

BEFORE THE
SURFACE TRANSPORTATION BOARD

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Ex Parte No. 699

ASSESSMENT OF MEDIATION AND ARBITRATION PROCEDURES

COMMENTS
of
THE NATIONAL INDUSTRIAL TRANSPORTATION LEAGUE

The National Industrial Transportation League
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Dated: May 17, 2012

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The National Industrial Transportation League (“League”) submits these Comments in response to the Notice of Proposed Rulemaking of the Surface Transportation Board (“STB” or “Board”) served on March 28, 2012 (“Notice”), in which the Board seeks comments on the measures that it might implement to increase the use of mediation and arbitration to resolve matters before the Board. In that Notice, the Board proposes to modify its existing rules to require parties to mediate certain matters and to clarify and simplify its existing rules for voluntary mediation. The Board also proposes an arbitration program under which shippers and carriers may voluntarily agree to arbitrate certain types of routine disputes that come before the Board and to clarify and simplify its existing arbitration rules. The Board’s Notice indicates that the Board “favors the resolution of disputes through the use of mediation and arbitration procedures, in lieu of Board proceedings, wherever possible.”¹ Notice at 2 (footnote omitted).

¹ The Board sought prior input regarding measures that it might implement to encourage or require greater use of mediation and arbitration, in a decision served August 20, 2010. The League participated in that prior phase of this proceeding by submitting comments (along with the American Forest and Paper Association) dated October 25, 2010 (“Initial Comments”). In those Initial Comments, the League urged the Board to expand its mediation procedures, and asked the Board take steps to reform, broaden and improve its arbitration procedures. The League suggested a number of possible improvements for both mediation and arbitration that the Board should develop in a further proceeding.

The League applauds the Board's initiative to reassess its mediation and arbitration procedures. Like the Board, the League strongly favors private resolution of disputes whenever possible. It believes that mediation and arbitration hold much promise for quickly and cost-effectively resolving a wide variety of transportation-related disputes. The League is well aware that the Board's mediation procedures, where used both in mandatory and non-mandatory settings, have had significant success in resolving even large disputes.²

The League supports the thrust and many of the elements of the Board's March 28, proposal. Specifically, it supports the Board's proposal to broaden its authority to order mediation. With respect to arbitration, the League also supports the Board's reforms, and in these Comments makes some further suggestions for improving the Board's fundamentally sound proposals. The Board's plans are fully within its authorizing statute, will eliminate unnecessary barriers to the broader use of mediation, and will likely facilitate and encourage the use of Board-sponsored arbitration, which up to now has been completely unused by the transportation industry.

I. STATEMENT OF INTEREST

The League is one of the oldest and largest national associations representing companies engaged in the transportation of goods in both domestic and international commerce. The League was founded in 1907, and currently has over 500 company members. These members

² See, e.g., *E.I DuPont de Nemours & Co. v. CSX Transp. Inc.*, STB Docket No. 42112, slip op. at 1 (May 11, 2009) (dismissing complaint because mandatory mediation resolved the dispute); *NRG Power Mktg. LLC v. CSX Transp. Inc.*, STB Docket No. 42122, slip op. at 1 (July 8, 2010) (dismissing complaint because mandatory mediation resolved the dispute); *Ameropan Oil Corp.—Petition for Declaratory Order—Reasonableness of Demurrage Charges*, STB Docket No. 42106, slip op. at 1 (Dec. 17, 2009) (granting withdrawal of petition because dispute resolved by mediation); *Williams Olefins, L.L.C. v. Grand Trunk Corp.*, STB Docket No. 42098, slip op. at 1 (Feb. 14, 2007) (dismissing complaint because dispute was resolved by mediation). Another current dispute, *Cargill, Inc. v. Aberdeen & Rockfish R.R.*, STB Docket No. 42117, is currently under non-mandatory mediation requested by the parties. See *Cargill, Inc. v. Aberdeen & Rockfish R.R.*, STB Docket No. 42117, slip op. 2-4 (June 8, 2010).

range from some of the largest users of the nation's and the world's transportation systems, to smaller companies engaged in the shipment and receipt of goods. The majority of the League's members include shippers and receivers of goods; however, third party intermediaries, logistics companies, and other entities engaged in the transportation of goods are also members of the League. Many members of the League are engaged in transportation of goods via rail subject to the jurisdiction of the Board, and therefore have a strong interest in the efficient and timely resolution of disputes between shippers and rail carriers.

II. THE LEAGUE SUPPORTS THE BOARD'S PROPOSAL TO BROADEN ITS AUTHORITY TO ORDER MEDIATION

In its Notice, the Board proposes to revise its rules to give it authority to order mediation in certain types of adjudicatory matters, excluding those in which the Board is statutorily required to determine public convenience and necessity ("PCN") or that involve labor protection matters. The proposed rule would permit the Board to institute mediation at the request of all or one of the parties to a dispute, or the Board could order mediation on its own initiative.³ Under the proposal, the Board would appoint a mediator, unless the parties mutually agree to a non-Board mediator and so inform the Board. If a Board mediator is used, the Board would pay the mediator; if a non-Board mediator is used, the parties would assume the mediator's cost. Mediation periods would last up to thirty days, although this period could be extended upon request. *See* Notice at 6.

The League fully supports the Board's proposals. The League believes that the use of mediation in disputes before the Board has shown substantial results, and justifies a broadening of the Board's authority to order mediation even where only one or even none of the parties has

³ Authority to grant voluntary mediation requests would be delegated to the Director of the Board's Office of Proceedings.

requested mediation. Although mediation without the request of even one of the parties is not to be taken lightly because of the potential for delay of a formal proceeding before the Board, the 30-day time limit proposed for Board-ordered mediation insures that proceedings will not be unduly delayed. The League also believes that mediation in excess of thirty days should be granted only at the mutual request of the parties to the dispute.

The League agrees that it is appropriate to delegate the authority to grant voluntary mediation requests to the Director of the Board's Office of Proceedings. Voluntary mediation requests should be acted upon promptly, and the proposed delegation would permit expedited mediation orders. Additionally, the League agrees with the Board that, if the mediation is under the direction of a Board employee, the Board should pay the cost of the mediator, but if the parties desire to use a non-Board mediator, it is appropriate for the parties to pay for the mediator's services.

While the League agrees, at this time, with the Board's determination not to adopt procedures for pre-complaint formal mediation within the Rail Customer and Public Assistance (RCPA) program, the League believes that the Board should continue to evaluate this option. Although the RCPA program already facilitates the resolution of disputes prior to the filing of a formal complaint, the League believes that there may be instances in which the parties desire more formal pre-complaint mediation services than the RCPA program presently provides. Thus, the Board should consider whether to provide the option of formal pre-complaint mediation should the parties to a dispute desire it.⁴ However, the League understands the

⁴ The Railroad-Shipper Transportation Advisory Council ("R-STAC") also indicated that parties should be able to invoke formal Board mediation without the filing of a formal complaint. R-STAC, Comments, at 5 (Mar. 15, 2011).

Board's desire to develop experience with the expanded mediation program proposed in the Notice before refining or expanding the RCPA process.

III. THE LEAGUE SUPPORTS MANY OF THE ELEMENTS OF THE BOARD'S ARBITRATION PROPOSALS BUT PROPOSES SOME FURTHER IMPROVEMENTS

Unlike the Board's mediation procedures, which are regularly used in both mandatory and non-mandatory settings, the Board's arbitration procedures have never been used. The League supports the Board's proposal to establish an arbitration program in which Class I and Class II rail carriers would agree in advance to arbitrate a "limited subset" of disputes that are the subject of formal Board proceedings when all other parties have consented to arbitration. There are clearly no statutory or other legal barriers to such an arrangement, and such a procedure has the potential to broaden the use of arbitration in transportation disputes.⁵

The League also agrees with many of the elements of the Board's arbitration proposal, however, the League suggests several improvements to the Board's draft structure.

A. Matters Eligible for Arbitration

Under the Board's proposed rules, all types of adjudicatory disputes that do not involve PCN determinations by the Board, and those related to labor protective conditions, could be arbitrated. The Board proposes to establish an arbitration program in which Class I and II rail carriers would agree in advance to arbitrate a "limited subset" of disputes, when such disputes are the subject of formal proceedings before the Board, and when all other parties to any such dispute have consented to arbitration ("Limited Arbitration Program"). The Board's Limited Arbitration Program would include disputes covering the following five issues: (a) demurrage charges; (b) accessorial charges; (c) compensation for the misrouting or mishandling of rail cars;

⁵ The League believes that the Board has the authority to order arbitration even without the agreement of the parties. See NITL, Comments, at 5-8 (Oct. 25, 2010).

(d) redress for a carrier's misapplication of its published rules and practices related to prior shipments; and (e) compensation for other alleged unreasonable practices and procedures related to past service. Other types of disputes could be arbitrated on a voluntary basis, provided that all parties consent. Arbitrations conducted pursuant to the Board's Limited Arbitration Program would be used only to redress alleged past wrongs with monetary compensation, and not to impose prospective or injunctive relief.

The League supports the concept of a "limited subset" of issues that would be automatically eligible for arbitration unless the Class I or Class II carriers involved choose to opt out. The Board's identification of five issues that would be eligible for arbitration on an "opt-out" basis for Class I and Class II rail carriers is similar (but somewhat narrower) than the list of issues that the League suggested should be the subject of one-party-triggered arbitration in its Initial Comments. *See*, NITL, Comments, at 8-9. The Board's proposed Arbitration Program also includes issues that are similar to the list of disputes published in the Rail Arbitration Rules of the National Grain and Feed Association ("NGFA"), under which the nation's railroads have already agreed to arbitrate such disputes involving NGFA shipper members, and with the list proposed by R-STAC in the prior stage of this proceeding.⁶ Again, however, the NGFA list of covered issues and the R-STAC proposal are broader than those issues included in the Board's Limited Arbitration Program.⁷ Thus, it is clear that at least the five issues proposed by the Board

⁶ *See* R-STAC, Comments, at 8 (Mar. 15, 2011).

⁷ *See* Rail Arbitration Rules § 2(b) (Nat'l Grain & Feed Ass'n, 1998, as amended) ("NGFA members shall arbitrate the following disputes arising between railroads and rail users . . . upon the filing of a complaint with the National Secretary . . ."), *available at* http://www.ngfa.org/files/misc/Web2010_Rail_Arbitration_Rules.pdf. The list of issues covered in the NGFA program include the following eight issues: (1) disputes involving the application of a railroad's demurrage rule(s) or term(s); (2) disputes involving the misrouting of loaded rail cars or locomotives; (3) disputes arising under receipts and bills of lading governed by 49 U.S.C. § 11706 (*e.g.*, Carmack disputes such as loss and damage claims, etc.); (4) except as otherwise mutually agreed, disputes arising from a rail transportation contract; (5) disputes involving the application of a railroad's special car or equipment

to be eligible for arbitration on an opt-out basis for Class I and Class II rail carriers already enjoys wide support among the shipper community, and the nation's Class I railroads have already agreed to arbitrate those five issues with a major constituency of grain shippers.

However, the League believes that the Board should broaden the list of disputes that would be covered by the Board's Limited Arbitration Program. In addition to the five issues listed by the Board, the League believes that the following three issues should also be part of the opt-out list: (a) disputes about loss and damage arising under receipts and bills of lading governed by 49 U.S.C. § 11706; (b) damage to a shipper's rail cars; and (c) damage as a result of service failures not otherwise covered in the Board's proposed opt-out list.

There is clear support in the record of the initial phase of this proceeding to expand the list of arbitral issues as proposed by the League herein. For example, the NGFA's arbitration program includes disputes arising under receipts or bills of lading governed by 49 U.S.C. § 11706.⁸ Similarly, the comments of the R-STAC in the prior phase of this proceeding urged the Board to include disputes involving certain property damage claims. *See* R-STAC, Comments, at 8 (Mar. 15, 2011). The additional three issues proposed by the League for inclusion in the Board's Limited Arbitration Program are all generally dollar-determinable, rarely have broad policy or regulatory ramifications, and are common sources of dispute between shippers and rail carriers. Thus, they are clearly issues that "possess[] monetary value but lack[] policy significance," which is the key criteria that the Board apparently used to develop its proposed list of five issues that are subject to arbitration. *See* Notice at 7.

program rules, such as certificates of transportation, vouchers, etc.); (6) disputes involving the application of a railroad's general car distribution rules; (7) disputes involving the mishandling of private cars or locomotives; and, (8) disputes involving a lease by a rail user of real property owned by a railroad or railroad affiliate, subject to certain limitations.

⁸ *See supra* note 7.

The League also agrees that other matters could be arbitrated at the request of all parties to the dispute. In light of the limitation specified in the Board's current rules, the League suggests, however, that the Board should clarify that these "other matters" include contract disputes, where all the parties to the dispute agree to Board-sponsored arbitration, despite the Board's lack of jurisdiction over the contract. Such a request would not, however, preempt the applicability of, or otherwise supersede, any existing arbitration clauses contained in contracts between shippers and carriers.

The League also supports the Board's proposal to limit matters eligible for arbitration only to redress alleged past wrongs with monetary compensation, and not to impose prospective or injunctive relief. Finally, the League agrees that the Board should reserve the right to require parties to adjudicate a pending matter using the Board's formal procedures where the Board concludes, either at the request of one or more of the parties or on its own initiative, that the particular dispute is unsuitable for arbitration.

B. Participation in the Board's Proposed Arbitration Program

The League supports the Board's proposal for an "opt-out" procedure for Class I and Class II rail carriers, by which such carriers would be deemed to agree voluntarily to participate in the Board's Limited Arbitration Program unless they opt out by filing a notice with the Board not later than 20 days after the effective date of the proposed rules, and not later than January 10 of any subsequent calendar year. After that time, a Class I or Class II rail carrier could opt out only on 90 days' notice, and such a withdrawal would not affect ongoing arbitration proceedings or arbitration in any program-eligible dispute pending before the Board before the 90-day opt-out notice takes effect. This requirement would have the effect of permitting a shipper with a dispute with a Class I or Class II rail carrier to file a complaint and engage in arbitration of that dispute within the 90-day opt-out period. Class III carriers, on the other hand, would have to

affirmatively “opt-in” to the Board’s Limited Arbitration Program. Once a Class III carrier opted in, however, it could opt-out only after the same 90-day notice period applicable to Class I and Class II rail carriers.

The League believes that the requirement for Class I and Class II rail carriers to opt-out of the Board’s arbitration program is fair. The League also believes that it is appropriate to require Class III carriers, who might not be as familiar as Class I or Class I rail carriers with the Board’s rules, to opt-in at any time. The January 10 deadline for opting out each calendar year and the 90-day notice period for opt-outs thereafter also appear reasonable. Indeed, the January 10 annual deadline for opting out is even more liberal than the NGFA’s arbitration program, which automatically establishes rights, obligations and responsibilities under the program without any annual commitment.⁹ The same 90-day notice period for opting-out is included in the NGFA’s arbitration program,¹⁰ and thus is presumably acceptable to the nation’s rail carriers, who continue to participate in that program.

The League believes that the Board should publish the names of all carriers who would become participants in the Limited Arbitration Program on its website, so that shippers will know if a dispute with a particular carrier will be eligible for arbitration. Further, the Board’s proposal for shipper participation on a voluntary, case-by-case basis to the Limited Arbitration Program is fair, and the procedures proposed by the Board to place a dispute on the “arbitration track,” also appear fair and efficient.

C. Number and Selection of Arbitrators

The League believes that a single, neutral arbitrator would generally be acceptable to resolve arbitration under the Board’s rules. However, use of a single arbitrator should be subject

⁹ See NGFA, Comments, at 3 (Oct. 20, 2010).

¹⁰ *Id.* at 2-3.

to the selection procedures described in subsection 1 below, and the parties should have the option to use a panel of three arbitrators as discussed in subsection 2 below.

In its proposal, the Board would maintain and update a list of arbitrators. The Board has proposed to update the list every other year; the League, however, believes that the Board should update the list of arbitrators annually. The League believes that the list should include arbitrators with practical experience in the industry, including non-lawyers. The Board should develop rules to govern the development of its list of arbitrators, to insure that arbitrators on the Board's list do not have a conflict of interest, and are knowledgeable and fair. For example, the Board might require the arbitrators on its list to submit a short *vita* outlining their qualifications, for publication on the Board's website. In addition, arbitrators on the Board's list should at least be required to disclose, upon request, past or current employment by or representation of any of the parties to a dispute, to insure that there is no actual or apparent conflict of interest in the appointment of an arbitrator.

If a single arbitrator is used from the Board's list, the League agrees with the Board that it would be appropriate for the Board to pay for the cost of the arbitrator assigned to the dispute from the agency's list. If, on the other hand, the parties mutually agree on an arbitrator who is not on the Board's list to adjudicate their proceeding, the League agrees with the Board's proposal to permit such parties to petition the Board to appoint that person on a "one-time" basis only, and in that case the parties would share the fees and/or costs of the arbitrator.

1. Selection of Arbitrator

The League believes that if the parties can mutually agree on an arbitrator on the Board's list, then the Board should appoint that person for the arbitration, and the Board should pay for the cost of that arbitrator. As noted above, if the parties can mutually agree on an arbitrator not

on the Board's list, then the Board should appoint that person for the arbitration, and the parties should share the cost of that arbitrator.

In its Notice, the Board also seeks comment on the use of a limited "strike" mechanism for appointing arbitrators from the Board's list, and whether such a mechanism would encourage the use of a single arbitrator system. The League believes that the use of a "strike" mechanism would likely encourage the use of a single arbitrator, but even more, the League believes that the use of a "strike" mechanism would encourage the use of arbitration itself, since the parties would feel that there was a transparent mechanism whereby an acceptable and neutral person for the arbitration could be found.

Thus, where the parties cannot agree on an arbitrator from the Board's list and cannot otherwise agree on an arbitrator not on the Board's list, the League believes that the Board should adopt the following procedure for appointing a single, neutral arbitrator from the Board's list, or for appointing one of the arbitrators on a three-person panel of arbitrators, as discussed in subsection 2 below. Specifically, upon the filing of a complaint whose subject matter is arbitration-eligible, and for which the parties have consented to arbitrate under the Board's proposed procedures, the League believes that the following process should be used:

- a) Within three business days upon receiving the notice from the shipper that it wishes to arbitrate, the Board would randomly select 10 possible arbitrators without a conflict of interest from its list and transmit that list of ten persons simultaneously to the complainant(s) and defendant(s);
- b) Within three business days from receiving the list from the Board, the complainant(s) and defendant(s) would inform each other of the names of two persons on the 10-person list that each side would have the right to strike;
- c) Within two more business days, the complainants and defendants would rank the remaining six persons with numbers "1" through "6" and simultaneously transmit their rankings to the Board. The Board would appoint the person with the highest combined ranking from both lists. If more than one person had the same highest combined ranking from both lists, the Board would randomly choose one of those persons with the highest combined ranking.

The League believes that the above procedure is fair, and would provide a great deal of credibility to the Board's arbitration program, to assure both shippers and carriers that the process is transparent and results in arbitrators who are both neutral in fact and who are perceived as neutral by both of the parties.

2. A Single Arbitrator Versus Multiple Arbitrators

The League believes that parties should have the option of using a panel of three arbitrators, instead of a single arbitrator.¹¹ Although many disputes might be resolved by a single arbitrator, the League believes that there are some disputes in which the collective judgment of three persons might be useful. However, this option should be used only where all parties to a dispute agree that one arbitrator would be insufficient; if not all parties agree that there should be a panel of three, then the arbitration should be undertaken by a single arbitrator.

If the parties have agreed that the arbitration should be decided by a panel of three, the complainant(s) and defendant(s) collectively would each name a party-appointed arbitrator, who would be required to be ethically neutral but who would be paid by the side that named him or her. Those two arbitrators would agree on a third arbitrator, either a person on the Board's list (in which case the Board would pay for the third arbitrator) or a person not on the Board's list (in which case the parties would split the cost of the third arbitrator). If the two party-appointed arbitrators could not agree within a short time on the identity of a third arbitrator, then the third arbitrator would be appointed from the Board's list under the procedure described in Section III. C.1 above.

¹¹ The parties should not have the option of appointing a panel of two arbitrators, since the possibility of a deadlock in such a situation is high.

D. Arbitration Period

The League agrees with the Board's proposal that the evidentiary phase of the arbitration must be completed within 90 days from the start date established by the arbitrator. The Board should make clear that the arbitrator would have the exclusive power to determine the availability of various types of discovery, and the extent of discovery, during the evidentiary phase. The arbitrator should also have the exclusive power to determine whether and the extent to which an oral hearing or argument is necessary, and the nature and schedule for evidentiary submissions within the 90-day evidentiary period. The 90-day evidentiary period should not be able to be extended by the arbitrator or even by the Board, unless both parties agree and the arbitrator so orders. The League also agrees with the Board's proposal that the arbitrator must issue a decision within 30 days following completion of the evidentiary phase. The Board's rules should specify that the arbitrator(s) should issue a written decision within this time period, which should include the pertinent facts, conclusions and reasons for the decision.

E. Available Relief Under the Board's Arbitration Program

The League strongly believes that the proposed maximum cap of \$200,000 per arbitrable dispute is too low, and is likely to substantially restrict the number of disputes that may be eligible for arbitration. The League believes that the maximum cap should be increased at least to \$500,000. That figure would, the League believes, better cover the majority of disputes under the proposed arbitration program, and make shipper parties more likely to participate in arbitration of the listed disputes, without discouraging rail carriers from participating in the program. The fact of the matter is that arbitrations before the Board are likely to be more expensive and take longer than private arbitrations, simply (but not solely) because of the right of appeal to the Board. A \$200,000 cap, which is the limit under the NGFA procedure, does not

need to take account this and other factors. While a \$200,000 limit might be appropriate in the case of grain and feed products, a Board-sponsored arbitration program will need to take into account of the fact that shippers of other commodities might be larger entities with larger facilities and more complex transportation arrangements than the entities typically shipping the products identified by the STCC numbers covered by the NGFA's arbitration rules.¹²

Finally, the League agrees with the Board that no prospective or injunctive relief should be available through the Board's arbitration program, because matters in which a party seeks prospective or injunctive relief have the potential to implicate significant regulatory or policy issues that are better suited for resolution using the Board's formal adjudicatory procedures.

F. Availability of Arbitration Awards

The League agrees with the Board's proposal that arbitrable decisions not be made public or posted on the Board's website, and that they would have no precedential value. However, the Board should make public the number of arbitrations filed and decided during each calendar year at the end of that year, and the general category of disputes arbitrated. This would permit the public to evaluate the use of the Board's processes, and encourage the use of arbitration.

G. Administrative and Judicial Review

The League strongly agrees that the Board's standard for administrative review should be very narrow, and that the "clear abuse of authority or discretion" standard that the Board proposes in its Notice is appropriate. The League believes that the Board should prescribe expedited procedural rules for filing an administrative appeal of an arbitrator's decision. Specifically, the Board should require an appeal to be filed within 10 days of the arbitrator's decision, and a reply 10 days thereafter. Moreover, the Board should commit to issuing a

¹² Of course, as the Board has proposed, parties might voluntarily agree to a higher cap.

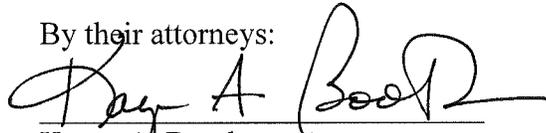
decision on administrative appeal within 90 days. Finally, the League believes that the Board's proposed rules on judicial review are appropriate and are required by law.

The League appreciates the opportunity to make its views known on this matter.

Respectfully submitted,

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By their attorneys:

A handwritten signature in black ink, appearing to read "Karyn A. Booth", written over a horizontal line.

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