

BEFORE THE
SURFACE TRANSPORTATION BOARD

Ex Parte No. 699

ASSESSMENT OF MEDIATION AND ARBITRATION PROCEDURES

OPENING COMMENTS OF UNION PACIFIC RAILROAD COMPANY

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Pursuant to the Board's Notice of Proposed Rulemaking served March 28, 2012 ("NPRM"), Union Pacific Railroad Company ("UP") hereby submits its opening comments on the Board's proposal to modify its rules regarding the mediation and arbitration of disputes subject to the Board's jurisdiction.¹ In the NPRM, the Board proposed (1) to modify the existing mediation and arbitration rules and (2) to create a pre-dispute hybrid model² under which Class I and II carriers would be deemed to agree to arbitrate certain disputes unless they repeatedly object.

In general, UP supports the Board's efforts in encouraging parties to voluntarily agree to mediation or arbitration. UP, however, has a few reservations over the proposed mediation rules and has serious concerns over the proposed pre-dispute hybrid model and the other proposed

¹ UP also joins in the opening comments submitted by the Association of American Railroads ("AAR").

² The term "proposed pre-dispute hybrid model," "pre-dispute hybrid model," or "hybrid model" is used to refer to the Board's proposal in the NPRM where Class I and II carriers would be deemed to agree in advance to arbitrate certain disputes unless they annually opt out, Class III carriers would agree to arbitrate certain disputes if they opt in, and shippers or other parties would agree to arbitrate certain disputes on a case-by-case basis. The proposal is a "hybrid" because it combines mandatory arbitration for certain carriers with voluntary arbitration for other parties.

arbitration rules. Consequently, UP believes the proposed hybrid model and arbitration rules will discourage, rather than encourage, parties to use Board-sponsored arbitration. UP's comments first address why the proposed pre-dispute hybrid model is procedurally unfair and unjustified. Second, UP's comments address several aspects of the NPRM that warrant modification or clarification. Finally, UP's comments address the essential features of a pre-dispute participant model if the Board pursues that approach as an alternative to case-by-case arbitrations.

I. The Non-Reciprocal Participation and Opt-Out Requirements of the Proposed Pre-Dispute Hybrid Model Are Procedurally Unfair and Unjustified.

UP supports alternative dispute resolution when the arbitration is voluntary and the governing procedures are reasonable and fair.³ The pre-dispute hybrid model that imposes arbitration on Class I and II carriers but allows shippers and other parties to choose arbitration on a case-by-case basis, however, is procedurally unfair as well as unjustified. The unfairness arises from the non-reciprocal participation requirements of the pre-dispute hybrid model that deny Class I and II carriers the same recourse and procedural protections provided to shippers or other parties. The hybrid model is unjustified because no evidence in the record supports imposing automatic arbitration on only Class I and II carriers.⁴ For these reasons and the reasons

³ For example, UP is a signatory to the Railroad Industry Agreement (“RIA”), which includes an arbitration provision. The provision allows either party to seek arbitration of certain RIA disputes under the Board’s arbitration rules in 49 C.F.R. Part 1108. UP is currently subject to Board-sponsored arbitration for a dispute arising under the RIA. *See Denver Rock Island R.R. Co. v. Union Pac. R.R. Co.*, NOR 42135 (STB served May 11, 2012) (STB decision submitting the dispute to arbitration). UP also subscribes to the Rail Arbitration Rules of the National Grain and Feed Association (“NGFA”), and UP has arbitrated disputes under these Rules. NGFA’s Arbitration Rules and Rail Arbitration Rules are available at <http://www.ngfa.org/trade-arbitration-rules.cfm>.

⁴ For ease of reference, we will use the term “certain carriers” to mean “Class I and II carriers.”

presented in the AAR's Comments, the Board should not go forward with the proposed pre-dispute hybrid model.

A. The non-reciprocal participation requirements of the hybrid model would deny carriers the recourse and the procedural protections that are available to shippers.

The pre-dispute hybrid model would create unfair results because the participation requirements depend upon the party's status. Class I and II carriers are deemed participants for eligible matters under the hybrid model unless they repeatedly opt out. NPRM at 7-8, 15. Class III carriers can participate in the hybrid model by opting in. NPRM at 8, 15-16. Shippers and other parties participate in the hybrid model only on a case-by-case basis. NPRM at 8, 16. This non-reciprocal participation requirement disadvantages certain carriers in multiple ways. First, certain carriers cannot seek arbitration under the hybrid model against a shipper because shippers do not and cannot choose to participate in advance. Shippers would become participants under the hybrid model only by filing a complaint and seeking to arbitrate a particular dispute. Shippers are otherwise nonparticipants. Under the hybrid model, consequently, carriers would not be able to invoke automatic arbitration against a shipper and will always be the respondents.

Second, the hybrid model appears to provide Class I and II carriers no opportunity to modify or state the issues to be arbitrated. The proposed rules in 49 C.F.R. § 1108.7(b) do not allow a carrier-respondent to file a counterclaim, assert an affirmative defense, or otherwise influence the issues for arbitration when answering the complaint.⁵ NPRM at 17. For example, if a shipper filed a complaint against a Class I carrier for demurrage charges on cars XYZ001, XYZ002, and XYZ003 and the carrier has not opted out of the hybrid model, the carrier cannot

⁵ In contrast, the NGFA Rail Arbitration Rules specifically allow the responding party to file a counterclaim or offset as well as assert any defense. *See* NGFA Rail Arbitration Rules § 2(d).

expand the scope of the arbitration to include demurrage charges on cars XYZ004, XYZ005, and XYZ006 even if those charges are relevant for resolving the dispute. Even if an arbitrator allowed a relevant counterclaim or carrier-requested issue on the grounds that the rules do not prohibit it, a shipper could argue that the arbitrator exceeded his authority by addressing claims or issues that the shipper did not agree to arbitrate. Since the pre-dispute hybrid model does not allow certain carriers to seek arbitration against a shipper in the first instance and apparently does not allow those carriers to counterclaim against the shipper, arbitration under the hybrid model may not fully resolve a dispute.⁶ Unless the proposed rules are modified to explicitly allow a respondent to submit a related counterclaim or offset, certain carriers may be forced to either drop their related claims or pursue them outside of the hybrid model.

Third, if Class I and II carriers do not opt out of the hybrid model, they would be exposed to the risk of being party to multiple, simultaneous arbitrations. Individual shippers would not be exposed to that same risk under the hybrid model because shippers would have the freedom to demand arbitration whenever they wish. Unlike formal proceedings where the Board is aware of conflicting deadlines and can adjust schedules to avoid conflicts, an arbitrator will not be aware of a party's conflicts in other arbitrations because the other arbitrations are confidential and submitted to a different arbitrator. Even if an arbitrator were aware of conflicting deadlines and wanted to avoid conflicts, the proposed rules do not allow the arbitrator or the parties to vary the

⁶ This problem does not arise under the current Part 1108 arbitration procedures. 49 C.F.R. § 1108.3(a) provides that all necessary parties voluntarily agree to Board-sponsored arbitration. If one party objected to arbitrating a related claim or affirmative defense, the other party's protection lies in withholding consent to arbitration.

time restrictions for completing the arbitration.⁷ This disparate exposure to simultaneous arbitrations coupled with an inflexible procedural schedule could impede certain carriers' abilities to fully and fairly defend the merits of a dispute under the hybrid model.

The non-reciprocal participation requirements of the pre-dispute hybrid model deny certain carriers the same recourse and procedural protections that are available to shippers and other parties. The hybrid model would be unfair for those carriers.

B. The hybrid model's non-reciprocal annual opt-out requirements are not justified by the record.

The Board offers no reason why Class I and II carriers should be deemed participants in the hybrid model unless they opt out while shippers and other parties decide whether to arbitrate on a case-by-case basis. There is no evidence in the record that the reason for limited use of Board-sponsored arbitration is because Class I and II carriers have refused to arbitrate disputes. In fact, the opposite is true. According to the Railroad-Shipper Transportation Advisory Council ("RSTAC") in this proceeding, some members of the shipper community are unwilling or unsure about arbitrating before the Board.⁸ Despite the fact that the record fails to show carrier refusal to arbitrate under the Board's procedures but indicates shipper reluctance, the hybrid model would strong-arm certain carriers to arbitrate disputes while allowing all other parties to freely choose whether to arbitrate under the Board's auspices. Neither the NPRM nor the record in this proceeding offers a justification for why certain carriers should be treated differently than all

⁷ Compare 49 C.F.R. § 1108.8(a)(1) (current regulation provides that parties may agree to vary the timetables, subject to the approval of the arbitrator) with NPRM 49 C.F.R. § 1108.8 (proposed regulation is silent as to whether the parties can vary the timetables).

⁸ Comments of the Railroad-Shipper Transportation Advisory Council, Ex Parte No. 699 (filed Mar. 15, 2011) at 6 ("RSTAC Comments").

other parties or explains why such disparate treatment would lead to more Board-sponsored arbitrations.

The NPRM also offers no reason why Class I and II carriers must opt out repeatedly. Under the proposed rules, even if a carrier initially notifies the Board that it is unwilling to participate in such lop-sided arbitration, the carrier must still annually notify the Board that it is unwilling to participate. NPRM at 15, NPRM C.F.R. § 1108.3(b)(1). The NPRM offers no reason why one opt-out notice is insufficient to apprise the Board and other parties that a carrier is willing to arbitrate only on a case-by-case basis.

II. The Proposed Regulations Would Not Encourage More Board-Sponsored Arbitrations.

Even if the proposed pre-dispute hybrid model were revised to address UP's concerns about the lop-sided nature of the hybrid model, UP has additional concerns about the proposed regulations that would influence its decision to participate in any Board-sponsored arbitration. UP also questions whether the Board has the authority to toll statutory deadlines for filing court actions when the parties are ordered to mediate without their consent. The following comments address specific aspects of the NPRM that warrant modification or clarification.

1. § 1108.1(b). The definition of “arbitration program-eligible matters” is ambiguous and does not consistently reflect the language in the NPRM discussion. *See* NPRM at 7. The definition should be clarified to specify that each dispute is limited to redress alleged past wrongs for particular parties. Furthermore, “other service-related matters” is too broad given that arbitrations are best suited for disputes involving modest monetary value and

lacking policy significance.⁹ For example, a shipper could seek to arbitrate the reasonableness of a carrier's tariff rules, such as a carrier's coal dust mitigation rule or exterior car contamination rule, under the overly broad language of "other service-related matters." The limitation of "as applied to particular transportation" is of little value because an arbitrator's finding that "PRB coal trains" or "TIH movements" are "particular transportation" would not reflect a clear abuse of arbitral authority or discretion. The Board should consider the following language:

(b) *Arbitration program-eligible matters* are those disputes, or components of disputes, that may be resolved using the Board's arbitration program involving one or more of the following subjects:

- (1) disputes involving demurrage charges as applied to a particular party;
- (2) disputes involving accessorial charges as applied to a particular party;
- (3) disputes involving the misrouting or mishandling of rail cars for a particular party; or
- (4) disputes involving a carrier's misapplication of its published rules and practices as applied to a particular party.

Further, the rules should expressly state that arbitration would not be available for challenging either (i) the reasonableness of a carrier's rates or charges, or (ii) the reasonableness of a carrier's practices, except as applied in specific circumstances. The reasonableness of rates and charges should be excluded from arbitration because determining the reasonableness of rates or charges requires access to data or resources that an arbitrator would not have. For example, only the Board has access to confidential costed waybill data used in Three-Benchmark rate cases and only the Board has staff

⁹ See RSTAC Comments at 6.

capable of evaluating stand-alone cost evidence. The reasonableness of a carrier's rules or practices should be excluded from arbitration for several reasons. Finding a rule generally unreasonable would require prospective or injunctive relief. Furthermore, any judgment that a rule or practice is generally unreasonable requires a broader perspective on the balance of shipper-carrier rights and obligations as well as impacts on a rail network, and a carrier should apply its rules and practices consistently among similar common carrier shippers.¹⁰ Such determinations are beyond the simplified and expeditious processes that are supposed to be the virtue of arbitration. Moreover, a single arbitrator in a single case should not be making decisions that would impact other shippers or carriers.

2. § 1108.2(b). The section should specify that arbitration procedures are not available to revoke an existing commodity or equipment exemption.
3. § 1108.3(b). For reasons discussed above in Section I, the participation requirements for a pre-dispute model should be the same for all parties, regardless if they are a Class I carrier, Class II carrier, Class III carrier, shipper, or other party.
4. § 1108.4(a)(2). This section, when compared to the discussion in the NPRM, is ambiguous in regards to the available relief for voluntary, case-by-case arbitrations. The discussion in the NPRM states, “[N]either a [\$200,000] cap nor the exclusion of prospective or injunctive relief would apply to voluntary arbitration of a non-arbitration-program-eligible dispute before the Board.” NPRM at 10. However, this section states,

¹⁰ If a shipper is covered by a transportation service contract, then such a dispute is beyond the Board's jurisdiction and not subject to Board-sponsored arbitration.

“No prospective or injunctive relief shall be available through the Board’s arbitration program, *or through any other arbitration before the Board.*” The discussion in the NPRM would allow prospective or injunctive relief to be granted in voluntary, case-by-case arbitrations, but the proposed regulation does not. The Board should clarify that prospective or injunctive relief is not available in any arbitration before the Board for reasons stated in paragraph one.

5. § 1108.6(a). This section should specify objective criteria that qualify an individual to be included on the roster of arbitrators. In addition, especially for single-arbitrator proceedings, the arbitrator must be neutral. Unless parties are convinced that an arbitrator who is considered biased or who has a conflict of interest will be disqualified from arbitrating their dispute, parties will be reluctant to use Board-sponsored arbitration.¹¹ If arbitrator qualifications are a perceived drawback to Board-sponsored arbitration, parties may be more comfortable with arbitration if the Board establishes objective arbitrator qualifications. UP supports the Board’s proposal that the roster of arbitrators should be posted on the Board’s website, and UP suggests that arbitrators’ background and employment history should also be posted on the Board’s website.¹²
6. § 1108.6(b). The arbitrator selection process in this section is inadequate to ensure parties’ confidence that the appointed arbitrator will be qualified and neutral. Parties are

¹¹ Shipper comments have expressed concern about arbitrator bias. NPRM at 5.

¹² In *Arbitration of Certain Disputes Subject to the Statutory Jurisdiction of the Surface Transportation Board*, the Board decided that the roster of arbitrators would include a short summary of the background and employment history of each arbitrator in order to assist parties in selecting an arbitrator. *Arbitration of Certain Disputes Subject to the Statutory Jurisdiction of the Surface Transportation Board*, Ex Parte No. 560 (STB served Sept. 2, 1997) at 6.

unlikely to arbitrate disputes in lieu of formal Board proceedings if they do not have any voice over who the Board selects as arbitrator in order to ensure the arbitrator is both qualified and neutral. The strike process in the current regulations is one means that parties can provide input. Alternatively, the rules could establish a “best final offer” process where each party submits an arbitrator’s name to the Board for selection.

Regardless of how the arbitrator is selected, the Board should establish a process so that a party can notify the Board that it has reason to believe that a proposed or appointed arbitrator is not neutral or is otherwise unqualified for the particular dispute. The Board should also establish a requirement that proposed or appointed arbitrators must disclose any relationship or dealings with the parties or their respective counsel. The Board cannot identify potential conflicts of interest an arbitrator may have with particular parties when assigning the arbitrator unless the Board continuously monitors all of the activities of arbitrators on its roster, which would be burdensome and intrusive. Requiring the arbitrator and the parties to disclose relationships and dealings they have with each other would be more efficient.

7. § 1108.7(b). This section is ambiguous in regards to the pleading requirements for case-by-case arbitrations versus the pleading requirements for the proposed pre-dispute hybrid model. It is not clear whether a respondent can limit the issues arbitrated pursuant to the hybrid model, and it is not clear whether a claimant has to consent to the limitation. The Board should clarify the pleading requirements for case-by-case arbitrations versus pleading requirements for the proposed pre-dispute hybrid model. Furthermore, the Board should allow respondents to file a counterclaim or assert an affirmative defense in their answer.

8. § 1108.8. This section should specify that parties may agree to vary the time restrictions for completing the arbitration, subject to the approval of the arbitrator.
9. § 1108.11. The proposed standard of review is inadequate. The Board cannot abdicate responsibilities that are placed upon it by the Interstate Commerce Commission Termination Act. Consequently, the Board should be able to review an arbitral decision on the grounds that the decision contravenes fundamental principles of the Board's governing statute. If the Board requires arbitrators and parties to disclose conflicts of interest as UP suggests in paragraph six, the nondisclosure of any relationship or dealings between an arbitrator and a party or the party's respective counsel should also be grounds for appeal. For example, parties would have the right to appeal the appointment of the arbitrator or the arbitral decision within 20 days of learning of the conflict of interest.
10. § 1109.3(g). This section regarding the proposed mediation rules should specify that the "applicable statutory deadlines" are "statutory deadlines imposed on the Board under the Interstate Commerce Act." This would clarify that other state or federal statutes of limitations are not tolled when a proceeding is held in abeyance to facilitate mediation.

III. A Pre-Dispute Participant Model Must Include Certain Features To Be Effective.

UP is not endorsing the establishment of an arbitration program where all parties agree in advance to arbitrate a limited subset of disputes by joining the program ("pre-dispute participant model" or "participant model"). However, if the Board discards the proposed pre-dispute hybrid model and pursues instead a pre-dispute participant model in addition to voluntary case-by-case arbitrations, an effective pre-dispute participant model must, at the very least, include the following features:

- The participation requirements should be the same for any party who chooses to utilize the pre-dispute participant model (i.e. all parties must affirmatively opt in by writing). Since participation would require an affirmative choice and would be reciprocal, there would be a voluntary agreement by the parties to use Board-sponsored arbitration. All parties would also have the same available recourse and the same procedural protections.
- Parties may further limit the scope of the program-eligible matters that they are willing to arbitrate and the maximum dollar amount of relief they are willing to arbitrate when they opt in to the participant model. Allowing parties to individually limit the subject-matters that they are willing to arbitrate would encourage greater participation in the pre-dispute model. For example, if a party is concerned about arbitrating a certain subject-matter within the participant model but cannot limit its exposure to arbitrating that subject-matter, the party will likely not opt in. On the other hand, if a party can specify the subject-matters within the participant model that it is willing to arbitrate, the party will more likely opt in. Parties will be more willing to participate in a pre-dispute participant model if they are given more flexibility to address their individual concerns. Likewise, allowing parties to individually set the maximum dollar amount of relief they are willing to arbitrate may remove a disincentive for smaller entities to participate and may encourage others to experiment with the pre-dispute participant model.
- Once a party joins the pre-dispute participant model, the party must remain a participant for a minimum period of time before the party can withdraw. This feature protects against the possible misuse of the participant model. If a party could opt in with the sole purpose of filing a complaint against another participant and could immediately withdraw

as soon as that dispute was underway, the party would get the benefit of the participant model without the exposure of binding arbitrations from other participants.

- Only firms directly engaged in transportation or shipping would be eligible to join the pre-dispute participant model. Trade associations, whose interests lie with broader policy issues, could not use the pre-dispute participant model. Moreover, as recent discovery disputes between a carrier and trade association in another proceeding have demonstrated, trade associations disclaim ability to compel or otherwise require certain action from their members.¹³ Accordingly, it is difficult to see how an arbitrator's decision against a trade association could be binding in any way that would resolve a dispute because its members would claim they were not bound by the decision. Trade associations, however, could seek Board-sponsored arbitration under the case-by-case procedures if the other parties consented to Board-sponsored arbitration or mediation. Presumably the parties would not agree unless under the circumstances they believe that the arbitration would have a binding effect.

In addition to the listed essential features, the modifications or clarifications to the rules outlined in Section II should apply to a pre-dispute participant model.

IV. Conclusion

UP supports the availability of alternative dispute resolution in lieu of formal Board proceedings for disputes involving modest monetary value and lacking policy significance if: participation is voluntary; the arbitrators are qualified and impartial; and the procedures are fair.

¹³ See Reply of the Western Coal Traffic League to BNSF Railway Company's Motion to Compel Discovery, Docket No. FD 35557 (filed Feb. 6, 2012) at 9.

However, the proposed arbitration rules are procedurally unfair, unjustified, or otherwise ambiguous and, therefore, would not encourage parties to seek Board-sponsored arbitration.

Respectfully submitted,



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