

BEFORE THE
SURFACE TRANSPORTATION BOARD

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Ex Parte No. 699

ASSESSMENT OF MEDIATION AND ARBITRATION PROCEDURES

REPLY COMMENTS

of

THE NATIONAL INDUSTRIAL TRANSPORTATION LEAGUE

The National Industrial Transportation League
1700 North Moore Street
Arlington, VA 22209

By its attorneys:

Karyn A. Booth
Nicholas J. DiMichael
Jason D. Tutrone
Thompson Hine LLP
1919 M Street, N.W., Suite 700
Washington, D.C. 20036
(202) 263-4108

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The National Industrial Transportation League (“League”) submits these Reply 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 requested 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 proposed 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 proposed an arbitration program under which shippers and carriers may agree to arbitrate certain types of disputes that come before the Board and to clarify and simplify its existing arbitration rules.

I. INTRODUCTION.

On May 17, 2012, the League filed its Comments in this proceeding (“League Comments”). In those Comments, the League applauded the Board’s initiative to reassess its mediation and arbitration procedures. League Comments, p. 3. The League fully supported the Board’s mediation proposals, indicating that the Board’s experience in mediation has shown substantial results; that such experience justified a broadening of the Board’s authority to order mediation even where only one or even none of the parties has requested it; and that the Board’s

proposed delegation of authority regarding mediation to the Director of the Office of Proceedings was appropriate. *Id.*, pp. 4-5. The League urged the Board to continue to evaluate the possibility of pre-complaint mediation, though the League agreed at this time with the Board's determination not to adopt such a program in order to develop more experience with an expanded mediation program before implementing formal pre-complaint mediation. *Id.*, pp. 5-6.

With respect to arbitration, the League's Comments generally supported the Board's proposed reforms, but made some further suggestions for improving the Board's fundamentally sound proposals. *Id.*, p. 3. Specifically, the League's Comments supported the Board's concept of a "limited subset" of issues that would be automatically eligible for arbitration unless the Class I or Class II carriers involved chose to opt out of the program ("Limited Arbitration Program"). *Id.*, pp. 6-7. The League urged the Board to broaden slightly the issues eligible for arbitration under its proposed Limited Arbitration Program. *Id.*, pp. 6-8. The League supported the concept of an "opt-out" arrangement for Class I and Class II rail carriers, and suggested some minor improvements to enable the shipping public to know whether a particular carrier was participating in the Limited Arbitration Program. *Id.*, p. 10. The League's Comments made a number of suggestions regarding the number and selection of arbitrators, and in particular urged the Board to adopt rules to govern the development of a list of arbitrators to insure that the arbitrators on the Board's list are knowledgeable and fair, and to adopt a "strike" mechanism so that the process of selection is transparent and results in arbitrators who are neutral in fact and who are perceived as neutral by the parties. *Id.*, pp. 10-13. The League's Comments also urged the Board to increase its proposed \$200,000 maximum cap on arbitrable disputes to \$500,000. *Id.*, pp. 14-15. Finally, the League supported the Board's proposals regarding the scope of review. *Id.*, pp. 15-16.

A variety of other parties also submitted comments. These included the Association of American Railroads (“AAR”). In addition, several Class I rail carriers (including BNSF, UP and NS) also submitted individual comments. The AAR’s Comments in general attacked the Board’s proposal, arguing that the Board lacked statutory authority to implement its Limited Arbitration Program and that in any event the proposal would not meet the Board’s goal of encouraging arbitration. The comments of individual railroads to some extent mirrored the AAR’s comments, but the comments of the Union Pacific in particular, as well as the BNSF, also made some positive suggestions for improving the Board’s proposal.

Other commenting parties included the Department of Agriculture (“DOA”), the National Grain and Feed Association (“NGFA”), the Montana Grain Growers Association (“MGGA”), and the Western Coal Traffic League (“WCTL”). Most of these parties were generally supportive of the thrust of the Board’s proposals, though they made various suggestions for improving the proposed Limited Arbitration Program. MGGA, for example, like the League, urged the Board to increase its maximum cap on arbitrable disputes. MGGA Comments, p. 2. NGFA likewise generally supported the Board’s program, but urged the Board to consider the benefits of a three-person arbitration panel rather than a single arbitrator, and urged the Board to require published, written decisions. NGFA Comments, pp. 4-5. NGFA also urged the Board to increase its \$200,000 cap. *Id.*, p. 7. DOA also urged the Board to permit the use of a panel of three arbitrators, and also urged the Board to publish the decisions of the arbitrators. DOA Comments, pp. 2-3.

The League has reviewed the comments submitted by the other parties, and hereby submits its reply.

II. THE BOARD HAS THE LEGAL AUTHORITY TO ADOPT ITS ARBITRATION PROPOSAL.

A. The Railroads Are Incorrect That the Board Lacks Legal Authority To Adopt Its Arbitration Proposal

In its Comments, the AAR argues that the Board lacks statutory authority to implement its opt-out proposal, because the Board has no authority to impose arbitration without the voluntary consent of the parties. AAR Comments, p. 5. The AAR argues that the proposed arbitration program “pressures” Class I and Class II rail carriers to submit to arbitration “without full knowledge of the matters or issues to be arbitrated, which cannot be meaningful consent.” *Id.*, pp. 5-8. The AAR also argues that the Board’s proposal is flawed because it unlawfully “completely delegates” the Board’s adjudicatory authority to private parties. *Id.*, p. 6, 9-10. The AAR’s analysis, which is echoed in the comments of several railroads,¹ is wrong.

In its Notice, the Board indicated that it has the authority to revise its arbitration rules under 49 U.S.C. § 721(a), which gives the Board the authority to carry out chapter 7 and subtitle IV, and to prescribe regulations to carry out its responsibilities under those two provisions.² Notice, p. 3. Section 721(a) also explicitly states that an enumeration of a power of the Board in chapter 7 and subtitle IV does not exclude another power that the Board may have in carrying out those provisions.

The Board’s current arbitration rules are the product of its decision in Ex Parte No. 560, *Arbitration of Certain Disputes Subject to the Statutory Jurisdiction of the Surface Transportation Board*, 2 S.T.B. 564 (1997) (“EP 560 Decision”). In its *EP 560 Decision*, the Board promulgated rules for arbitration of disputes that had not yet been brought to the Board in

¹ See, e.g., Comments of Norfolk Southern Railway Company (“NS”), pp. 3-6. However, even the NS notes only that the power cited by the Board for authority to issue its rules “likely” does not include the power to delegate Board power to private arbitrators. NS Comments, p. 3.

² Section 721(a) states: “The Board shall carry out this chapter and subtitle IV. Enumeration of a power of the Board in this chapter or subtitle IV does not exclude another power the Board may have in carrying out this chapter or subtitle IV. The Board may prescribe regulations in carrying out this chapter and subtitle IV.”

a formal proceeding, under Part 1108 of the Board's rules. In its *EP 560 Decision* and in the rules promulgated by that decision, the Board noted that Part 1108 arbitration would "not be conducted pursuant to the ADRA." *Id.*, 2 S.T.B at 567 and 49 C.F.R. § 1108.2(c). Thus, the AAR's Comments correctly note that the Board's current Part 1108 arbitration rules "claim their authority from only 49 U.S.C. § 721(a) and explicitly disclaim authority from the ADRA." AAR Comments, p. 7. The AAR, which was an active participant in the Ex Parte No. 560 proceeding, clearly did not have a problem in 1997 with the authority of the Board to promulgate its current rules, since it failed to appeal those rules at the time. Indeed, the AAR has waived any right to do so now, since it did not file any judicial challenge to the Board's current rules within the time required by the Hobbs Act.

The AAR attempts to justify its failure to challenge the Board's authority in 1997, when the agency adopted its current arbitration rules under 49 U.S.C. § 721(a) rather than under the Alternative Dispute Resolution Act, 5 U.S.C. §§ 571-584 ("ADRA"), because the AAR believes that the current arbitration rules are "voluntary," whereas the rules proposed in this proceeding allegedly are not. AAR Comments, p. 7. Specifically, the AAR argues that "the existing Part 1108 rules contemplate *voluntary* resolution of matters by arbitration where all parties consent," however, because the proposed rules "could not be understood to be voluntary on the part of Class I or Class II railroads, the Board lacks authority under 49 U.S.C. § 721(a) to adopt the proposal." AAR Comments, p. 7, [emphasis in original].³ It is clear that the AAR concedes that

³ Interestingly, the AAR's Comments never try to make a connection between the "voluntary" nature of the current rules and the text of 49 U.S.C. § 721(a): why does Section 721(a) of the statute, which gives the Board broad authority to carry out its statutory responsibilities and to promulgate rules to do so, justify even a "voluntary" arbitration program that by its terms does not rely on the ADRA for statutory authority? The AAR's argument implicitly concedes that even though Section 721 does not by its terms mention a Board power to initiate an arbitration program, the provision is broad enough to mean that a Board-sponsored arbitration program is within the power of the Board, and that "regulations" to authorize such a Board-sponsored arbitration program would be justified in order for the Board, in the words of the statute, to "carr[y] out this chapter and subtitle."

the Board *has* the authority to issue rules on arbitration under 49 U.S.C. § 721(a) as long as the arbitration program is “voluntary.” Thus, according to the AAR’s own interpretation of the legal standard, the issue of authority under 49 U.S.C. § 721(a) turns on whether the proposed rules are “voluntary.” As explained below, the proposed arbitration rules plainly meet the AAR’s “voluntary” standard.

The AAR makes a similar argument in contending that the Board’s proposed arbitration program is an unlawful delegation of the Board’s authority. AAR Comments, pp. 9-10. Specifically, the AAR declares that “[t]he Board has no authority under 49 U.S.C. § 721(a) to abdicate its adjudicatory authority in favor of private arbitrators *absent the consent of all of the parties.*” *Id.*, p. 9 [emphasis added]. It is clear from this statement that the AAR concedes that there would not be an improper delegation and that the Board would have the authority to promulgate an arbitration program under 49 U.S.C. § 721(a), as long as all parties could “consent.”

Thus, under the AAR’s own analysis, whether the issue is directly one of “authority” under 49 U.S.C. § 721(a) or whether the issue is one of improper “delegation” under the same statute, the authority of the Board to promulgate arbitration rules under Section 721 turns on whether the proposed arbitration program is “voluntary”, and whether there is “consent.” But as discussed further immediately below, the Board’s proposed arbitration program is voluntary and includes the railroads’ consent, both of which may be exercised via the Board’s proposed opt-out procedures. Thus the AAR’s attacks on the authority of the Board to adopt the program are, under the AAR’s own legal standard, unfounded.

Looked at from the broadest perspective first and before discussing the AAR’s specific arguments as to why the Board’s program is allegedly not “voluntary,” it is difficult, indeed

impossible, to find compulsion in the Board's proposed program. Although the AAR's comments allege that the Board's proposed program "pressures" only Class I and Class II rail carriers (AAR Comments, pp. 5-6), the AAR does not even try to describe the nature or contours of the alleged "pressure" by the Board. The fact of the matter is that there is no compulsory arbitration under the proposed rules and *there are no legal consequences* to Class I and Class II rail carriers if they choose to opt-out of the program, as permitted by the proposed rules. Under the Board's proposal, the opt-out only requires a simple notice to be filed with the Board within 20 days of the effective date of the new rules (and thereafter by January 10 of each year), or anytime thereafter, by providing 90 days' notice to the Board – hardly a burden. Of course, after having proclaimed for so long through their industry trade association, the AAR, that the industry is in favor of mediation and arbitration to resolve disputes, rail carriers might be embarrassed to opt out, but embarrassment is not legal compulsion, and does not render a decision to opt out involuntary.

The AAR claims that a "significant reason" for the allegedly involuntary nature of the proposed program is that the NPR "fails to adequately define what disputes would be subject to the proposed arbitration program, thereby making it impossible for railroads that do not opt out to have the knowledge to voluntarily consent to arbitration." Of course, if a rail carrier truly believes that the subjects identified in the Board's proposed arbitration program "fail to adequately define" the legal contours of the arbitration, it could just simply opt out. But the fact of the matter is that the Board's proposed rules are not, as the AAR claims, "circular and open ended." AAR Comments, p. 8. The Board's proposed rules in fact delineate four precise categories of disputes that would be subject to arbitration: "demurrage; accessorial charges; misrouting or mishandling of rail cars; and disputes involving a carrier's published rules and

practices as applied to particular rail transportation” See proposed 49 C.F.R. § 1108.1(b).⁴

The nature of and the issues involved in each of these types of disputes are readily understood in the transportation industry. Ironically, two of these four categories of dispute under the Board’s proposed rules (demurrage and misrouting of rail cars) are *exactly* the subjects of covered disputes under the Rail Arbitration Rules of the National Grain and Feed Association, to which all of the nation’s Class I railroads have voluntarily subscribed.⁵ The other two categories (accessorial charges and disputes involving a carrier’s published rules and practices as applied to particular rail transportation) are closely akin to other categories within the NGFA Rail Arbitration Rules, and the meaning of these categories and the contours of these disputes are well known to those in the rail transportation industry.⁶ It is hard to believe that each of the nation’s rail carriers would have agreed to be bound by rules under a private arbitration agreement that their national trade association now asserts are “circular and open ended.”

⁴ The AAR’s Comments complain that wording in the Notice states that disputes that fall within the opt-out proposal “should possess monetary value but lack policy significance” and that disputes that “raise novel questions” would not be suitable for arbitration, but that these “restrictions” are not in the text of the proposed rules themselves. The argument is ridiculous. These phrases were plainly intended to *describe* the general nature of the categories chosen by the Board to be included in its opt-out program, and not be substantive requirements on their own. Indeed, the inclusion of these phrases in the rules would result in the very vagueness and ambiguity about which the AAR complains.

⁵ See Section 2(b) of the Rail Arbitration Rules of the National Grain and Feed Association, adopted August 24, 1998 and amended at various times thereafter, (“NGFA members shall arbitrate the following disputes arising between railroads and rail users . . . upon the filing of a complaint with the National Secretary . . .”). See 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 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.

⁶ See *fn. 4 supra*. Moreover, the categories chosen by the Board for its Limited Arbitration Program are the same as or very similar to the categories for arbitration advocated by the Railroad-Shipper Transportation Advisory Committee (“R-STAC”) in its initial comments in this proceeding on March 15, 2011, a further indication that the categories chosen are well-known in the transportation industry and are not “circular and open-ended,” as the AAR claims. See R-STAC Comments in Ex Parte 699, March 15, 2011, p. 8.

More specifically, the AAR points to the phrase “other service-related matters” in the proposed regulations as vague and indefinite. AAR Comments, p. 8.⁷ This problem can be cured by simply deleting the phrase, or making it more definite. AAR also complains that “the proposed rule’s phrase ‘disputes involving a carriers’ published rules and practices as applied to particular rail transportation’ does not make clear that important policy issues might be involved.” *Id.* But the Board’s Notice specifically accounts for this possibility by noting that the Board reserves the right to require a party to adjudicate a pending matter using the agency’s formal procedures where the Board concludes that the specific matter is not suitable for arbitration. Notice, p. 7. Thus, if a dispute involving a carrier’s published rules or practices does in fact involve important policy issues, there is a ready remedy. The Board might wish to reaffirm this matter in its final decision and/or in the rules themselves.

Secondly, the AAR complains that the Board’s proposal “cannot be understood to be a voluntary agreement . . . because of its one-sided nature,” in that Class I and II carriers would need to opt-out “up front,” whereas shippers could decide, on a case-by-case basis, to elect whether to pursue arbitration or not. AAR Comments, pp. 8-9.⁸ But the fact that Class I and Class II carriers will be required to opt-out “up front” does not eviscerate the “voluntary” act of an opt-out decision by Class I and II railroads. A “voluntary” act or decision does not necessarily require precisely and procedurally the same acts or decisions as between a complainant and defendant as long as the acts, decisions, or consent by both parties can be freely given. Indeed, according to *Black’s Law Dictionary*, for consent to be *voluntarily* given, it must be given “[i]ntentionally; without coercion.” *Black’s Law Dictionary* 1605 (8th ed. 2004). In

⁷ The criticism of this wording is also made by the Union Pacific Railroad Company (“UP”). See UP Comments, p. 7.

⁸ See also UP Comments, p. 4.

addition, a *voluntary act* is an act “[d]one by design or intention.” *Id.* Under the Board’s proposed rules, the railroads have the opportunity to exercise their intentions regarding whether to participate or opt-out of the proposed arbitration program both after the adoption of the program and at any time thereafter through the filing of a notice and, thus, there is no plausible argument supporting a claim of coercion.

Railroads can exercise their intent to arbitrate by silence. AAR cites to the *Restatement (Second) of Contracts* (“*Restatement*”) to assert that the proposed opt-out provision must fail because it “is contrary to the fundamental principle of contract law that silence does not constitute acceptance to form a valid contract, with limited exceptions not present here.” AAR Comments, p. 12. But this assertion suffers from a fundamental misreading of the *Restatement*. Under the *Restatement*, silence operates as acceptance “[w]here the offeror has stated or given the offeree reason to understand that assent may be manifested by silence or inaction, and the offeree in remaining silent and inactive intends to accept the offer.” *Restatement (Second) of Contracts* § 69(b) (1981). Here, the railroads clearly have notice and reason to understand that their assent to arbitration may be manifested by silence or inaction. Also, because the railroads have the sophistication and resources to file a simple opt-out notice, it is difficult to imagine that their silence could mean anything other than an intent to arbitrate.

Moreover, the fact of the matter is that there are only seven Class I railroads who are potential defendants to a claim under the proposed rules, whereas there are tens of thousands of different shippers. This fact alone justifies different treatment between those parties under the Board’s proposed program. It is a virtual certainty that every Class I and II railroad will, in a particular year, be involved in a number of demurrage, accessorial, and misrouting disputes, while only a relatively small minority of the many thousands of different shippers on those seven

railroads are likely to be so involved. More importantly, it is the meaning, application or reasonableness of the *railroads'* demurrage, accessorial, and routing rules and practices that will be at issue in the cases chosen by the Board to be included in the proposed Limited Arbitration Program, not the shipper's rules. Because of this circumstance, it is entirely rational for the Board to require Class I and II railroads to make a decision "up front" to subject themselves (and their own rules) to arbitration of such disputes, without requiring thousands of shippers who may never be involved in such disputes to provide the same "up front" consent.

The AAR also argues that the proposed arbitration program is not "voluntary" because it would appear to grant a shipper an opportunity to veto a counter claim or arbitration request by a respondent railroad on the grounds that the shipper has not consented to arbitrate that issue.

AAR Comments, pp. 9, 13-14. This criticism is echoed by the comments of the Union Pacific Railroad Company ("UP"), when it says that the proposed rules do not allow a carrier respondent to file a counterclaim or assert an affirmative defense. For example, UP notes, if a shipper files a complaint against a Class I carrier for demurrage charges on certain cars, the carrier cannot expand the scope of the arbitration to include a demurrage dispute involving other cars. UP Comments, pp. 4-5.

The criticism is fair, but the problem is easily fixable. The League suggests that the Board could allow a counterclaim or affirmative defense as long as the counterclaim was: (1) among the list of arbitrable disputes under the Board's program; and, (2) the carrier's counterclaim or defense is related to the "same transportation events" as the primary claim. Such a twofold standard would ensure that the counterclaim would be among those types of disputes that the Board has determined are suitable for arbitration, and that the discovery and evidence in

the arbitration on the counterclaim or affirmative defense would be closely related to the primary claim, thus preserving the limited scope and efficiency of the primary claim in arbitration.⁹

Finally, the AAR argues that the Board has no authority to “abdicate” its adjudicatory authority in favor of private arbitrators “absent the consent of all parties,” and that the Board cannot “completely delegate” its authority over its primary jurisdiction to a private arbitrator, citing only the concurring opinion of Judge Sentelle in *Association of American Railroads v. Surface Transportation Board*, 162 F.3d 101, 111-12 (D.C. Cir. 1998). But as noted above, the Board’s proposal is in fact voluntary, which undercuts the AAR’s analysis at the outset.

But even more to the point, the Board’s proposal does *not* “completely delegate” its authority at all. In focusing on *American Railroads*, AAR overlooks District of Columbia Circuit precedent that clearly distinguishes between delegation and legitimate use of outside parties. For example, in *Perot v. Federal Election Commission*,¹⁰ the Federal Election Commission (“FEC”) permitted certain non-profit organizations to stage candidate debates if they used “pre-established objective criteria” to determine which candidates could participate. Instead of mandating a particular set of criteria, the FEC let each organization decide what criteria it would use.¹¹

While the court noted “the general proposition that when Congress has specifically vested an agency with the authority to administer a statute, it may not shift that responsibility to a

⁹ UP also objects to the Board’s proposed arbitration program because (1) carriers must opt out, while shippers can participate on a case-by-case basis; and (2) carriers that choose not to opt out would be allegedly exposed to the risk of “multiple, simultaneous arbitrations” in which one arbitrator would be unaware of the schedule to which the carrier might be subject in another arbitration. See UP Comments, pp. 4, 5-6. The UP’s first objection is incorrect, for the reasons described in the text above. UP’s second objection is not credible, since the carrier itself would be in a position to inform one or both arbitrators about the conflicting schedules; it is highly unlikely that both arbitrators would refuse to accommodate the carrier to the best of their ability. In any event, the cases eligible for arbitration will not by their nature be lengthy, complex, or high-dollar litigations; the simple fact of the matter is that attorneys “juggle” conflicting litigation schedules as a matter of course all the time.

¹⁰ *Perot v. FEC*, 97 F.3d 553 (D.C. Cir. 1996).

¹¹ *Id.* at 559.

private actor . . . ,” it found that FEC “ha[d] not delegated any authority”¹² According to the court, merely vesting discretion in an outside party is not a delegation because “virtually any regulation of a private party could be described as a ‘delegation’ of authority, since the party must normally exercise some discretion in interpreting what actions it must take to comply.”¹³ The court also noted that the FEC retained authority to determine the meaning of “objective criteria” and could impose penalties for using non-objective criteria.¹⁴ Thus, the *Perot* decision makes clear that an agency may rely on an outside party’s discretion if guided by a standard set by the agency.¹⁵ Accordingly, use of an outside party is not a delegation if: (1) the outside party’s exercise of discretion is limited; and (2) the outside party’s actions are subject to an assured, timely, and meaningful review by the agency.¹⁶

It is clear that, under the Board’s proposal, the agency is not delegating its authority to adjudicate disputes. The arbitrator’s exercise of discretion is limited and must be “guided by the Interstate Commerce Act and by STB and ICC precedent.” *See* proposed 49 C.F.R. §§ 1108.3(c), 1108.11. The proposed rules provide for an assured, timely, and meaningful review of arbitrator decisions. Specifically, they grant a right of appeal to the Board itself, along with appellate procedures. When reviewing an arbitrator’s decision, the Board cannot simply apply a “rubber-stamp;” it must overturn the arbitrator’s decision if it involves a clear abuse of an arbitrator’s authority or discretion. *See* Notice, p. 10 and proposed 49 C.F.R. § 1115.8. Because

¹² *Id.* at 559.

¹³ *Id.* at 560.

¹⁴ *Id.* *See also U.S. Telecom Ass’n v. FCC*, 359 F.3d 554, 567 (D.C. Cir. 2004) (stating that an agency can rely on an outside party’s discretion “so long as there is a reasonable connection between the outside entity’s decision and the federal agency’s determination”). *U.S. Telecom*, unlike the Board’s proposal, involved a grant of unbridled discretion to the outside entity.

¹⁵ *Perot*, 97 F.3d at 560.

¹⁶ *See U.S. Telecom*, 359 F.3d at 567-68 (noting that an agency can avoid delegation by providing “timely” and “assured” oversight and a final review that is not merely a “rubber-stamp”).

the Board is providing standards to guide arbitrator decisions and a right to a meaningful Board review of arbitrator decisions, there is no delegation of Board authority.

In fact, as the AAR's Comments obliquely recognize, the courts *have* approved the agency's use of arbitration, in the context of labor disputes. Indeed, the agency's authority to require arbitration of such disputes in the face of an attack on the grounds that such arbitration was an improper delegation that divested the agency of jurisdiction was explicitly upheld in *Brotherhood of Locomotive Engineers, et al. v. Interstate Commerce Commission*, 808 F.2d 1570, 1579 (D.C. Cir. 1987) ("*BLE v. ICC*"). The court, after extensively discussing the history of labor protective conditions and the imposition of the requirement for arbitration, *see BLE v. ICC*, 808 F.2d at 1572-1575, including the requirement for arbitration promulgated in *Norfolk & W. Ry.*, 354 I.C.C. 605, 610 (1978), as modified by *Mendocino Coast Ry.*, 360 I.C.C. 653 (1980), *aff'd sub nom. Railway Labor Executives' Ass'n v. United States*, 675 F.2d 1248 (D.C. Cir. 1982), concluded:

Where, as here, the conditions to which the Commission subjected the railroads specifically require them to submit to arbitration as a prerequisite to its approval of the transaction, the Commission has in fact exercised jurisdiction. Once a controversy is properly before a tribunal, the doctrine of primary jurisdiction has no bearing on how it rules on substantive issues. *Arbitration is a legitimate method of resolving labor disputes and it does not divest the Commission of its jurisdiction. McKeon v. Toledo P. & W. R.R.*, 595 F. Supp. 766, 769 (D. Ill. 1984). We thus reject the unions attempt to expand the scope of the doctrine that the Commission adjudicate disputes that it properly determines to be arbitrable.

BLE v. ICC, 808 F.2d at 1579 (emphasis added). *See also International Brotherhood of Electrical Workers v. Interstate Commerce Commission, et al.*, 862 F.2d 330, 336 (D.C. Cir. 1988) ("*IBEW v. ICC*") ("Nothing in the Act either requires or forecloses the agency's use of arbitration in employee disputes . . . The ICC acted in its sound discretion in electing to use arbitration . . ."); *Timothy W. Black, et al v. Surface Transportation Board*, 476 F.3d 409, 413

(6th Cir. 2007) (the Board acts “well within its authority” in using arbitration in employee disputes).

The AAR attempts to distinguish this solid precedent in two ways. First, it argues that the use of arbitration has been upheld by the courts, but under the Board’s authority to protect the interests of affected employees, not under the general authority of 49 U.S.C. § 721(a). Second, the AAR argues that the use of mandatory arbitration in labor protective conditions reflects the allegedly “unique role” arbitration plays in labor disputes. *See* AAR Comments, p. 10. But neither argument is correct.

First, it is true that the use of arbitration has been upheld by the courts under the Board’s authority to protect the interests of affected employees. For example, under 49 U.S.C. § 10903(b)(2), the agency is required to insure that certificates of abandonment contain provisions “to protect the interests of employees”; *see also* 49 U.S.C. § 10902(d)(requiring the agency to insure that there is fair and equitable arrangement for the protection of the interests of employees that may be affected by a line purchase) and 49 U.S.C. § 11326 (requiring the agency to protect the interests of employees in transactions involving rail carriers) Under that statutory authority, the agency has exercised this power by requiring parties to initially submit disputes to arbitration. *See Ass’n of American Railroads v. Surface Transportation*, 162 F.3d 101 (D.C. Cir. 1998); *IBEW v. ICC*, 862 F.2d at 336; *Timothy W. Black, et al v. Surface Transportation Board*, 476 F.3d 409 (6th Cir. 2007); *BLE v. ICC*, 808 F.2d at 1579. Although the power to require arbitration is not specifically mentioned in the statute, under 49 U.S.C. § 701(a), the agency is given the authority to “carr[y] out” the terms of the statute, and the specific enumeration of a power in the statute does not exclude another power that the Board may have in order to carry out its statutory mandate. In the case of employee protective requirements, the agency has

decided that mandatory arbitration is a proper way to carry out its statutory mandate, and the courts have agreed that there is no improper delegation.

The Board's proposed arbitration rules in this case are exactly parallel. Just as the agency is statutorily required to protect the interests of employees and has chosen to exercise this authority by requiring arbitration of disputes, the agency is *also* statutorily charged with determining the lawfulness of rail carrier tariffs, including but not limited to the reasonableness of a carriers rates, charges, rules and practices. *See* 49 U.S.C. §§ 10701, 10702, 10704, 10746, 11704. In this proceeding, the Board has chosen to implement its statutory mandate by proposing to establish a voluntary arbitration structure for complaints related to certain narrow circumstances, such as disputes over demurrage, accessorial charges, etc., that would otherwise be within the jurisdiction of the Board, along with a right of appeal to the Board itself. In other words, the Board has chosen to exercise its authority over such matters through voluntary arbitration, just as it has chosen to exercise its authority in the case of labor disputes through mandatory arbitration.

The AAR attempts to limit the force and applicability of this precedent to the Board's proposals in this proceeding by arguing that the use of mandatory arbitration in the labor protection context reflects the allegedly "unique role" that arbitration plays in labor disputes. AAR Comments, p. 10. However, the AAR cites no precedent for this argument, for there is none. Indeed, a review of the cases cited above indicates that the court's affirmation of the agency's power to order arbitration was not based on some "unique role" that arbitration plays in labor disputes at all, but rested on ordinary rules of statutory construction and ordinary *Chevron* deference. *See, e.g., IBE v. ICC*, 862 F.2d at 335-337, 338. The Board would clearly be

authorized under the same tenets of statutory construction and the same *Chevron* deference to provide for arbitration in the present case.¹⁷

B. The Board Might Modify the Wording of Some Of Its Proposed Rules to Clarify The Meaning of the Text

Among the comments submitted by the railroad industry in this proceeding, the Comments of UP are notable because they, in part, at least engage the Board's own proposal and try to improve it, rather than just opposing the proposal outright. *See* UP Comments, pp. 7-12. UP indicates that these comments would "influence its decision to participate in any Board-sponsored arbitration," and then goes on to list ten different suggestions for improving the Board's proposed rules. The League wants to be sensitive to carriers' reasonable concerns and positive suggestions. Although it does not agree with all of UP's recommendations, it believes that some of UP's proposals which would clarify and improve the text should be adopted, especially if such changes would encourage other rail carriers to participate in an arbitration program.

1) § 1108.1(b), the definition of "arbitration-program eligible matters" – UP's comments make some suggestions for improving the meaning or clarity of the Board's proposed text. One of these, related to the wording "other service-related matters" has been dealt with on page 10 above, and as discussed there, the League believes that the wording could be eliminated or clarified. The League agrees with UP's suggestions relating to § 1108.1(b) (1) – (3), but suggests some modifications concerning § 1108.1(b)(4) and its remaining wording.

Accordingly, the League believes that the UP's proposed changes on page 8 of its comments should be revised as follows, so that the final text of § 1108.1(b) should read as follows:

¹⁷ In fact, the agency's use of arbitration in labor disputes delegates much *more* authority to private arbitrators than the Board's proposed arrangement in this case, since in labor disputes the agency has chosen to review the decision of an arbitrator only where there recurring or otherwise significant issues of general importance regarding the interpretation of a labor protective condition. *See IBE v. ICC*, 862 F.2d at 333.

(b) *Arbitration program-eligible matters* are those disputes, or components of disputes, that may be resolved using the Board's arbitration program involving one or more of the following subjects:

- (1) disputes involving demurrage charges as applied to a particular party;
- (2) disputes involving accessorial charges as applied to a particular party;
- (3) disputes involving the misrouting or mishandling of rail cars for a particular party;
- (4) disputes involving a carrier's misapplication or reasonableness of its published rules or practices as applied in specific circumstances.

"Arbitration program-eligible matters" do not include a challenge to the reasonableness of a carrier's rates.¹⁸

2) § 1108.2(b), exclusions – The League agrees with UP's suggestion concerning the use of arbitration in exemption revocation proceedings, since the League recognizes that such use of arbitration is outside the stated confines of the Board's proposal.

3) § 1108.3(b), participation requirements – For reasons stated earlier in these Reply Comments, the League does not agree with UP's suggested changes.

4) § 1108.4(a)(2), prospective or injunctive relief – UP has pointed out a seeming discrepancy between the text of the Board's Notice and the text of the proposed regulation. The League agrees that the discrepancy should be clarified, but believes that the Board should clarify the rule to be consistent with the discussion in the Notice, rather than the resolution suggested by the UP. In other words, the text of the rule should make clear that prospective or injunctive relief is available where both parties agree.

5) § 1108.6(a), criteria for arbitrators – see discussion in Section C below.

6) § 1108.6(b), selection of arbitrators – see discussion in Section C below.

7) § 1108.7(b), pleading requirements – The League does not agree that the section is ambiguous with respect to pleading requirements. As discussed above at page 11, the League

¹⁸ Although the League would like to see arbitration available to challenges to a rail carrier's rates, it recognizes that the Board's decision does not go that far, and thus agrees with UP that a challenge to the reasonableness of a rail carrier's rates (but not a carrier's demurrage or other charges, or rules or practices as applied in specific circumstances) should be excluded in the arbitration rules.

does agree that the Board could give a limited right to file a counterclaim or assert an affirmative defense.

8) § 1108.8, time requirements – The League agrees with the UP’s suggestion, which mirrors the League’s own Comments. *See* League Comments, p. 14.

9) § 1108.11, standard of review – see discussion in Section C below.

10) § 1109.3(g), statutory deadlines – The League agrees with the UP’s suggestion for clarifying the wording.

Finally, at page 14 of its Comments, UP suggests that only firms directly engaged in transportation or shipping should be eligible to join the pre-dispute participant model; trade associations could not use that model. *See* UP Comments, p. 14. The League agrees. Neither shipper nor carrier trade organizations should be eligible to use the Board’s Limited Arbitration Program.

C. The Board Should Make Modifications to Its Proposal to Better Respond To Issues Regarding the Selection of Arbitrators and the Standard of Review

In its Comments, the League discussed at some length the need for the Board to update its list of arbitrators; to develop rules to govern its list of arbitrators; to require arbitrators to disclose possible conflicts of interest; and to develop a fair and transparent “strike” mechanism to insure that arbitrators are both in fact neutral and are perceived as neutral by the parties. *See* League Comments, pp. 11-13.

The comments of both UP and BNSF discuss possible improvements to the criteria and standards for arbitrators. The League agrees with BNSF that it is important to define the criteria that will be used to select arbitrators for the arbitration program. *See* BNSF Comments, p. 4; *compare with* League Comments, p. 11. The League also agrees with UP that the roster of arbitrators should be posted on the Board’s website, with information about each arbitrator. *See*

UP Comments, p. 10; *compare with* League Comments, p. 11. The League also agrees with UP that a transparent and fair “strike” process should be developed for the selection of an arbitrator, and discussed that matter at length in its own Comments. *See* UP Comments, pp. 10-11; *compare with* League Comments, pp. 11-13. The League also agrees with UP that an arbitrator should be required to disclose any relationship or dealing with the parties or their counsel. *See* UP Comments, p. 11; *compare with* League Comments, p. 11. The League believes that all parties that may access an arbitration program by the Board – either shippers or carriers – have an interest in ensuring a fair and transparent process, and the League believes that this is one area where the Board should take steps to improve its proposed structure.

Related to the issue of the qualifications and conduct of the arbitrator is the issue of the standard of review. In general, the League believes that the Board’s proposal strikes the correct balance. As discussed above, under the Board’s proposal, the arbitrator is required to be guided by the Interstate Commerce Act and by STB and ICC precedent, and the decision of an arbitrator can be overturned if the decision involves a clear abuse of an arbitrator’s authority or discretion. The League believes that the standard of review for an arbitrator’s decision should be narrow, since a broad standard of review will lead to frequent and complex appeals and would seriously undercut a prime rationale for arbitration in the first place, namely, that arbitration is likely to be faster, cheaper, and more efficient. Thus, the League does not agree with UP’s suggestion that the standard of review should be broadened to include an appeal on the grounds that the decision “contravenes fundamental principles of the Board’s governing statute”; or with BNSF’s suggestion that the arbitrator has “exceeded his or her authority” or “contravenes statutory requirements.” *See* UP Comments, p. 12; BNSF Comments, p. 5.¹⁹ The League believes that the

¹⁹ Similarly, the League does not agree with AAR’s similar suggestion that the standard of review should be broadened to include an appeal on the basis that the award “does not exceed an arbitrator’s authority or contravene

combination of the instruction in the Board's proposal that the arbitrator must "be guided by the Interstate Commerce Act and by ICC and STB precedent," combined with the "clear abuse" standard, is proper.

Both BNSF and UP also suggest one additional ground for appeal, namely bias on the part of the arbitrator. BNSF suggests an appellate standard where the arbitrator has exhibited "evident partiality." *See* BNSF Comments, p. 5. UP has suggested an appeal where the arbitrator has not disclosed any relationship or dealing with the arbitrator and a party or the party's counsel. *See* UP Comments, p. 12. The League believes that the BNSF's proposed "evident partiality" standard goes too far, and that "evident partiality" is too vague a standard of review. However, the League believes that UP's suggestion for an appeal where an arbitrator has not disclosed a relevant relationship, is sound, and believes that the Board should broaden its appellate standard slightly to accommodate that concern.

III. THE BOARD'S PROPOSALS WILL ENCOURAGE AND FACILITATE THE USE OF ARBITRATION

In its Comments, the AAR argues that the Board's proposal will not meet its stated goal of encouraging arbitration, for many of the same reasons that the AAR claims that the Board's proposal is unlawful. Specifically, the AAR argues that the Board's proposal will not encourage arbitration, because the Board's proposal would place Class I and Class II carriers at both a substantive and procedural disadvantage; because it allegedly fails to adequately define the subject matters that would be sent to arbitration; because the Board's proposal allegedly does not ensure that arbitrators would be both neutral and competent; and because the Board's proposed

statutory requirements." *See* AAR Comments, p. 18. The League believes that the requirement to be guided by the ICA and ICC and STB precedent, combined with the "clear abuse" standard, is sufficient to protect the parties and provide meaningful review.

standard of review would not encourage parties to arbitrate disputes. AAR Comments, pp. 12-16.

All of these alleged “flaws” have been dealt with substantially in these Reply Comments. The League believes that the Board’s proposal is a sound and fair one, and that both shippers and carriers are likely to use the Board’s Limited Arbitration Program. The improvements suggested by the League in its opening Comments and in these Reply Comments would strengthen the program and make it even more likely that the program will be utilized.

The AAR’s claim that the Board’s proposed program will not be used by rail carriers rings utterly hollow when the Board considers the current state of affairs, and the “improvements” suggested by the AAR. Specifically, *in the fifteen years since the Board developed its current rules, Board-sponsored arbitration has never – not even once – been used to resolve a transportation-related dispute.* The AAR’s suggested “improvements” – a vague “reassessment” as to how arbitrators are selected, a nebulous suggestion to establish “clear procedures” for the selection of an arbitrator, and a request to “clarify” the standard of review – are utterly inadequate. *See* AAR Comments, pp. 17-18. The Board’s proposal is strikingly similar to both the successful NGFA arbitration program, and the suggestions of the R-STAC in this proceeding. The League believes that, once the Board’s program is in place, rail carriers will see the benefits and participate. But, if all Class I and Class II rail carriers opt out, the situation will simply remain the same as it is now. The Board’s program, as modified as suggested in the League’s Comments and in these Reply Comments, should at least be tried.

IV. THE BOARD SHOULD CAREFULLY EVALUATE THE SUGGESTIONS OF OTHER SHIPPER AND GOVERNMENT PARTIES

As noted above at page 4, the National Grain and Feed Association and the Montana Grain Growers Association submitted comments which were largely supportive of the Board’s

proposal. NGFA urged the Board to utilize a three-person panel of arbitrators as a matter of course. NGFA Comments, p. 5. NGFA also urged the Board to require the issuance of a public, written decision. MGGA echoed the comments of NGFA in calling for the ordinary use of a three-person panel of arbitrators, but believed that the Board's proposal to keep arbitration decisions confidential was a sound one. MGGA Comments, p. 2. The Department of Agriculture urged the Board to provide for a three-person panel of arbitrators at the request of either party, and also urged the Board to publish the arbitrators' decisions. DOA Comments, p. 3.

The League's Comments, in contrast, believed that a single arbitrator would be sufficient, unless the parties agreed on a panel of three, as long as the Board strengthened its qualification requirements for arbitrators; provided information regarding possible bias; and utilized a fair and transparent "strike" mechanism. The League also believed that the Board's proposal to keep arbitration decisions confidential was a sound approach, since it would encourage participation in the arbitration process, especially by carriers.

These are not easy issues to resolve, and there is likely no "right" answer. The League still believes that its suggestions on these two issues are sound, but urges the Board to carefully weigh the views of these other shipper and government parties in coming to a conclusion that will result in a sound, useful and used arbitration process.

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

Respectfully submitted,

The National Industrial Transportation League
1700 North Moore Street
Arlington, VA 22209

By its attorneys:

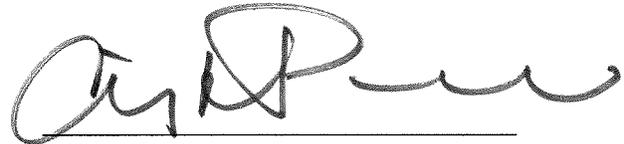
A handwritten signature in cursive script that reads "Karyn A. Booth". The signature is written in black ink and is positioned above a horizontal line.

Karyn A. Booth
Nicholas J. DiMichael
Jason D. Tutrone
Thompson Hine LLP
1919 M Street, N.W., Suite 700
Washington, D.C. 20036
(202) 263-4108

Dated: June 18, 2012

CERTIFICATE OF SERVICE

I hereby certify that on the 18th day of June 2012, I served the foregoing comments on all parties of record.

A handwritten signature in black ink, appearing to read 'Aimee Depew', written over a horizontal line.

Aimee Depew