory standard requiring that an arbitrator's decision be economically sound. The AAR does agree with NGFA, however, that parties should be free to agree on a methodology to resolve a rate dispute in an individual arbitration.

Similarly, arbitration cannot be used to establish alternate methodologies for market dominance. The Board should reject ACC's market dominance proposal for at least three reasons.³ First, arbitration cannot be used to establish a burden shift, absent agreement of the parties. Second, revenue adequacy is irrelevant to market dominance. The question of whether or not a carrier faces effective competition in a particular marketplace has nothing to do with whether or not a railroad's entire system has earned a return on invested capital that exceeds the industry cost of capital in a given period. Firms in competitive markets routinely earn returns in excess of their cost of capital. *See* AAR Comments, *Railroad Revenue Adequacy*, EP 722, at 13 (filed September 5, 2014). Third, ACC's reliance on the limit price rule as a potential criteria for establishing market dominance is flawed because, as previously stated by the AAR, "[t]he fact that the limit price rule could presume a rail carrier to be market dominant even where the railroad has responded to potential competition by setting its prices near, at, or below a competitor's price illustrates that the Board's limit price rule is no substitute for analysis of

³ RCC's similar proposal should likewise be rejected. *See* RCC Opening Comments at 2.

competitive conduct.” See AAR Comments, *Total Petrochemicals & Refining USA v. CSX Trans.*, NOR 42121 (filed July 24, 2013).

III. The Board Should Not Collect Data on Refusals to Arbitrate

A number of the shipper interests’ comments call on the Board to track and publish refusals by railroads to arbitrate disputes. The Board should reject proposals made by shipper interests in this proceeding that attempt to set up a ‘heads, I win, tails, you lose’ environment by asking the Board to create arbitration rules with new substantive advantages for their members as described above and then ask the Board to “create a record of unsuccessful attempts by one or more shippers to enter into arbitration.” RCC Comments at 2; ACC Comments at 2.

Moreover, there can be no legitimate use for data on how often parties decline to use a voluntary process. In order for a process to be truly voluntary, parties should be free of coercion to conclude that it is the best option to resolve a particular dispute. Parties may decline to arbitrate a particular dispute for a wide variety of reasons. There may be instances where a railroad defendant believes that a complaint lacks any merit and will be resolved expeditiously by a motion to dismiss. In such cases, arbitration may be more expensive and less efficient than the Board’s regulatory process. Or the dispute may be addressed in an arbitration not sponsored by the STB or resolved in confidential settlement negotiations. Keeping a tally of declined requests to arbitrate without having any means to assess the validity of the alleged disputes would be meaningless.

The Board should reject the implication that there is some action that should flow from refusals to arbitrate. The Board has no authority to compel arbitration in the absence of a voluntary agreement by the parties. See AAR Comments, *Assessment of Mediation and Arbitration Procedures*, EP 699, at 5-12 (filed May 17, 2012). The Reauthorization Act simply confirmed the conclusion that the Board reached in EP 699 that arbitration can be a useful tool

for railroads and their customers to resolve some disputes in appropriate circumstances. *See Assessment of Mediation and Arbitration Procedures*, EP 699 (STB served May 13, 2013) (stating that the Board’s rules were “designed to be flexible, party-driven, and functional.”). It did not create a requirement to arbitrate or even suggest that arbitration is appropriate in all, or even most, circumstances.

Conclusion

The Board should modify its proposals and adopt rules for arbitration, consistent with the AAR comments above and previously filed in this proceeding.

Respectfully Submitted,



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