



ASSOCIATION OF  
AMERICAN RAILROADS

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Honorable Cynthia T. Brown  
Chief, Section of Administration  
Surface Transportation Board  
395 E St., S.W.  
Washington, DC 20423

Re: STB Docket No. EP 699, Assessment of Mediation and Arbitration Procedures

Dear Ms. Brown:

In response to the Surface Transportation Board's Notice of Proposed Rulemaking served March 28, 2012, attached please find the Reply Comments of the Association of American Railroads for filing in the above proceeding.

Respectfully submitted,

Louis P. Warchot  
*Counsel for the Association of  
American Railroads*

Attachment

BEFORE THE  
SURFACE TRANSPORTATION BOARD

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STB Ex Parte No. 699

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ASSESSMENT OF MEDIATION AND ARBITRATION PROCEDURES

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REPLY COMMENTS OF THE  
ASSOCIATION OF AMERICAN RAILROADS

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**Introduction**

Pursuant to the Notice of Proposed Rulemaking (“NPR”) served on March 28, 2012 in this proceeding, the Association of American Railroads (“AAR”), on behalf of its freight railroad members, hereby submits its reply comments.

In the NPR, the Surface Transportation Board (“STB” or “Board”) proposed to modify its rules regarding alternative dispute resolution (“ADR”), specifically mediation and arbitration of disputes subject to the Board’s jurisdiction. The Board proposed to: (1) require parties to mediate certain matters and otherwise change its rules regarding mediation; (2) establish a new arbitration program that would allow all but Class I and Class II railroads to elect in individual cases whether to consent to arbitration, but require Class I and Class II railroads to affirmatively “opt-out” of participation or otherwise find themselves bound to arbitrate an unclearly defined subset of disputes subject to the jurisdiction of the Board (“Opt-Out Proposal”); and (3) make other changes to its rules.

In its opening comments filed on May 17, 2012,<sup>1</sup> the AAR expressed its support for Board efforts to encourage the use of voluntary mediation and arbitration processes to resolve disputes in lieu of bringing matters before the Board in formal proceedings. However, the AAR also detailed serious substantive legal concerns over the Board's proposed changes, particularly the Opt-Out Proposal. The AAR pointed out that the Board lacked the statutory authority to adopt the Opt-Out Proposal because it cannot be understood as a voluntary agreement by a Class I or Class II railroad to arbitrate a dispute.<sup>2</sup> See AAR Opening Comments at 6-12. The AAR opening comments also concluded that because the proposed rules were procedurally ambiguous and unfair to Class I and Class II railroads, the rules were unlikely to encourage Board-sponsored arbitration. *Id.* at 12-16. The AAR pointed out a number of structural changes to the Opt-Out Proposal that would be necessary to ensure a fair and equitable process for the resolution of disputes consistent with the provisions of the ICC Termination Act and the ADRA. The AAR also reiterated its view that the Board can reach its stated goal of encouraging arbitration and mediation with less drastic changes to its rules.

Opening comments were also filed by the United States Department of Agriculture ("USDA"), the National Industrial Transportation League ("NITL"), the Western Coal Traffic League ("WCTL"), the Montana Grain Growers Association ("MGGA"), the National Grain and Feed Association ("NGFA"), the United Transportation Union – New York State Legislative Board ("UTU-NY"), and the National Railroad Passenger Corporation ("Amtrak").

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<sup>1</sup> Separate opening comments were also filed by BNSF Railway Company ("BNSF"), Norfolk Southern Railway Company, and Union Pacific Railroad Company.

<sup>2</sup> The Board does not have the authority to adopt its proposal under 49 U.S.C. § 721(a) or the Administrative Dispute Resolution Act, 5 U.S.C. § 571-584 ("ADRA").

In the discussion below, the AAR responds to the opening comments filed in this proceeding. The AAR notes that many of the parties that support the proposals in the NPR nonetheless identify many similar problems with the Opt-Out Proposal observed by the AAR in its opening comments – all of which would be deterrents to participation. The AAR also responds to specific changes to the proposed rules suggested in the opening comments.

## **Discussion**

### **I. Comments in Favor of the Proposed Rules Illustrate the Flaws in the Opt-Out Proposal**

Non-railroad parties, with the exception of UTU-NY, generally expressed support for the Board's proposed rules in their opening comments. But in doing so, many parties identified similar issues and concerns as those raised by the AAR relating to the fairness, transparency, and practicality of the Opt-Out Proposal. *See, e.g.*, NGFA Opening Comments at 2 (“... the NGFA believes that in several respects, the STB's proposed rail arbitration procedures falls short of fostering the fairness and transparency so essential to the successful functioning of an unbiased arbitration system.”); MGGA Opening Comments at 2 (“There is a bit of a stick for the Class 1 railroads, in that they are presumed to be on board unless they very publicly opt out – it would be good to find a carrot for them as well.”); Amtrak Opening Comments at 3-4 (contrasting Amtrak's “voluntary” participation in the proposed arbitration program with the freight railroads' “mandatory” participation). It is not surprising that even some parties potentially benefited by the proposed arbitration program's discriminatory structure have identified problems with the proposed rules. The fundamental concerns raised by the AAR strike at the heart of whether or not any Board sponsored arbitration will ever be utilized. USDA correctly states, “if parties are to make use of the arbitration system, there

must be assurances of fairness, neutrality, and openness to foster an atmosphere of trust.”

USDA Opening Comments at 2.

The AAR continues to believe that the Board’s existing rules, if modified as suggested in the AAR opening comments, would encourage arbitration where it was in all parties’ interest. But if the Board concludes that it is necessary to adopt a pre-dispute participant model, the program should comply with the ADRA and be available to all parties on an equal, reciprocal basis and the mechanisms outlined in the NPR should be modified to reflect other successful programs. As BNSF aptly summarizes in its opening comments, the attributes of a successful, voluntary arbitration program include:

- (1) The programs cover a narrow, well-defined range of disputes,
- (2) the programs provide clear guidelines for the decision-makers to resolve the dispute,
- (3) the programs establish criteria for selecting decision-makers will be neutral and qualified,
- (4) the programs provide for an appropriate level of confidentiality, and
- (5) the programs adopt a clear and meaningful standard of review of arbitration decisions.

BNSF Opening Comments at 2.

For example, several other parties share the AAR’s concerns with the NPR’s framework for the selection of a competent and neutral arbitrator as a critical flaw in the proposed arbitration program. *See, e.g.*, AAR Opening Comments at 14-15. There appears to be widespread concern that the Board would not be able to populate a roster of arbitrators with individuals with the appropriate substantive knowledge and requisite neutrality. *See* NGFA Opening Comments at 5-6 (“NGFA members have expressed concerns over the background and type of expertise that would be possessed by arbitrators used in the Board’s proposed process.”); WCTL Opening Comments at 10 (“WCTL has concerns about the

ability of the Board to find suitable “neutral” arbitrators for cases involving railroads and shippers.”). The STB is an expert regulatory body with specialized institutional knowledge related to the economic regulation of railroads. The number of individuals that possess suitable experience to serve as arbitrators for disputes subject to the Board’s jurisdiction is necessarily small. And those individuals with such experience most likely gained their knowledge and skills by working for or with either railroads or shippers. Thus, the potential overlap of individuals with both knowledge and experience on the one hand and neutrality on the other is likely very small. This may be why the Board’s existing arbitration program has not been as widely used as the Board would have liked – not due to any perceived structural deficiencies which the Board is trying to remedy in this proceeding.

Thus, there may be an unsolvable, fundamental problem with a framework where the Board maintains a master list of arbitrators. For this reason, the AAR submitted that the Board could adopt a final offer system where each party to a dispute would submit their choice for an arbitrator along with a justification why the Board should select that individual. Each side would then have an opportunity to reply and argue why the other side’s choice would not be suitable. *See* AAR Opening Comments at 18. A demonstrated conflict of interest should disqualify an individual for service as an arbitrator. Final discretion would be left to the Board to select the arbitrator. If neither selection of the parties was suitable, the Board could require the parties to resubmit new choices.

Concerns regarding the competence and neutrality of potential arbitrators are also at the foundation of suggestions by some parties that the Board should appoint a panel of three arbitrators to hear disputes. *See* NGFA Opening Comments at 5. *See also* NITL Opening Comments at 12. The AAR can see merit in utilizing a three arbitrator panel, where each

party sponsors (and pays for) an arbitrator, and the Board uses the final offer method outlined above for the third arbitrator, if the parties cannot agree.<sup>3</sup> A three-person panel brings the benefit of three perspectives and an opportunity for arbitrators to interact and benefit from each other's experience. It also makes the arbitrators accountable to one another and therefore less likely to stray far from statutory principles and common sense.

Several parties expressed concern how a Board-sponsored arbitration would interact with other arbitration regimes, such as the one established by NGFA or arbitration pursuant to contractual agreements. NGFA Opening Comments at 4 (“[S]ome NGFA members have expressed concern as to the impact the Board’s rail arbitration program ultimately may have on rail carriers’ participation in NGFA’s system.”); Amtrak Opening Comments at 4 (“The Proposed Rule should clarify that the Board’s regulations do not preempt or supersede new or existing arbitration clauses contained in agreements between any participating parties.”). The AAR submits that the Boards should adopt a “first, do no harm” approach to establishing a new participant arbitration program. The Board should clarify that any arbitration program that it establishes will be secondary to and supplement other established arbitration regimes. That is, the Board’s rules should state that where parties to a dispute are members of another arbitration program or have agreed by contract to arbitrate the dispute, the Board will not send the dispute to Board-sponsored arbitration.<sup>4</sup> In addition, another way that the Board can ensure the smooth interaction with other arbitration regimes is to adopt the AAR proposal to

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<sup>3</sup> A reciprocal, truly voluntary arbitration program that is compliant with the ADRA would likely avoid the delegation and augmentation of appropriations issues raised in the AAR Opening Comments. *See* AAR Opening Comments at 9, 20-21.

<sup>4</sup> Indeed, if the dispute involves a transportation contract, the Board has no jurisdiction. 49 U.S.C. § 10709(c). Attempting to expand Board-sponsored arbitration to Section 10709 contracts would complicate the rules regarding STB review because the STB would lack authority to review arbitrators’ decisions applying such contracts.

allow participants to opt-in to any program in writing and specify what particular types of disputes the party would be willing to arbitrate in a Board-sponsored program. *See* AAR Opening Comments at 19.

Several parties also identified problems with the proposed standard of review of “clear abuse of the arbitrator’s authority or discretion” to those raised by AAR on opening. *See* AAR Opening Comments at 15. AAR agrees with USDA that “there are circumstances under which either party may wish to appeal an arbitrated decision” beyond clear abuse of an arbitrator’s authority or discretion. USDA Opening Comments at 3. Moreover, the AAR agrees with WCTL that it is unclear that the proposed standard will withstand judicially scrutiny. *See* WCTL Opening Comments at 12. (“[I]t remains unclear if the proposed NPRM’s “clear abuse of arbitral authority or discretion” standard sought to be applied by the full Board in any review of an arbitral decision would be sufficient to with stand an administrative appeal filed under the Hobbs Act. Pelofsky v. Wallace, 102 F.3d 350, 353 (8<sup>th</sup> Cir. 1996).”).

## **II. AAR Responses to Specific Proposals Contained in Opening Comments**

The AAR hereby responds to some of the specific recommendations regarding the Opt-Out Proposal made in the opening comments.

**Interstate Commerce Act and Agency Precedent.** NGFA takes issue with the Board’s proposal that arbitrators be required to “be guided by the Interstate Commerce Act and by STB and ICC precedent.” NGFA Opening Comments at 9. NGFA argues that “the Board should not instruct arbitrators to be guided by prior STB and ICC decisions, except for jurisdictional issues.” *Id.* at 10. As the AAR noted in its opening comments, the Board has

an obligation to ensure that the statutory requirements that it has been charged by Congress to fulfill have been met. AAR Opening Comments at 15, 18. Moreover, if the Board proceeded to adopt rules that did not require arbitrators to be guided by agency precedent, the practical effect would be to create two (or more) different sets of requirements for carriers based on whether a dispute was subject to arbitration. Creating such uncertainty by establishing different regulatory requirements on railroads based on whether a dispute is heard by an arbitrator or the Board is contrary to the public interest and a deterrent to arbitration. The Board should retain the challenged language and require that arbitrators be guided by the Interstate Commerce Act and by STB and ICC precedent.

**Expanded Scope of Arbitration.** NITL advocates that the Board should broaden the list of disputes subject to automatic arbitration to include three additional subjects. NITL argues that disputes about loss and damage arising under receipts and bills of lading governed by 49 U.S.C. § 11706, damage to a shipper's rail car, and damage as a result of "service failures not otherwise covered in the Board's proposed opt-out list" should be included. NITL Opening Comments at 8. The AAR opposes such an expansion for various reasons.

Resolution of freight claims falls outside the expertise of the Board and has been assigned by Congress to courts. 49 U.S.C. § 11706(d). Moreover, the body of precedent under 49 U.S.C. § 11706 provides valuable guidance to both railroads and shippers which would be lost if claims were diverted to decisions that do not establish precedent. Similarly, the STB does not have experience in deciding car damage disputes under the AAR Interchange Rules. Besides lacking the technical expertise to resolve such issues, such disputes are already subject to arbitration procedures. Accordingly, expanding the scope of

the STB arbitration to include such disputes would potentially add only uncertainty and confusion.

Finally, the AAR is concerned that the quoted “service failures” language is ambiguous and overbroad and could be construed by arbitrators to embrace a wide range of topics including a substantive investigation into the common carrier obligation which often involves service to other shippers. Such disputes are best left to the legal and policy expertise of the Board. The Board should establish a clear list of limited subject matter disputes that implicate findings of fact or application of clear rules for any automatic, participant arbitration program. Moreover, the Board should expressly state that only disputes subject to its jurisdiction will be eligible to be arbitrated under such a program. Some of the matters suggested by NITL are not the type of disputes which the Board would be able to adjudicate, so could not and should not be subject to Board sponsored arbitration.

**Publication of Arbitration Decisions and Protection of Confidential Information.**

NGFA advocates that the Board should make arbitration awards available publicly, but accord them no precedential weight. *See* NGFA Opening Comments at 8. Parties generally agree that arbitration awards should not be accorded any precedential value, but there is a split of opinion as to whether the awards should be confidential. The AAR recognizes that some aspects of arbitration proceedings will contain confidential information not suitable for public release. But the AAR also believes that making arbitration awards public would have three benefits. First, public decisions that summarize the position of the parties discourage extreme positions and can encourage voluntary settlement. Second, public awards would create incentives for arbitrators to render thoughtful, well-reasoned decisions. Third, public awards will allow parties to make an informed decision in selecting arbitrators based on their prior

work. As such, the AAR proposes that arbitrators should be required to render written confidential decisions to the parties involved in disputes and also a shorter public summary of the decision to be submitted to the Board for release on the Board's website. In the event of an appeal of an arbitration award to the Board, the entire record would be submitted to the Board, subject to the Board's normal rules regarding protective orders and the release of confidential information.

**Arbitration of Passenger Issues.** Amtrak notes that both the current and proposed 49 C.F.R. § 1108.4(a)(1) provide that an arbitrator may grant monetary damages "to the extent available under the Interstate Commerce Act. . . ." Amtrak asks the Board to extend arbitration to disputes involving Amtrak and the freight railroads subject to Board jurisdiction under 49 U.S.C. § 24308. The freight railroad members of the AAR do not support extending an arbitration program to disputes concerning Amtrak.<sup>5</sup> Potential disputes between Amtrak and the freight railroads under Section 24308 will not likely fall within the subset of disputes described above, i.e., disputes that implicate only findings of fact or application of clear rules. Such disputes implicate broader legal and policy considerations and would, in several instances, involve matters that have yet to be addressed by the Board. Therefore, they would not be appropriate to be included in any Board- sponsored arbitration program.<sup>6</sup>

**Panel of Arbitrators Review of Arbitration Decisions.** USDA proposes that the Board create an appellate panel of arbitrators to review arbitration awards. *See* USDA

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<sup>5</sup> The NPR does not define "Class I or Class II railroad." It is not clear from the NPR whether Amtrak would qualify under the proposed rules.

<sup>6</sup> AAR agrees that if Amtrak and a freight railroad already have an arbitration provision in their agreement, then those arbitration procedures should apply and STB-sponsored arbitration would not. *See supra* p. 7.

Opening Comments at 3. USDA's proposal to create a panel of arbitrators to review arbitration decisions does not appear workable for two reasons. First, there is the practical problem with a general lack of suitable individuals to serve as arbitrators in the first place that precludes the development of a cadre of appellate arbitrators. Second, as detailed in the AAR opening comments at 15, the Board must retain some authority to ensure that arbitrators do not contravene the statutory authority of the Board. *See also* WCTL Opening Comments at 12. Third, the Board would have to fund such an appellate panel. Creating an appellate arbitration panel would simply add another layer of review adding time and expense to the process.

**Reasonableness of Rates Is Not Arbitrable.** Finally, MGGA states, “[a]dditionally, we hope that prospective relief, including for freight rates, can be added to your rules, rather than limiting this process to retrospect.” MGGA Opening Comments at 2. The AAR does not support allowing arbitrators to determine the reasonableness of rates whether through reparations or prospectively. The standards for rate reasonableness either require access to confidential unmasked revenue data in the waybill sample or staff resources adequate to analyze stand-alone cost evidence. An arbitrator lacks both and therefore should not be allowed to set rates for past or future shipments. The Board has correctly concluded that arbitration should not be used for any matter that requires prospective or injunctive relief.

## Conclusion

The AAR continues to support the Board's stated goal of fostering voluntary, private sector resolution of disputes without resort to formal litigation. However, the proposed rules do not meet that goal and should not be adopted. The Board should instead consider the alterations to its existing, successful programs detailed in the AAR's opening comments. The Board should carefully consider the comments received and issue a new notice of proposed rulemaking to allow for public comment on its new proposal.

Respectfully Submitted,



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