



ASSOCIATION OF AMERICAN RAILROADS

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

ENTERED
Office of Proceedings
June 13, 2016
Part of
Public Record

Re: EP 730, *Revisions to Arbitration Procedures*

Dear Ms. Brown:

Pursuant to the Notice of Proposed Rulemaking served in the above docketed proceeding on May 12, 2016, the Association of American Railroads respectfully submits the attached comments.

Sincerely,

Timothy J. Strafford
Counsel for the Association
of American Railroads

BEFORE THE
SURFACE TRANSPORTATION BOARD

STB Ex Parte No. 730

REVISIONS TO ARBITRATION PROCEDURES

COMMENTS OF THE
ASSOCIATION OF AMERICAN RAILROADS

In a Notice of Proposed Rulemaking (“NPRM”) served on May 12, 2016, the Surface Transportation Board (“Board”) proposed to modify its rules regarding arbitration to conform to the requirements of the Surface Transportation Board Reauthorization Act of 2015, P.L. 114-110 (2015) (“STB Reauthorization Act”). The Association of American Railroads (“AAR”), on behalf of its member railroads, submits these comments in response to the Board’s NPRM.

Section 13 of the STB Reauthorization Act, codified at 49 U.S.C. § 11708, is consistent with other law regarding arbitration by federal agencies. *See, e.g.,* 5 U.S.C. § 575. The Board is now authorized to make a voluntary arbitration process available to parties to resolve disputes subject to its jurisdiction. 49 U.S.C. §11708(a). The availability of the arbitration process is limited, and arbitration cannot be used to resolve disputes “to obtain the grant, denial, stay, or revocation of any license, authorization, or exemption; [. . .] to prescribe for the future any conduct, rules, or results of general, industry-wide applicability; [. . .] to enforce a labor protective condition; [. . .] or that are solely between 2 or more rail carriers.”

49 U.S.C. §11708(b)(2)(A)-(D). Arbitration may only be made available after written consent of all of the relevant parties. 49 U.S.C. § 11708(c)(1)(B)(i).

The AAR continues to support the Board's efforts to encourage the use of voluntary arbitration for disputes subject to the jurisdiction of the Board. The AAR has long supported arbitration as a form of alternative dispute resolution at the Board when it was voluntary and pursuant to a written agreement because arbitration is an agreement-based process grounded in contract law. *See* AAR Comments, EP 699 (filed May 17, 2012) (citing *Rent-A-Center, West, Inc. v. Jackson*, 130 S.Ct. 2772 (2010); *Adkins v. Labor Ready, Inc.*, 303 F.3d 496 (2002)). Voluntary resolution of disputes without resort to formal litigation can, in the right circumstances, conserve resources and may lead to efficient and just outcomes for all parties. For this reason, the AAR supports those aspects of the NPRM that recognize the voluntary nature of arbitration. For example, the AAR supports the proposal that would allow the parties to submit a joint notice of willingness to arbitrate a dispute and the proposal that would allow the parties to agree to a lower monetary cap on damages.

In the comments below, the AAR offers suggestions to improve the proposed rules to further reflect the statutory authority given to the Board by Section 13 of the STB Reauthorization Act to establish a voluntary arbitration program. To be effective, the Board's arbitration process should be seen by all stakeholders as effective, neutral and fair. The comments seek to remedy aspects of the proposed rules that are ambiguous or appear to give the Board or Board staff unchecked discretion that could be perceived as undermining neutrality.

Comments

I. The Board's Proposal of Limiting Arbitration of Rate Disputes to Cases where the Rail Carrier Stipulates Market Dominance is Sensible

The NRPM seeks comment on whether the Board should limit arbitration of disputes as to the reasonableness of a rail carrier's rate to cases where the railroad stipulates market dominance. NPRM at 3. This proposal is sound and makes practical sense. The STB Reauthorization Act makes arbitration available for rate disputes only in cases where "the rail carrier has market dominance (as determined under section 10707)." 49 U.S.C. § 11708(c)(1)(C). Limiting arbitration in cases where the carrier agrees to stipulate market dominance is in keeping with the voluntary nature of arbitration, generally. The alternative – to bifurcate the case into a preliminary market dominance proceeding before the Board – would add unnecessary complexity to what should be a fully agreed-upon, straightforward process.

II. Proposed Sections 1108.9 and 1108.11 Should be Revised

The Board should revise the proposed rules to reflect the requirements for arbitration decisions that resolve disputes as to the reasonableness of a rail carrier's rates. The NPRM notes that § 11708(c)(3) requires arbitrator(s) handling rate disputes to "consider the Board's methodologies for setting maximum lawful rates, giving due consideration to the need for differential pricing to permit a rail carrier to collect adequate revenues (as determined under § 10704(a)(2))." NPRM at 2 & fn. 3. While this language is included in proposed § 1108.4, the Board should add this standard to its proposed rules regarding arbitration decision requirements, 49 CFR § 1108.9, and the Board's standard for appellate review, 49 CFR § 1108.11 and 49 CFR § 1115.8. The AAR has included proposed rule language making this change in the appendix.

Proposed § 1108.9 states that “[t]he arbitrator shall provide an unredacted draft of the arbitration decision to the parties to the dispute, in accordance with § 1108.7.” That provision should also account for the fact that the decision may contain highly confidential information that should be made available only to opposing outside counsel and not be made available to in-house personnel. The AAR suggests revising that sentence to read, “[t]he arbitrator shall provide an unredacted draft of the arbitration decision to the parties to the dispute, in accordance with any protective orders governing the release of confidential and highly confidential information pursuant to § 1108.7(e).”

III. The Rules Should Reflect the Time Limit for Any Arbitral Rate Prescription

The Board should also revise the proposed rules to reflect the time limits for rate prescriptions. The NPRM addresses the maximum amount of *monetary relief* that is available for rate disputes, *see, e.g.*, 49 CFR §§ 1108.2 and 1108.3, but the NPRM fails to address the maximum amount of *time* that is available for rate prescriptions. Section 11708(g)(3) provides two limitations to arbitration decisions that involve the reasonableness of a rail carrier’s rates. 49 U.S.C. §§ 11708(g)(3)(A)-(B). Read together, the available rate relief in an arbitration dispute—whether in the form of monetary reparations, a rate prescription, or both—is the *lesser* of \$25,000,000 *or* five years from the date of the arbitral decision. Indeed, this reading is similar to how the Board currently applies its own limits on relief for Three-Benchmark cases filed with the Board. Excluding the maximum amount of time from the rules could lead an arbitrator to award more rate relief than the statute allows, if for example, \$25,000,000 is not reached until after five years from the arbitral decision. The Board should include the statutory time limit provided in Section 11708(g)(3)(B) in its rules, as shown in the appendix.

IV. The Roster of Arbitrators Should be Established in a Transparent Way Subject to Objective Criteria

Section 11708(f)(1) obligates the Board to establish and maintain a roster of arbitrators. That roster is to be made up of “persons with rail transportation, economic regulation, professional business experience, including agriculture, in the private Sector.” *Id.* To carry out this directive, the Board should revise its proposal and establish an objective set of criteria that would qualify individuals to serve as arbitrators. The Board should develop additional qualifications in addition to the NPRM’s criteria of “persons seeking to be included on the roster would be required to have training in dispute resolution and/or experience in arbitration or other forms of dispute resolution.” The AAR suggests the Board require individuals to demonstrate at least 10 years of experience and a professional reputation for fairness, integrity and good judgment.

There should be no discretion for the Board to exclude qualified individuals from the roster. Because of the limited number of qualified individuals with the expertise necessary to adjudicate a dispute subject to the Board’s jurisdiction, the Board should not create a bar to being included on the roster based on past or even present affiliation with railroads, shippers, or other stakeholders. Issues of neutrality and conflicts of interest should be dealt with in the process for selecting arbitrators in a particular dispute, not in being included on a roster. As the Board concluded in 1997, “[i]n short, we see no reason to limit the roster to a chosen few; rather, we believe the roster should be open to any willing arbitrator who demonstrates the necessary experience.” *Arbitration of Certain Disputes Subject to the Statutory Jurisdiction of the Board*, 2 S.T.B. 564, 572 (1997).

The Board should also develop a transparent process for adding all qualified individuals to the roster. For example, the Board could require that all applicants provide a narrative explaining how their experience meets the required criteria and supportive reference letters. The Board could post those applications on its website and allow 20 days for objections. If no one objects, the individual would be added to the roster. If there is an objection, the Board could issue a written decision setting forth its reasons for accepting or rejecting the application. The Board should add all qualified applicants to the roster.

The Board should make the roster publicly available on its website. In addition to the NPRM's proposal to include a "brief biographical sketch of each arbitrator, including information such as background, experience, and geographical location, as well as general contact information, based on the information supplied by the arbitrator," the Board should also include a statement identifying the statutory requirements under which the individual qualifies. That is, the roster should state whether the individual qualifies for rail transportation, economic regulation, or professional, private-sector business experience, including agriculture. The roster should also include fee information for each arbitrator.

V. The Strike Process for Selecting the Sole or Lead Arbitrator Should be Driven by the Parties

The NPRM would establish a process that would task Board staff with creating a strike list culled from the roster based on "a variety of factors, including relevant background and experience, acceptability, geographical location, and any expressed preferences of the parties." NPRM at 5. Additionally, "[t]he culled list would have an odd number of arbitrators to ensure that parties have the same number of strikes." *Id.* Selecting an odd number of

candidates may ensure the same number of strikes for each party, but it does nothing to ensure the strike list is not weighted in favor of one party or another.

Instead, the Board should put in place a process that puts the parties in control of selecting the sole or lead arbitrator. As the Board's proposal recognizes, subjecting the entire roster to the strike process in each case is impractical and inefficient, especially if the suggestion made above that the roster include all qualified applicants is accepted. However, there is no requirement that the Board alone, as opposed to the parties, select the members of the case-specific list to which strikes are applied, and the appearance of fairness demands that the parties be involved in that process. Each dispute is different, and the parties should have the opportunity to identify from the broad roster a subset of potential arbitrators they believe are most appropriate for their particular dispute.

The AAR suggests the following two-step process for establishing the strike list to be the sole or lead arbitrator, in the event that the parties cannot agree. First, the parties should have the opportunity to remove individuals from the roster for cause in their particular dispute. While experience with railroads, shippers or other stakeholders should not be a bar to being added to the overall roster of arbitrators, eligibility to serve as the sole or lead arbitrator should be subject to a rule to prevent conflicts of interests. Parties who are involved in a particular dispute may be aware of reasons why an individual arbitrator on the roster may be unsuitable for deciding their dispute. Such a process would be in keeping with commercial arbitration that allows an arbitrator to be disqualified for partiality or lack of independence. *See, e.g.*, Rule 18, Commercial Arbitration Rules and Mediation Procedures, American Arbitration Association (2013).

Second, the parties could also be required to submit a final-offer strike list of up to 10 potential arbitrators that are agreeable to them. If there is only one arbitrator that appears on both lists, he or she should be selected as the agreed-upon arbitrator. If there are multiple arbitrators that appear on both lists, the parties should alternatively strike names until one remains, beginning with the complainant. If no name appears on both lists, the parties could alternatively strike from the Board's entire roster, as culled by those that are disqualified for cause. Such a process would provide a party-driven process that would ensure that the strike list is not biased in favor of one party or the other.

Conclusion

The Board should modify its proposals and adopt rules for arbitration, consistent with the comments above.

Respectfully Submitted,



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Appendix
Proposed Regulatory Language

§ 1108.8 Relief.

(a) *Relief Available.* An arbitrator may grant relief in the form of money damages or a rate prescription in rate disputes to the extent they are available under this part or as agreed to in writing by the parties. A rate prescription shall not exceed 5 years.

§ 1108.9 Decisions.

(a) *Decision requirements.* Whether by a panel of arbitrators or a single arbitrator, all arbitration decisions shall be in writing and shall contain findings of fact and conclusions of law. All arbitration decisions must be consistent with sound principles of rail regulation economics. In disputes regarding the reasonableness of a rail carrier's rates, the arbitration decision must give due consideration to the need for differential pricing to permit a rail carrier to collect adequate revenues (as determined under section 10704(a)(2)). The arbitrator shall provide an unredacted draft of the arbitration decision to the parties to the dispute, in accordance with any protective order governing the release of confidential and highly confidential information pursuant to § 1108.7(e).

§ 1108.11 Enforcement and appeals.

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(b) *Board's standard of review.* On appeal, the Board's standard of review of arbitration decisions will be narrow. The Board will review a decision to determine if the decision is consistent with sound principles of rail regulation economics, a clear abuse of arbitral authority or discretion occurred; the decision directly contravenes statutory authority; or the award limitation was violated. In disputes regarding the reasonableness of a rail carrier's rates, the Board will review a decision to determine if the decision gave due consideration to the need for differential pricing to permit a rail carrier to collect adequate revenues (as determined under section 10704(a)(2)). Using this standard, the Board may modify or vacate an arbitration award in whole or in part.

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§ 1115.8 Petitions to review arbitration decisions.

An appeal of right to the Board is permitted. The appeal must be filed within 20 days of a final arbitration decision, unless a later date is authorized by the Board, and is subject to the page limitations of § 1115.2(d). For arbitrations authorized under part 1108 of this chapter, the Board's standard of review of arbitration decisions will be narrow, and relief will only be granted on grounds that the decision is inconsistent with sound principles of rail regulation economics, a clear abuse of arbitral authority or discretion occurred, the decision directly contravenes statutory authority, or the award limitation was violated. In disputes regarding

the reasonableness of a rail carrier's rates, the Board will review a decision to determine if the decision gave due consideration to the need for differential pricing to permit a rail carrier to collect adequate revenues (as determined under section 10704(a)(2)). For labor arbitration decisions, the Board's standard of review is set forth in Chicago and North Western Transportation Company—Abandonment—near Dubuque & Oelwein, Iowa, 3 I.C.C.2d 729 (1987), aff'd sub nom. International Brotherhood of Electrical Workers v. Interstate Commerce Commission, 862 F.2d 330 (D.C. Cir. 1988). The timely filing of a petition will not automatically stay the effect of the arbitration decision. A stay may be requested under § 1115.3(f).