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RAILROAD-SHIPPER TRANSPORTATION ADVISORY COUNCIL  
Washington D.C.

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March 15, 2011

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

Re: Ex Parte No. 699, Assessment of Mediation and Arbitration Procedures

Dear Ms. Brown:

Pursuant to the Board's Notice of August 22, 2010, attached please find the Comments of the Railroad-Shipper Transportation Advisory Council (RSTAC) for filing in the subject proceeding.

Respectfully,



J. Reilly McCarren  
Chairman  
Railroad-Shipper Transportation Advisory Council

BEFORE THE  
SURFACE TRANSPORTATION BOARD

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Ex Parte No. 699

*ARBITRATION OF CERTAIN DISPUTES SUBJECT TO THE STATUTORY  
JURISDICTION  
OF THE SURFACE TRANSPORTATION BOARD*

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COMMENTS

OF

THE RAILROAD-SHIPPER TRANSPORTATION ADVISORY COUNCIL

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**COMMENTS  
OF  
THE RAILROAD-SHIPPER TRANSPORTATION ADVISORY COUNCIL**

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The Railroad-Shipper Transportation Advisory Council ("RSTAC") is an advisory Council established under the provisions of 49 U.S.C. §726 to advise the U.S. Department of Transportation, the Surface Transportation Board and the U.S. Congress on rail policy issues, with particular emphasis on issues of importance to small railroads and small shippers. RSTAC members are appointed by the Board's Chairman and normally number fifteen: four representatives of small shippers, four representatives of small railroads, three representatives each of large shippers and large railroads, and a member to represent the public. The small shipper representatives, the small railroad representatives and the public representative constitute the voting members of RSTAC. The U.S. Secretary of Transportation and the members of the STB are *ex officio*, non-voting members of RSTAC.

RSTAC meets quarterly for the purpose of discussing rail transportation issues affecting railroads and their customers. Periodically, RSTAC publishes "White Papers" addressing issues of particular or timely interest and containing the recommendations of the

Council. Those publications, as well as other information about RSTAC may be found on the STB website.

RSTAC submits these Comments in response to the Notice of the Surface Transportation Board ("STB" or "Board") served on September 2, 2010, in which the Board seeks comments on the use of mediation and arbitration as an effective means of resolving disputes that are subject to the Board's jurisdiction. In its Notice, the Board indicated that it favored private sector dispute resolution to the extent practical. The Board has sought input on how it might encourage greater use of mediation and arbitration procedures, and whether any changes to existing rules might be necessary. The Board further seeks comment "regarding possible changes to its rules to permit the use of Board-facilitated mediation procedures without the filing of a formal complaint."

RSTAC members support use of alternative dispute resolution whenever possible to resolve issues between carriers and their customers that cannot be readily resolved through bilateral discussion. Many RSTAC members have direct experience with such procedures and RSTAC believes that such procedures are generally preferable to formal proceedings before the Board, which can be both lengthy and expensive. Further, mediation in particular can serve to ease tensions which may occasionally arise in carrier-customer relationships.

RSTAC evaluated current STB programs for alternative dispute resolution, including the informal mediation process conducted by the STB Rail Consumer and Public Assistance Program ("RCPAP"), formal mediation conducted pursuant to a complaint, and binding arbitration.

#### Rail Consumer and Public Assistance Program

RSTAC finds that the RCPAP program has been quite effective for resolving issues of limited consequence. This program appears to have been particularly effective at resolving

service issues which have arisen between carriers and rail customers. RSTAC desires to see this program continue.

One limitation of the program has been the difficulty in publicizing its existence, particularly to small rail customers that may not be members of national trade associations. While the Board and RSTAC have each tried to disseminate information about RCPAP, reaching small rail shippers and receivers has proven difficult. RSTAC believes that the effectiveness of the program warrants additional efforts to reach rail customers, particularly those of small and medium size. Railroads may be able to assist the Board in this effort by publicizing the program through customer contacts.

#### Mediation Procedures

RSTAC believes that STB-sponsored mediation has failed to reach its potential to resolve issues between carriers and customers. The requirement to file a formal complaint has historically posed a significant monetary barrier to use of STB mediation. Further, the investment in the complaint creates momentum towards a formal proceeding, and parties' positions become solidified in advance of potential mediation. In many cases, the amounts at stake, particularly in non-rate cases, have not justified the cost of filing a formal complaint. In such cases, the customer has been left without a remedy.

On February 15, 2011, the Board announced in EP 542 that it proposed to reduce filing fees, in most cases, to a maximum of \$350. That reduction will make STB mediation much more accessible and feasible for cases involving relatively modest amounts. Despite that reduction, RSTAC believes that parties should be able to petition the STB for mediation of a potential complaint without actually having to file such a complaint. The party requesting mediation

would still have to pay the fee associated with a formal complaint, but with the new schedule proposed by the Board that will not be a burden. Such a procedure would apply to non-rate disputes, as the STB already has mediation procedures for rate cases, and fees are already quite reasonable for small and medium shipment cases.

The ability to invoke Board mediation without the filing of a formal complaint would provide two principal benefits. First, the parties would not need to incur the legal and expert costs that would be involved with the filing of a formal complaint. Secondly, and perhaps more importantly, the ability to obtain a mutually satisfactory solution if the parties can avoid the necessary hardening of positions that occurs while preparing or defending a formal complaint. *This pre-complaint mediation should be kept confidential, again to minimize the emotional elements of a dispute and provide the best opportunity for informal resolution.* While respondents would not be required to mediate, except where already required by existing board procedures, RSTAC believe that in most cases respondents would agree to mediation.

RSTAC believes that mediation helps the settlement process by facilitating the exchange of information through a trusted intermediary. Consequently, RSTAC places a high value of having STB staff mediate potential complaints, due to their significant knowledge of the rail industry. RSTAC views the proposed enhanced mediation capability to be beneficial for the Board as the reduced fee schedule envisioned in EP 542 may well result in additional case load. However, the effectiveness of mediators will have a significant bearing on the success of mediation efforts and the Board should ensure that all potential mediators have an appropriate level of training and knowledge for the task.

## Arbitration

RSTAC does not believe current STB arbitration procedures to be effective. Lack of arbitration activity supports this view. Further, submissions by shipper organizations in this proceeding indicate a lack of enthusiasm in the rail customer community for STB arbitration as currently structured. Shipper organizations appear to be split between those favoring binding arbitration of certain disputes and those with little interest in arbitration at all. Further, several parties have expressed doubt to whether the Board has authority to order binding arbitration.

RSTAC believes that the Board lacks clear authority to order binding arbitration. Even if such authority could be established, the inevitable court challenges would undoubtedly delay the cause of alternative dispute resolution by several years. Further, for cases of significant economic value, parties are unlikely to prefer arbitration when the expertise of the full Board is available through a formal process. Certainly, major policy issues should not be decided by an arbitrator.

RSTAC does believe, however, that arbitration of relatively modest cases has significant value. Several RSTAC members have experience with the arbitration system administered by the National Grain and Feed Association ("NGFA") for its members. NGFA is one of the respondents to Ex Parte 699. Both carriers and customers report satisfaction with NGFA arbitration, although some see room for improvement in certain areas. Arbitration has particular value in cases possessing monetary value but lacking policy significance, for example resolution of demurrage disputes.

The NGFA model offers potential for a successful STB arbitration system. The key is that the general commitment to arbitrate is voluntary. That approach would allow the STB to set up a subscription based approach to arbitration where companies could commit to arbitrate

applicable disputes for a period of time, for example one year. If both parties to a dispute had previously subscribed to the arbitration system, arbitration could then be invoked on a single-party basis for a particular dispute. Additionally, arbitration would still be available to parties that had not "opted in" but were willing to submit an individual dispute to STB arbitration. That provision is broader than that employed by NGFA, but appropriate for STB as a government agency. So structured, some companies could commit wholeheartedly to the arbitration approach while others could evaluate its results before making such a commitment. Many rail customers do not normally have business before the Board and would be unlikely to subscribe to an arbitration program, perhaps not even to learn of it. RSTAC believes the joint subscription/case-by-case approach, by retaining the essential voluntary nature of arbitration, would fall within the STB's statutory authority.

While the STB addresses a far broader range of customers and issues than NGFA, the general rules of NGFA arbitration provide a solid framework for consideration by STB. Some of the key points are as follows:

- Monetary damages are limited – in the case of NGFA to \$200,000 for an individual case, a limit RSTAC believes likewise appropriate for the Board.
- Arbitration is limited to specific types of cases. In particular, rate cases are excluded.
- Pursuant to the current "opt-out" model at NGFA, subscribers can withdraw from the system on 90-day notice.
- Arbitration panels are comprised of three arbitrators picked by NGFA, rather than having two arbitrators representing the parties with only a single neutral arbitrator. RSTAC believes the NGFA system yields significantly superior results, as long as the arbitrators are knowledgeable and fair, and recommends this system for adoption by the Board.

RSTAC recommends that unlike NGFA, the STB allow arbitration of disputes where monetary claims have not yet arisen, for example in the event that a railroad published a new rule that could plausibly give rise to such claims, although such arbitration should be limited to parties

that would likely incur charges as a result of the rule change. RSTAC also recommends that both mediation and arbitration decisions before the board be confidential; at NGFA mediation is confidential but arbitration decisions are made public. In addition, complainants would need to make the same type of pre-complaint filing as previously discussed in the mediation section, and pay the associated fee. In some cases, mediation may be a preferable first step to arbitration.

RSTAC recommends the following items be allowable subjects for STB arbitration:

- Démurrage disputes involving the application of demurrage rules or terms;
- Misrouting of loaded rail cars or locomotives;
- Disputes involving the application of a railroad's special car or equipment program rules;
- Disputes involving the application of a railroad's general car distribution rules;
- Disputes involving the mishandling of private cars or locomotives;
- Non-payment of charges falling into these categories
- Disputes involving contracts covering the transportation of agriculture products subject to the Board's jurisdiction provided that the disputes submitted to arbitration are limited to first six points listed above unless otherwise agreed to by the parties;
- Disputes involving property damage claims arising under or related to a rail sidetrack agreement (see Note 2);
- Reasonableness of rules and practices (see Note 3);
- Disputes involving a lease by a rail user of real property owned by a railroad or railroad affiliate (subject to the limitations in Note 1 and further to an affirmative statement by the subscribing company that it is willing to have this subject covered by arbitration);
- Any other issue mutually agreed by the parties to a particular case.

These suggestions borrow heavily from the existing NGFA arbitration process, with modifications RSTAC believes appropriate for the STB and the general shipper-railroad

community. An arbitration system established along these lines would allow rail customers meaningful recourse for issues which involve significant amounts but do not rise to the level of major policy concern or implicate amounts so large as to materially impact most companies. In order to make such a system successful, a sufficient number of knowledgeable and skilled arbitrators must be available. RSTAC concurs with the recommendations of several parties to EP 699 that Board update and expand its list of arbitrators. If the arbitration system proves successful, the Board could consider expansion of its scope in future years.

RSTAC members who belong to NGFA note that the NGFA arbitration agreement gives precedence to that forum over others. Consequently any similar system developed by the Board should allow the continued operation of private sector systems such as NGFA and other, similar programs that might develop. Similarly, arbitration clauses already part of existing contracts should not be pre-empted by an STB arbitration program; however, railroads and customers would be allowed to incorporate STB arbitration as an alternative to other arbitration schemes in future contracts.

As the arbitration system envisioned by RSTAC would represent a significant departure from the Board's current system of arbitration, any rules adopted by the Board should be sufficiently flexible to allow adjustment of the program based on experience.

### Conclusion

RSTAC believes that an effective system of mediation and arbitration can provide carriers and shippers a path to resolve disputes that have become too contentious to resolve on a purely bilateral basis but do not warrant the time and expense involved with a formal complaint. Furthermore, many disputes which might otherwise generate a formal complaint may be resolved

at an earlier stage to the benefit of the parties, and the Board. The use of alternative dispute resolution also helps keep disputes at appropriate levels, and avoids unnecessary escalation.

An effective system for mediation and arbitration at the STB must encompass several features:

- Participants must have a reasonable expectation of receiving a fair hearing, whether in mediation or arbitration.
- The cost to access the system must be proportionate to the benefit of using it.
- The ability to obtain a formal STB proceeding for major issues should not be impaired.
- Mediation and arbitration activities as outlined herein should be kept confidential and inadmissible in any following STB proceedings so as not to deter participation

RSTAC believes that an effective system of arbitration and mediation will provide a significant benefit to carriers, customers and the Board.

Respectfully Submitted,

The Rail-Shipper Transportation Advisory Council

By:



J. Reilly McCarren  
Chairman  
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Note 1: Real estate leases subject to arbitration would be subject to the following conditions:

- (1) A dispute involving the application of a lease of real property owned by a railroad or railroad affiliate ("Rail Lessor") on the one hand and leased by a company using rail service on the leased premises ("Facility Lessee"), on the other, except for specific disputes arising under Chapter 109, 111 or 113 of Subtitle IV, Part A, Title 49 U.S.C. The arbitrators shall have no authority to modify or refuse to apply the existing terms of a lease in resolving such disputes. Railroad affiliate means any person which succeeds to the real property interest of a Rail Lessor if that person continues to provide rail service to a Facility Lessee.

- (2) A dispute involving termination, expiration or renewal of a lease of real property owned by a Rail Lessor and leased by a Facility Lessee, except for specific disputes arising under Chapter 109, 111, or 113 of Subtitle IV, Part A, Title 49 U.S.C., subject to the following:
- a. The arbitrators shall have no authority to resolve a dispute concerning such termination, expiration, or renewal where:
    - i. The lease covers real property which the Facility Lessee has not used to receive or forward rail shipments for a continuous period of twelve (12) months or more, unless such disuse has been caused by any act of force majeure or unwillingness or inability of the serving railroad to provide rail service when reasonably requested to do so,
    - ii. The Facility Lessee is in material default under the terms of the lease, and such default either has not been cured after reasonable notice, or as required by the lease (This, however, does not preclude the arbitration of the question whether the Facility Lessee is in material default),
    - iii. The Rail Lessor's title to the leased premises in reversionary and the reversion has occurred,
    - iv. The dispute involves a matter other than rental or liability terms,
    - v. The Rail Lessor sells the premises on terms that are the same or more favorable to the Rail Lessor than sale terms presented in writing by the Rail Lessor to the Facility Lessee and not accepted in writing by the Facility Lessee within thirty (30) days.
  - b. In the event a Rail Lessor and a Facility Lessee are unable to agree on the rental rate for renewal of a lease of real property, the arbitrators may establish the rental rate. However the arbitrators may not require the Rail Lessor to accept a rental rate which is less than the fair market rental value of the leased premises based on the highest and best use, but not including the separate value of tenant improvements attributable to the current tenant.
  - c. In the event the parties fail to agree to the liability terms proposed for renewal of a lease of real property, either party may submit the liability terms proposed for review to Board arbitration. The arbitrators may reject and revise the terms proposed to the extent that they are commercially unreasonable (giving consideration, but not limited, to the nature of the Facility Lessee's operations, the rental rate relative to potential liabilities assumed by each of the parties, and customary commercial real estate practices), or unconscionable. The arbitrators shall not require a party to bear any liability for environmental contamination caused by the other party.
  - d. The arbitrators may not require renewal or extension of a lease of real property for a term exceeding five (5) years. If, at the expiration of such lease, the Rail Lessor and Facility Lessee are unable to agree on the rental or liability terms for renewal or continuation of the lease, either party may seek prescription of such terms under this subsection 2.
  - e. The arbitrators in making a decision on the renewal or extension of a lease of real property shall consider whether the Rail Lessor has demonstrated other uses for the property which justify a refusal by a Rail Lessor to renew or extend a lease.

Note 2: Disputes involving property damage claims arising under or related to a rail sidetrack agreement whether the sidetrack is owned or operated by a rail shipper/receiver, a railroad or a third party. The arbitrators shall decide such a case based upon the express terms of such sidetrack agreement between the parties unless the arbitrators find that the relevant liability provision(s) in such agreement is/are commercially unreasonable. In that event, the arbitrators may decide the case based upon what they find to be commercially reasonable under the facts of the particular case.

Note 3: (1) Except as provided in (2), specific railroad-rail user disputes involving the reasonableness of a railroad's published rules and practices as applied in the particular circumstances of the dispute on matters related to transportation or service (including demurrage), that otherwise would be subject to the unreasonable practice jurisdiction of the Board under 49 U.S.C. § 10702(2).(2), disputes involving the following are not subject to arbitration hereunder: (i) a railroad's rates or charges, including rate levels and rate spreads, (ii) whether an industry or station is or should be open or closed to reciprocal switching, (iii) a railroad's credit terms, or (iv) a railroad's car allocation/distribution rules or practices. (3) In determining whether the application of a particular rule or practice is reasonable, the arbitrators should consider, among other things, the practical effects on the operation of both the railroad and rail user involved, and (ii) whether the rule or practice, or its absence, has a disparate negative impact on either the rail user or the railroad.