

BEFORE THE
SURFACE TRANSPORTATION BOARD

ASSESSMENT OF MEDIATION AND)
ARBITRATION PROCEDURES) STB Ex Parte No. 699
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**OPENING COMMENTS OF THE
WESTERN COAL TRAFFIC LEAGUE**

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I.

DISCUSSION

The Board's NPRM is in follow-up to the Board's initial August 20, 2010 Notice seeking comments on the use of revised mediation and arbitration procedures. The STB has long sought to encourage the use of Board-sponsored alternative dispute resolution ("ADR") procedures as a means of resolving disputes outside of the Board's formal complaint processes. As WCTL noted in its Oct. 2010 Comments, this is the sixth proceeding held since the STB's inception addressing ADR matters³ – which proceedings were a follow-up to similar proceedings initiated by the Interstate Commerce Commission.⁴

³ See *Arbitration of Certain Disputes Subject to the Statutory Jurisdiction of the Surface Transportation Board*, STB Ex Parte No. 560 (STB served Sept. 2, 1997) (adopting new rules providing for binding, voluntary arbitration of certain rate or practices disputes); *Arbitration – Various Matters Relating to Its Use As An Effective Means of Resolving Disputes That Are Subject to the Board's Jurisdiction*, STB Ex Parte No. 586 (STB served Sept. 20, 2001 and May 22, 2002) (proceeding designed to promote and facilitate use of ADR and, *inter alia*, added formal rate case procedures in Stand-Alone Cost ("SAC") cases (at 49 C.F.R. Pt. 1111) that a complaint include a statement that the complainant considered seeking arbitration); *Major Rail Consolidation Procedures*, STB Ex Parte No. 582 (Sub-No. 1) (STB served June 11, 2001) (rules adopted (at 49 C.F.R. § 1180(h)(5)) regarding use of ADR to address railroad merger implementation and service problem issues); *Procedures to Expedite Resolution of Rail Rate Challenges to Be Considered Under the Stand-Alone Cost Methodology*, STB Ex Parte No. 638 (STB served Apr. 3, 2003) at 2 (adopting a requirement in SAC cases that parties to proceedings engage in non-binding mediation); *Simplified Standards for Rail Rate Cases*, STB Ex Parte No. 646 (Sub-No.1) (STB served Sept. 5, 2007) ("*Simplified Standards*") (requiring parties to proceedings brought under *Simplified Standards* to engage in mandatory mediation).

⁴ In the early 1990s the ICC sought to encourage the use of ADR procedures whenever agreed to by the parties and where practical to do so. See *Use of Alternative Dispute Resolution Procedures in Commission Proceedings and Those in Which the*

The Board's proposed NPRM rules generally are consistent with and address the views and concerns WCTL expressed in its Oct. 2010 Comments. Those comments urged the Board to use caution with the possible expanded use of the mandatory ADR procedures that could lead to complex, costly, and uncertain litigation, delay proceedings, or involve processes that are skewed in favor of the railroads. In this respect, the proposed NPRM rules should not unduly harm or prejudice the rights of WCTL members in seeking resolution of complaints, and they might provide new opportunities for expedited resolution of disputes brought before the Board. However there are several matters involving the proposed rules which may require Board clarification and revision, as discussed below.

A. MEDIATION

The Board's NPRM seeks to expand the current use of mediation employed in rate complaint cases to other formal disputes brought before the Board, and to establish the rules and procedures governing such mediation.⁵ WCTL provides the following comments on the Board's proposed NPRM mediation rules.

First, the Board's NPRM seeks to retain its existing Stand Alone Cost ("SAC") rate case mediation rules, at 49 C.F.R. § 1109.4, mandating the use of mediation

Commission Is A Party, 8 I.C.C.2d 657 (1992). Those rules are set forth at 49 C.F.R. Pt. 1109, as revised.

⁵ The proposed NPRM rules would not apply to proceedings involving the grant, denial, stay, or revocation of any license, or any related authorizations or exemptions. See NPRM at 18-19.

after the commencement of a SAC case.⁶ As WCTL has previously conveyed (*see* WCTL Oct. 2010 Comments at 6), League members that have brought maximum rate (SAC) cases generally have found the Board's current 49 C.F.R. § 1109.4 procedures requiring non-binding mediation at the outset of SAC proceedings useful, even if few cases ultimately have been successfully resolved under these procedures.

Second, the NPRM addresses procedures for the commencement of mediation in other non-rate case dispute proceedings. The NPRM proposes to amend 49 C.F.R. § 1011.7 to delegate to the Director of the Office of Proceedings authority to authorize parties to a proceeding before the Board, *upon mutual request*, to participate in mediation with a Board-appointed mediator, for a period of up to 30 days. *See* NPRM at 13-14. Also, the NPRM proposes, at 49 C.F.R. § 1109.2, that the Board may, *by its own order, or upon the request for mediation by one or more parties* at any time following the filing of a complaint,⁷ order mediation. *Id.* at 19.⁸

⁶ The Board's NPRM does not seek to change its current mediation requirements for non-SAC rate cases as established in *Simplified Standards*, although the NPRM does not seek to codify and incorporate that requirement as part of its new rules.

⁷ WCTL previously expressed concerns about the possible implementation of Board-facilitated pre-complaint mediation absent adequate protections. The Board's NPRM does not provide for the use of Board-facilitated mediation without the filing of a formal complaint, leaving it to the informal processes of the Board's existing Rail Customer Public Assistance, or the parties own negotiations, to address possible pre-complaint mediation. *See* NPRM at 6.

⁸ WCTL understands from the language of the NPRM (at 6) that this language is not inconsistent, as the proposed rules are intended to delegate to the *Director of Proceedings* the authority to authorize mediation where there is mutual party consent to mediation, and authorize the *Board* only to order mediation on its own order, or upon the request of one or more parties to a dispute for mediation. The Board should clarify this matter if this understanding is not, in fact, the case.

WCTL submits that, in any instance where mediation is requested by one or more parties, but not mutually agreed to by all parties to a dispute, that the Board should give particular weight to the preferences of the complaining shipper. The reason for granting this preference is to ensure that the shipper is not unduly pressured into mediation if it comes at the price of prejudicing its right to pursue a formal complaint or makes such complaint proceeding more expensive or lengthy.

Third, consistent with WCTL's suggestions made in its Oct. 2010 Comments, the Board's NPRM proposes, at 49 C.F.R. § 1109.3(b), (e), and (g), that mediation be short in duration (*i.e.*, 30 days), with extensions strictly limited to instances where all parties agree, with assurances that any statute of limitations applicable to challenges is tolled, and mediation will not be ordered more than once in any particular proceeding, unless all parties mutually request another round of mediation. WCTL remains supportive of these provisions, which are essential to help ensure that Board-sponsored mediation does not unduly interfere with shippers' statutory right to obtain reasonable rates, practices, etc. upon complaint to the Board.

Fourth, the NPRM proposes, at 49 C.F.R. § 1109.4(f), to recodify the Board's existing rules that the procedural schedule in full SAC cases will not be stayed pending the resolution of mediation. *See also* NPRM at 10. WCTL is supportive of this rule, which is consistent with Board precedent, and the right of shippers to pursue their statutory right to obtain reasonable rates, without delay. *See S. Miss. Elec. Power Ass'n v. Norfolk S. Ry.*, STB Docket No. 42128 (STB served Mar. 14, 2011) at 3; *Seminole*

Elec. Coop., Inc. v. CSX Transp., Inc., STB Docket No. 42110 (STB served Oct. 21, 2008) at 1-2. Similarly, the NPRM proposes, at 49 C.F.R. § 1011.7(a)(2)(xviii), to delegate to the Director of the Office of Proceedings, *upon mutual request of the parties*, the authority to authorize other non-rate proceedings to be held in abeyance during the pendency of the mediation period in non-SAC cases.⁹ This proposed rule further protects the right of shippers to seek statutory relief, without delay, etc. in non-SAC rate case proceedings.

Fifth, the NPRM, at 49 C.F.R. § 1109.3(f), includes confidentiality provisions. These provisions differ somewhat from the NPRM's proposed (and recodified) SAC mediation rules, at 49 C.F.R. § 1109.4(d), which also provide for mediation confidentiality, but without the same exacting terms and conditions (*e.g.*, the SAC mediation provisions do not require the destruction of documents at the conclusion of mediation). WCTL submits that the existing confidentiality provisions applying in SAC cases have been effective, and that the Board should consider applying these confidentiality provisions as part of its new rules to be applied to all cases, or at least consider eliminating the document destruction requirement, which appears to go beyond the Board's standard rules of administrative practice.

⁹ However, the NPRM also specifies, at 49 C.F.R. § 1109.3(g), that parties should submit to the Director of the Office of Proceedings mutual requests that a proceeding be held in abeyance pending resolution of mediation, and that "[t]he Board shall promptly issue an order in response to such requests." Because there may be confusion in proposed NPRM language as to whether the Office of Proceedings or the full Board has actual authority to issue procedural schedule stays, WCTL submits that the Board should further clarify its intent.

B. ARBITRATION

Perhaps recognizing that the Board's long-standing arbitration procedures have not been utilized in the decade since the process was first established, the Board's proposed NPRM rules seek to jump start arbitration in areas where arbitration might be useful and effective, and provide for a streamlined dispute resolution process. WCTL provides the following comments on the proposed NPRM arbitration rules.

First, the Board's proposed NPRM, at 49 C.F.R. § 1108.1(b), clarifies that the type of disputes that would be eligible for Board-sponsored arbitration would include demurrage and accessorial charges, compensation for misrouting or mishandling of rail cars, redress for a carrier's misapplication of its published rules and practices as applied to particular rail transportation, and other service-related matters.¹⁰ The list of eligible matters does not include rate cases, or other complex cases, except on petition. *Id.* at 49 C.F.R. § 1108.3(a)(1)-(3).¹¹ For the reasons WCTL has previously conveyed (*see* WCTL Oct. 2010 Comments at 9-11), and namely because the Board's existing arbitration rules are not well-suited for resolving complex cases, including large rate cases based on SAC (*e.g.*, cases where governing precedent is important, there is a need for extensive discovery, and there is a greater complexity involved in presenting and evaluating the

¹⁰ As with mediation, the proposed NPRM rules would not apply to proceedings involving the grant, denial, stay, or revocation of any license, or any related authorizations or exemptions. *See* proposed NPRM at 49 C.F.R. § 1108.2(b).

¹¹ The Board's NPRM, at 7, clarifies that disputes raising novel questions would not be suitable for Board-supervised arbitration, and generally, matters that are subject to arbitration should "possess[] monetary value but lack[] policy significance."

evidence), WCTL agrees that the arbitration program-eligible matters should be limited to less complex matters where Board expertise and assistance is not necessary.

Also, while WCTL believes that Board-sponsored arbitration could prove useful in expeditiously resolving arbitration-eligible disputes, it should be recognized that in application, there may be hindrances to seeking Board-sponsored arbitration under the proposed NPRM rules that the Board has not recognized in its NPRM. Namely, many of the arbitration program-eligible matters that the Board has considered in recent years have been matters on referral from the courts, *e.g.*, demurrage collection actions against shippers first brought in the state or federal courts by railroads. In such actions, the court normally stays the matter pending referral to the Board on the basis of primary jurisdiction seeking a Board determination on certain matters falling under the Board's jurisdiction.¹² In the usual course, if the court is requesting Board guidance on the law and issues of liability, then there would appear to be little opportunity or discretion to invoke arbitration that would not involve such Board responsive guidance. This is a matter on which the Board may want to give further consideration.

Second, the Board's proposed NPRM, at 49 C.F.R. § 1108.3(a)(4), clarifies that arbitration will not occur where one or more parties does not consent to arbitration, or is not included as a participant in the Board's arbitration program. The Board clarifies

¹² *See, e.g., Portland & W. R.R. – Petition for Declaratory Order – RK Storage & Warehousing, Inc.*, STB Finance Docket No. 35406 (STB served July 27, 2011). One reason why such matters would be brought in the first instance in civil court by railroads is because the Board has jurisdiction over rail carriers, not shippers, and has the ability to award damages against rail carriers, but not against shippers. *See, e.g.,* 49 U.S.C. §§ 11701, 11704(b).

that a Class I and Class II rail carrier will be deemed to have agreed in advance to participate in the Board's arbitration programs, unless it officially "opts-out" of the program. *Id.* at § 1108.3(b)(1).¹³ Shippers and other parties may participate in arbitration-program eligible arbitrations on a case-by-case basis by the filing of a notice indicating agreement to participate in arbitration. *Id.* at § 1108.3(b)(3). As WCTL has previously conveyed, in cases involving shippers, it believes that arbitration should be voluntary, at the election of the shipper. *See* WCTL Oct. 2010 Comments at 12. The Board's proposed NPRM preserves this requirement, thus allowing the shipper discretion on whether to seek to invoke Board-supervised arbitration.¹⁴

Third, the Board's proposed NPRM, at 49 C.F.R. § 1108.4(a)(1)-(2), proposes to limit disputes eligible to be arbitrated to matters involving potential damages of \$200,000 or less, exclusive of interest, and it proposes to remove any request for prospective or injunctive relief as a program-eligible matter. WCTL agrees that injunctive relief should be left to the expert discretion of the Board. The Board has asked for comments on its proposed monetary damages limits. WCTL submits that the \$200,000 limit is acceptable, but that the Board should not categorically limit the potential use of arbitration to larger disputes, if the parties to a dispute otherwise agree.

¹³ Class III railroads may participate in the program if they file a written notice with the Board advising of their intent to participate in the program. *Id.* at § 1108.3(b)(2).

¹⁴ The STB has previously stated that "[t]he Board on its own cannot *mandate* arbitration under the current statute," which requires Board adjudication of complaints. STB Ex Parte No. 586, *Arbitration – Various Matters Relating to its Use As An Effective Means of Resolving Disputes That Are Subject to the Board's Jurisdiction*, STB Ex Parte No. 586 (STB served Sept. 20, 2001) at 3 n.7 (emphasis added).

Fourth, the Board's proposed NPRM, at 49 C.F.R. § 1108.6, proposes the use of a single neutral arbitrator, selected by the STB from a qualified arbitrators' list maintained by the Board, with the Board paying for the cost of any arbitrator assigned to a dispute from its list. WCTL agrees that the use of a single, neutral arbitrator to determine disputes of limited size and scope is appropriate, and that a panel of two or three arbitrators may not make sense in such instances, especially if the parties would be required to pay for the expenses of multiple arbitrators. However, WCTL has concerns about the ability of the Board to find suitable "neutral" arbitrators for cases involving railroads and shippers, given that, even a brief perusal of the Board's current Roster of Available Arbitrators reveals that approximately one-third of the 36 names on the list would be considered challengeable for cause in such proceedings given their known careers in the transportation arena on behalf of shippers or railroads.

The Board's NPRM requests comments on how to select arbitrators from a suitable list. *See* NPRM at 8-9. Assuming that a suitable unbiased roster of possible neutral arbitrators could be developed, the Board could consider the use of standard arbitration rules for selection of an arbitrator. For example under Rule 12 of the JAMS Streamlined Arbitration Rules & Procedures (located at <http://www.jamsadr.com/rules-streamlined-arbitration/>), the parties seek to reach agreement on an arbitrator, and if no agreement is made, a list of eligible candidates is provided to the parties, and individual members on that list can be removed for cause. The process then employed consists of the striking of one name, and the ranking of the remaining candidates in order of

preference, with the remaining candidate with the highest composite ranking appointed as arbitrator.

Fifth, the Board's proposed NPRM, at 49 C.F.R. §§ 1108.8, 1108.9, and 1108.11 provides for discovery at the discretion of the arbitrator, the evidentiary proceeding to be completed within 90 days from the start date established by the arbitrator, a written decision (containing findings of fact and conclusions) issued within 30 days following completion of the evidentiary phase, and any appeal to the full Board to be filed within 20 days of service of a final arbitration decision. The proposed NPRM, at 49 C.F.R. § 1108.3(c), further provides the Arbitrator with authority to depart from the Board's procedural rules or regulations for the formal resolution of disputes. However, in making a determination on the merits, the arbitrator "shall be guided by the Interstate Commerce Act and by STB and ICC precedent." *Id.* On appeal to the full STB, the Board's authority to modify or vacate an arbitration award is on grounds that such award reflects a clear abuse of arbitral authority or discretion. *Id.* at §§ 1108.11(c), 1115.8.

WCTL has concerns about whether discovery of any reasonably complex matter can be completed on the expedited bases contemplated under the proposed NPRM, but otherwise agrees that arbitration should be handled on an expedited basis, with limited appeal rights to the full Board, to ensure that the purposes of affording parties with an expedited arbitration process is not undermined.¹⁵

¹⁵ The NPRM rules do not contain STB decisional deadlines for appeals of arbitral decisions to the full Board, and, in fact, the NPRM proposes to remove the prior requirement that the STB must decide any appeal within 50 days. To encourage the expedited resolution of matters, the Board should include an appropriate deadline for

Sixth, the Board’s proposed NPRM, at 10, provides that in cases where the full Board has reviewed an arbitral decision, any subsequent appeal to the federal courts would be pursuant to the Hobbs Act (28 U.S.C. §§ 2321, 2342), under the traditional arbitrary and capricious test. If there is no appeal of an arbitral decision to the full Board, the NPRM clarifies that the appeal would be made directly to federal district court under the Federal Arbitration Act (9 U.S.C. §§ 9-13), under the test of clear and convincing evidence of arbitrator fraud or bias (9 U.S.C. § 10). On initial review, there appears to be uncertainty as to how such judicial appeals would be handled and the standards that would be applied on review.

For example, under the normal standard of judicial review under the Administrative Procedure Act, an agency decision will not be set aside unless it is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. § 706(2)(A). Notwithstanding traditional notions of judicial deference on matters subject to the Board’s jurisdiction, it remains unclear if the proposed NPRM’s “clear abuse of arbitral authority or discretion” standard sought to be applied by the full Board in any review of an arbitral decision would be sufficient to withstand an administrative appeal filed under the Hobbs Act,¹⁶ and if not, would the Board need to apply a different

Board decisions on appeal, which WCTL submits should be decided within 45 days of appeal, or sooner.

¹⁶ *See, e.g., Pelofsky v. Wallace*, 102 F.3d 350, 353 (8th Cir. 1996) (a court’s deference to federal agencies “does not permit abdication of the judicial responsibility to determine whether the challenged [action] is contrary to statute, . . . devoid of administrative authority[,] or is otherwise unreasonable”).

standard in reviewing arbitral decisions brought to the full Board than what is proposed in the NPRM.

Additionally, The Federal Arbitration Act governs matters where there is “[a] written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract.” 9 U.S.C. § 2. Under this standard, there may be some uncertainty as to whether Board-sponsored arbitration, while conducted at the mutual consent of the parties, would still be governed by the Federal Arbitration Act, with an arbitral decision eligible to be appealed directly to federal district court under 9 U.S.C. § 10. At a minimum, these may be matters that a party considering arbitration may have concerns about in considering to pursue Board-sponsored arbitration, and are matters that the Board may need to consider further, and provide further guidance on, as part of its follow-up decisions in this proceeding.

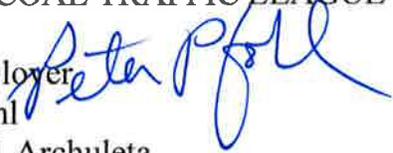
CONCLUSION

WCTL appreciates the Board’s consideration of the above opening comments. WCTL supports continuing Board efforts to promote ADR and private sector resolution of stakeholder disputes, but continues to stress that ADR should not be viewed as a “catch-all” cure to resolving shipper complaints or the underlying substantive problems facing shippers in obtaining agency relief. There is still a vital need for the STB as the expert agency appointed by Congress to resolve disputes in a timely manner and advance policies to protect railroad consumers against carrier abuses.

Respectfully submitted,

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