BEFORE THE
SURFACE TRANSPORTATION BOARD

ASSESSMENT OF MEDIATION AND ARBITRATION PROCEDURES	))))))	STB Ex Parte No. 699

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REPLY COMMENTS OF THE
WESTERN COAL TRAFFIC LEAGUE

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The Western Coal Traffic League ("WCTL" or "League") hereby submits the following Reply Comments in response to the Board's Notice of Proposed Rulemaking ("NPRM") served in the above-captioned proceeding on March 28, 2012, and the opening comments filed by other parties on or about May 17, 2012.

As WCTL emphasized in its Opening Comments, WCTL believes that the Board's proposed NPRM rules may provide new opportunities for expedited, Board-sponsored alternative dispute resolution ("ADR") of discrete disputes brought before the Board, and the NPRM generally addresses the League's concerns about the need to ensure that shippers' statutory rights to bring complaints before the Board are not undermined. WCTL's Opening Comments also addressed specific NPRM items where it believed modest clarification and improvements are necessary.

In its opening comments, the U.S. Department of Agriculture ("USDA") expressed support for the Board's NPRM rules, and provided several suggestions and

recommendations, as did the other shipper parties submitting opening comments.[1] In their opening comments, the railroad parties stated generally that they supported the Board's efforts to encourage STB-sponsored ADR procedures, but they also expressed opposition to significant components of the NPRM rules[2] – with one railroad party contending that, through its NPRM, the Board is seeking to "offload its adjudicatory responsibilities to a for-hire contractor."[3]

WCTL believes that the Board's proposed NPRM is a serious effort to encourage ADR, and address concerns about the availability and use of ADR, including those expressed by Chairman Elliott, who has described the Board's arbitration process as "moribund."[4] The railroads' expressed concerns over the NPRM in large part appear vastly overstated, and WCTL has concerns that many of the railroads' suggested changes are unwarranted and unnecessary, and would only serve to ensure that Board-sponsored arbitration will continue to be an elusive potential option to resolve disputes outside of the Board's formal complaint processes.

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[1] *See* Comments of the USDA ("Op. USDA Comments"); Comments of the National Industrial Transportation League ("Op. NITL Comments"); Comments of National Grain and Feed Association ("Op. NGFA Comments"); Comments of Montana Grain Growers Association.

[2] *See* Comments of the Association of American Railroads (Op. AAR Comments"); Opening Comments of Union Pacific Railroad Company (Op. UP Comments"); Comments of BNSF Railway Company ("Op. BNSF Comments"); Comments of Norfolk Southern Railway Company ("Op. NS Comments").

[3] *See* Op. NS Comments at 5.

[4] *See* Testimony of Daniel R. Elliott III, Before the U.S. Senate Committee on Commerce, Science, and Transportation, Hearing on the Federal Role in National Rail Policy (Sept. 15, 2010) at 7-8.

In these reply comments, WCTL addresses the participating parties' opening comments, with a focus on areas where the League has substantive concerns with those comments.

I.

DISCUSSION

A. <u>USDA/Shippers' Opening Comments</u>

In its opening comments the USDA "applaud[ed]" the Board's NPRM, stating that the proposed ADR processes provide "potential lower cost alternatives for carriers and shippers to resolve disputes in a more amicable fashion than through more formal processes." Op. USDA Comments at 2. USDA also provided substantive recommendations on a few aspects of the Board's NPRM addressing arbitration.

First, for matters involving arbitration, USDA requested that the Board "proactively preserve" options of agricultural shippers to use either STB-sponsored arbitration or private arbitration as established under existing railroad and agricultural shipper ADR programs. *Id.* WCTL submits that this concern is adequately addressed in the proposed NPRM, which clarifies that arbitration will be commenced only after: (i) a complaint is filed whose subject matter is arbitration program-eligible; (ii) the complainant states in its complaint that it is willing to arbitrate voluntarily all or part of the dispute; (iii) a notice is issued by the Board advising other parties to the matter that the carrier(s) involved in the dispute are participants in the arbitration program; and (iv), if so, the Board assigns the matter for arbitration. *See* NPRM at 8; proposed NPRM at 49

C.F.R. §§ 1108.3(b)(3), 1108.7. As the League set forth in its Opening Comments, WCTL agrees that shippers should be authorized to decide, on a case-by-case basis, whether to seek to invoke Board-supervised arbitration. *See* Op. WCTL Comments at 9. In this respect, the Board's proposed rules would fully preserve a shipper's right to pursue alternative forms of redress, *e.g.*, through a formal Board-adjudicated statutory complaint, or through alternative arbitration programs that do not involve the STB.[5]

Second, USDA suggests that, at the request of any party to an arbitration, the Board should provide for a panel of three arbitrators, rather than one, with the parties paying the expenses of two of the arbitrators and the Board paying for the third. Op. USDA Comments at 3.[6] WCTL has concerns that, if the Board is going to limit the amount of disputes/relief as it has proposed at 49 C.F.R. § 1108.4(a)(1) to $200,000 or similar levels, then requiring the parties to pay substantial expenses of a panel of arbitrators may discourage the use of arbitration as an inexpensive alternative to traditional, formal dispute resolution proceedings before the Board.[7] However, as WCTL stated in its opening comments, the Board should not categorically limit the potential use

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[5] Also, the proposed NPRM, at 49 C.F.R. § 1108.3(d), provides that "[n]othing in the Board's regulations shall preempt the applicability of, or otherwise supersede, any new or existing arbitration clauses contained in agreements between shippers and carriers."

[6] NGFA states a preference for the use of a three-person arbitration panel, although it requests that the proposed $200,000 cap on disputes be expanded. *See id.* at 4-7.

[7] In its Opening Comments, WCTL provided comments on how the Board may be able to best provide for the selection of a suitable neutral arbitrator. *See* WCTL Op. Comments at 10-11.

of arbitration for larger disputes if the parties agree. Also, for any dispute assigned to Board-sponsored arbitration, if the parties agree, they should be able to use a panel of three arbitrators. In that instance, it would be appropriate for the parties to share the fees and/or costs of the second and third arbitrators.

Third, USDA comments that "transparency in the arbitration process, accomplished by publishing the decisions that exclude propriety information, would best serve the ideal of neutrality." *Id.* at 3.[8] The proposed NPRM provides that decisions should be served on parties and the Board simultaneously, in a manner that "is consistent with protecting the confidentiality of the decision, if so requested by the parties." Proposed NPRM at 1108.9(b).

WCTL agrees that the default rule should be to make the arbitral decisions public, which is also consistent with the Board's practice in issuing its decisions publicly. Also, in light of the proposed NPRM appeals process, at 49 C.F.R. §§ 1108.11 and 1115.8, which provide for party appeals of an arbitration decision to the full Board, and with the availability of judicial appeals of a Board decision, it appears appropriate and necessary for arbitral decisions to be made publicly available. In this respect, while standard STB confidentiality procedures should be incorporated into the arbitration process (*e.g.*, for discovery, evidentiary filings, etc., as appropriate) as is provided for

[8] NGFA also requests that arbitral decisions be made publicly available. *See* Op. NGFA Comments at 8-9.

under the Board's proposed NPRM (at 49 C.F.R. § 1108.8), WCTL believes that it is appropriate to make arbitral decisions publicly available.[9]

Fourth, USDA requests that the Board consider adding a separate appeals process "for instances not involving a clear abuse of an arbitrator's authority or discretion." Op. USDA Comments at 3. USDA suggests as one option, the establishment of a "separate panel composed of more experienced arbitrators that only arbitrate appeals" – which process apparently would not involve a Board-appeal opportunity. *Id.* WCTL has questions about the need for the establishment of multiple, separate appeals processes, the practicality of establishing such processes, and the appropriateness of establishing varying standards for different types of appeals. Additional information on such alternative appeals processes and standards would be necessary before WCTL could provide more substantive comments on this matter.

NITL suggests that, while not part of this NPRM process, the Board should continue to evaluate the option of pre-complaint formal mediation, should the parties to a dispute desire it. *See* Op. NITL Comments at 5-6. As WCTL stated in its October 25, 2010 comments, the League agrees that consideration of voluntary, shipper-elect, pre-complaint mediation could potentially assist the parties in resolving differences in individual disputes through the Board's involvement in the matter, prior to having to

[9] The proposed NPRM, at 49 C.F.R. § 1108.9(b), provides that the arbitrator should simultaneously serve a copy of the decision on the parties and upon the Board. To accommodate any extraordinary confidentiality concerns that may arise in any given case, the Board could consider clarifying that the arbitrator may take limited, appropriate actions to protect confidentiality as part of the issuance of a public, written decision (e.g., through the use of limited redactions) as necessary and appropriate.

bring an actual complaint. See WCTL Oct. 25, 2010 Comments at 7-9. However, any such potential initiatives should be carefully crafted and consistent with the manner WCTL has suggested in its October 2010 comments so as to ensure that mediation does not prejudice a shipper's statutory right to bring a formal complaint challenge. *Id.*[10]

NGFA requests that the proposed NPRM "not instruct arbitrators to be guided by prior STB and ICC decisions, except for jurisdictional issues." Op. NGFA Comments at 10. WCTL understands and agrees that the effective, streamlined, and cost-effective use of arbitration necessitates a requirement that appeals of arbitral decisions be limited to "a clear abuse of an arbitrator's authority or discretion" as set forth in the proposed NPRM at 49 C.F.R. § 1115.8, and agrees with NGFA that a requirement that arbitrators be strictly guided by prior agency decisions, appears somewhat inconsistent with this approach. However, as WCTL discussed in its Opening Comments (at 12-13), since any Board decision on review of an arbitral decision will be subject to judicial appeal under the Hobbs Act (28 U.S.C. §§ 2321, 2342), if the Board's decision upholds an arbitral award, but is contrary to established law, then the Board's decision would presumably be subject to challenge on appeal in the United States Court of Appeals. Thus, because of the limitations presented by the Hobbs Act's reviewability standards, any agency decision departing from governing law would necessarily appear to be subject to close scrutiny on appeal.

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[10] For example, the agency has previously stated that "[p]arties are admonished that use of ADR for purposes of delay is an abuse of the process and will not be condoned." *Use of Alt. Dispute Resolution Procedures in Comm'n Proceedings & Those in which the Comm'n is a Party*, 8 I.C.C.2d 657, 661 (1992).

B. Railroad Opening Comments

In their opening comments, the railroads posit a number of arguments in opposition to significant components of the Board's NPRM.

First, the participating railroad parties all express particular dissatisfaction with the Board's "opt-out" proposal at proposed NPRM 49 C.F.R. § 1108.3(b) that clarifies that a Class I and Class II rail carrier will be deemed to have agreed in advance to participate in the Board's arbitration program, unless it notifies the Board of its election to opt-out.[11] *See*, *e.g.*, Op. AAR Comments at 5-7, 11-13; Op. UP Comments at 3-7; Op. NS Comments at 4-7; Op. BNSF Comments at 3-4. The railroads argue strenuously that the Board's opt-out procedures are improper because they, in essence, seek to force arbitration on railroads in arbitration-eligible matters sought by shippers, without the true, voluntary consent of individual railroads. The railroads further argue that "[t]he Board has no authority to impose arbitration without the voluntary consent of the parties." Op. AAR Comments at 5.

However, the Board's rules explicitly provide that a railroad's mutual consent is required, as the proposed NPRM provides that the Board "will not assign to arbitration any dispute in which one or more parties is not a participant in the Board's arbitration program and does not otherwise consent to arbitration." Proposed NPRM at 49 C.F.R. § 1108.3(a)(4). While it is true that the NPRM establishes that a Class I or Class II carrier must file a formal notice that it elects to opt-out of the arbitration program

[11] Class III railroads may participate in the program if they file a written notice with the Board advising of their intent to participate in the program. *Id.* at §1108.3(b)(2).

should it not desire to participate in the program (*see id.* at § 1108.3(b)), that fact should not cause the Board concern, because individual carriers still have full discretion to opt-out of the program, and thus the program remains fully voluntary for railroads.

Affected railroads are obviously sophisticated entities who, individually and through their trade associations, have been given full notice of the Board's proposed NPRM arbitration rules. It is a very simple task for an unwilling Class I or Class II railroad to voluntarily opt-out of the Board's arbitration program, by (i) filing a notice informing the Board of the carrier's decision to opt-out within 20 days of the Board's adoption of its rules, or no later than January 10 of each calendar year; or (ii) filing a notice with the Board at any time, with such notice taking effect 90 days after filing. *See* proposed NPRM at 49 C.F.R. § 1108.3(b)(1)(i) and (ii). Accordingly, each affected railroad has the full opportunity to opt-out of arbitration, and thus, arbitration is not being forced upon the railroads leaving them with no meaningful choice in the matter.[12]

Second, notwithstanding the Board's proposed NPRM, which states that its new arbitration rules are being promulgated pursuant to the Board's authority under 49 U.S.C. § 721(a) (*see* NPRM at 14), the railroads still insist that the Alternative Dispute Resolution Act ("ADRA"), 5 U.S.C. §§ 571-84, governs. *See* Op. AAR Comments at 11-12; Op. NS Comments at 3-4. AAR suggests that the NPRM violates the ADRA because the ADRA "prohibits a federal agency from requiring any person to consent to arbitration

[12] Also, this is not a circumstance where individual railroads are being forced into a contract of adhesion, and there thus cannot be an improper "delegation of the Board's adjudicatory responsibilities to private parties" (Op. AAR Comments at 6) in instances such as this where there is, in fact, adequate consent.

as a condition of receiving a contract or benefit." Op. AAR Comments at 11 (citing 5 U.S.C. § 575(a)(3)). However, nowhere in the Board's NPRM do the proposed rules require a railroad to agree to arbitration as a condition to receiving any contract or benefit. Similarly, NS argues that the proposed NPRM must fail under the ADRA because it violates the ability of parties to craft an agreement of their choosing (*e.g.*, because it negates an individual carrier's ability to choose not to arbitrate certain matters, or to choose to limit the range of awards). However, this argument again fails to recognize that the Board's proposed rules provide carriers with full discretion to opt-out, and thus the program remains voluntary for individual railroads.

Third, the railroads argue that the proposed rules are "lopsided" and put railroads at a "substantive advantage" vis-à-vis shippers by allowing shippers to decide when to pursue arbitration on a case-by-case basis. *See* Op. AAR Comments at 13; Op. NS Comments at 6; Op. UP Comments at 3-7. However, these objections appear to be based on the faulty assumption that the railroads have a right to bring complaints against shippers for a violation of the law under the ICC Termination Act ("ICCTA"), which of course, is incorrect.

Under the law, "[a] person, including a governmental authority, may file with the Board a *complaint about a violation of this part by a rail carrier providing transportation or service subject to the jurisdiction of the Board under this part*." 49 U.S.C. § 11701(b) (emphasis added).[13] The Board's proposed NPRM at 49 C.F.R. §

[13] Board precedent has long held that "the [agency] only has such jurisdiction as has been conferred upon it by Congress, and that does not give it the power to make

1108.7, properly recognizes the fact that it is shippers that have a statutory right to bring a complaint against railroads, and have the Board adjudicate their complaint, and not vice-versa. The proposed rules also properly uphold the statutory right of shippers to elect to pursue a formal complaint before the Board, or elect to seek arbitration for arbitration program-eligible matters.[14]

Fourth, the railroads argue that the proposed rules put the participating carriers at a "procedural disadvantage" by authorizing shippers to specify what complaints may be arbitrated. Railroads argue that they are being thrust into "a system that does not protect their ability to defend against unfounded complaints or seek appropriate counter claims." Op. AAR Comments at 13-14; *see also* Op. UP Comments at 4-6, 11. These contentions appear overstated and unfounded. As described *supra*, under the Board's proposed arbitration commencement procedures, arbitration may be sought to be invoked only after an individual complaint is brought whose subject matter is arbitration program-eligible. *See* proposed NPRM at 49 C.F.R. § 1108.7(a). After the

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orders adjudicating claims of carriers against shippers and requiring the payment of such claims." *Penn. R. v. Fox & London, Inc.*, 93 F.2d 669, 670 (2d Cir. 1938); *accord Laning-Harris Coal & Grain Co. v. St. Louis & San Francisco R.R.*, 15 I.C.C. 37, 38 (1909) ("It is clear that the [agency] . . . is not authorized to adjudicate the claim of a railroad company against a shipper, but only the claim of a shipper against a railroad company for violation of the interstate commerce law.")

[14] UP incorrectly states that the Board is seeking to implement "pre-dispute" ADR (Op. UP Comments at 3), but that characterization is obviously incorrect, as the proposed rules clearly provide that the commencement of arbitration begins only *after* a written complaint is filed and served in accordance with the Board's rules set forth at 49 C.F.R. § 1104, adequate consent to arbitration is established, the subject matter of the complaint is arbitration program-eligible, and the Board has set the matter for arbitration, if appropriate. *See* 49 C.F.R.§ 1108.7.

filing of the complaint, any defendant-respondent has the right to answer the complaint, and presumably, state any defense (*e.g.*, the Board is deprived of jurisdiction to hear the complaint because the matter is subject to a private contract). *See id.* at § 1108.7(b).

In any given case, if there were any cross complaint reasonably tied to the complaint over which the Board had jurisdiction, then presumably that cross-complaint could be included in the respondent's answer.[15] The Board would then need to determine which, if any of the matters, could and should be arbitrated.[16] WCTL has every confidence that the Board can and will properly delineate the proper scope of issues for arbitration, if arbitration is deemed appropriate in any given case.

Fifth, the railroad parties criticize the proposed NPRM for "fail[ing] to adequately define what disputes would be subject to the proposed arbitration program." *See* Op. AAR Comments at 7. Also, UP seeks to limit the universe of arbitration program-eligible matters. *See* Op. UP Comments at 7-9. However, the Board's proposed NPRM, at 49 C.F.R. § 1108.1(b), reasonably clarifies the type of disputes eligible for Board-sponsored arbitration. This includes demurrage and accessorial charges, compensation for misrouting or mishandling of rail cars, redress for a carrier's misapplication of its published rules and practices as applied to particular rail

[15] The Board's current rules for answers to complaints authorize appropriate cross complaints. *See* 49 C.F.R. §1111.4(d).

[16] However, if a railroad respondent were seeking through a counterclaim an award set-off, or seeking to have the arbitrator adjudicate matters outside of the Board's jurisdiction, consideration of that matter as part of a formal Board-adjudication, or Board-sponsored arbitration, would clearly be improper. *See*, *e.g.*, *Laning-Harris Coal & Grain Co. v. St. Louis & San Francisco R.R.*, 15 I.C.C. 37, 38 (1909).

transportation, and other service-related matters. *Id.*[17] The list of eligible matters does not include rate cases, or other complex cases, except on petition. *Id.* at §§ 1108.1(b), 1108.3(a)(1)-(3).[18]

AAR asserts that disputes such as the reasonableness of carrier coal loading rules or conditions on toxic-by-inhalation shipments might be the subjects of Board-sponsored arbitration, and that these types of proceedings should not be arbitration eligible. However, the Board's proposed NPRM is clear that such matters would not be eligible for arbitration as "[a]ll arbitrations conducted pursuant to the Board's arbitration program would be used only to redress alleged past wrongs with monetary compensation, and not to impose prospective or injunctive relief." NPRM at 7. WCTL also submits that, contrary to UP's suggestions, there is no need to precisely pigeonhole each and every matter that is arbitration-eligible. The Board's proposed NPRM properly provides for the subject matters that are subject to arbitration, and the Board can and will properly determine individual matters that are appropriate subjects for arbitration under its rules, on a case-by-case basis.

Sixth, the railroads suggest that the Board incorporate into its proposed NPRM additional standards of full Board review of arbitral decisions, including adding the phrase "or contravenes statutory requirements." Op. AAR Comments at 18; *see also*

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[17] As with mediation, the proposed NPRM rules would not apply to proceedings involving the grant, denial, stay, or revocation of any license, or any related authorizations or exemptions. *See* proposed NPRM at 49 C.F.R. § 1108.2(b).

[18] The Board's NPRM, at 7, clarifies that disputes raising novel questions would not be suitable for Board-supervised arbitration, and generally, matters that are subject to arbitration should "possess[] monetary value but lack[] policy significance."

Op. BNSF Comments at 4-5 (requesting similar, additional Board grounds for modification or vacation of an arbitration award). WCTL submits that the proposed NPRM's limited appeal process providing for modification or vacation of arbitral awards "only on grounds that such award reflects a clear abuse of arbitral authority or discretion" (proposed NPRM at 49 C.F.R. § 1108.11(c)), should not be supplemented in the matter requested by the railroads. The Board's proposed appellate review standards provide an adequate balance that maintains agency control over the arbitration process with ultimate decision making authority, while preserving the speed and finality that makes arbitration attractive in the first place.

Also, any remaining legitimate concerns are adequately addressed by the fact that the proposed NPRM provides, at 49 C.F.R. § 1108.3(c) that the arbitrator "shall be guided by the Interstate Commerce Act and by STB and ICC precedent." Additionally, as explained above, any Board decisions on appeal are reviewable in federal court under the Hobbs Act, further assuring that any arbitrator decision will not contravene ICCTA.

CONCLUSION

WCTL appreciates the Board's consideration of the above Reply Comments.

Respectfully submitted,

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