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Before the  
SURFACE TRANSPORTATION BOARD

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Ex Parte No. 699

ASSESSMENT OF MEDIATION AND ARBITRATION PROCEDURES

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COMMENTS  
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Attorney for Samuel J. Nasca

May 17, 2012

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COMMENTS

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Preliminary Statement

Samuel J. Nasca,<sup>1/</sup> for and on behalf of United Transportation Union-New York State Legislative Board (UTU-NY), submits these comments in response to the Notice of Proposed Rulemaking (NPRM), decided and served March 28, 2012. 77 Fed. Reg. 19591-96 (Apr. 2, 2012).

The Surface Transportation Board (STB, or Board), subsequently, on April 13, 2012, decided upon the text of a Supplemental Notice of Proposed Rulemaking (SNPRM), but STB did not give notice to interested parties of its action, and likewise did not make public the text of the SNPRM, at the Board's offices, or service by mail, or by posting on the Board's website. However, the April 13 SNPRM subsequently was published in the Federal Register, 77 Fed. Reg. 23208-9 (Apr. 18, 2012), with comments due June 18,

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<sup>1/</sup> New York State Legislative Director for United Transportation Union, with offices at 35 Fuller Road, Albany, NY.

2012, the same day reply comments are due for the instant March 28, 2012 NPRM.

Rail carrier employees have an important stake in STB procedures, which include the proposals for revisions to existing rules for mediation and arbitration. The interest of rail employees extends not only to employee protective conditions imposed by statute upon various transactions, but also to the proper administration of substantive provisions of governing statutory and regulatory provisions.

UTU-NY suggests the current situation does not warrant an extensive change or revision to the Board's mediation and arbitration rules. If the agency desires to expend funds for arbitration fees, by directing parties to arbitrators largely consisting of former or retired agency employees, as suggested by the NPRM, UTU-NY urges the Government funds be better employed through reinstatement of the Administrative Law Judge process.

### Background

1. Initial Notice For Comments. This proceeding was instituted almost two years ago, on August 20, 2010, with an open-ended Notice and Request for Comments (N&RC), the Board stating it favors private sector resolutions of disputes as an alternative to its formal processes where possible. 75 Fed. Reg. 52054 (Aug.24, 2010). The N&RC sought input regarding measures to implement greater use of mediation and arbitration procedures, including changes to the Board's existing rules, along with possible changes in rules to permit use of Board-facilitated mediation without the

filing of a formal complaint. The N&RC stated the Railroad-Shipper Transportation Advisory Council (RSTAC) will review comments and prepare a report to the Board reflecting the input of its members. The N&RC proposed no specific language changes for the agency's rules. All comments were invited without specification. Comments were submitted by 10 parties, on or about October 25, 2010.<sup>2/</sup>

2. RSTAC. Questions immediately arose concerning the role of RSTAC.<sup>3/</sup> The Board on December 3, 2010 issued a decision stating that RSTAC's comments would be accorded the same consideration as other parties' comments. In its decision the Board also extended the time for RSTAC comments, as well as for any other interested parties to file comments, until March 15, 2011.

Prior to the Board's December 3, 2010 clarification of RSTAC's status, the agency on November 10, 2010 issued a notice of vacancies on RSTAC, and requested suggestions of candidates to fill two vacancies. Ex Parte No. 526 (Sub-No. 2), Notice of Railroad-Shipper Transportation Advisory Council Vacancies. 75 Fed. Reg. 70080-81 (Nov. 16, 2010).

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<sup>2/</sup> Two additional comments were late-filed. Comments, consisting of 1-1/2 pages, were submitted by one practitioner, the undersigned, suggesting the rulemaking be held open for further comments pending disposition of a related proceeding. UTU-NY now endorses those comments.

<sup>3/</sup> RSTAC was created by ICC Termination Act of 1995 (ICCTA), and is codified at 49 U.S.C. 726. Except for several ex officio members, the STB Chairman appoints all RSTAC members. The STB implemented RSTAC by decision served January 29, 1996. 61 Fed. Reg. 2866-67 (Jan. 29, 1996). UTU-NY has suggested elsewhere the Board should substantially reduce the current wide-ranging scope of RSTAC. Ex Parte No. 712, Improving Regulation and Regulatory Review (UTU-NY Comments, filed Jan. 10, 2012). Notably, the Chairman has not appointed a RSTAC member associated with a recognized railroad employee organization background.

RSTAC submitted its comments on March 15, 2011. The Board held the proceeding in abeyance. On October 18, 2011, the Board issued another notice soliciting nominations for seven additional RSTAC vacancies. Ex Parte No. 526 (Sub-No. 3), Notice of Railroad-Shipper Transportation Advisory Council Vacancy. 76 Fed. Reg. 64426 (Oct. 18, 2011). Approximately 50 responses were received to the Board's invitation.

The Board on January 10, 2012, announced the seven RSTAC vacancies were now filled. (STB News Rel. No. 12-2).

3. Notice of Proposed Rulemaking. The Board on March 28, 2012 issued its NPRM, with comments due May 17, and replies due June 18, 2012. The NPRM noted that 12 comments were received in response to the August 20, 2010 N&RC, the December 3, 2010 extended comment period drawing only two comments in addition to those already filed nearly two years earlier in October, 2010--one of these coming from RSTAC. The NPRM claims the parties generally support increased use of mediation, but support for changes to the arbitration rules is "more limited." (NPRM, 4-5). The NPRM claims that "only" AAR and WCTL voiced objections to expanding mediation,<sup>4/</sup> apparently overlooking the practitioner comment that "it is questionable whether greater use of mediation should be encouraged."

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<sup>4/</sup> AAR (Association of American Railroads), and WCTL (Western Coal Traffic League), embrace members concerned with major coal movements, a commodity constituting the majority of rail tonnage. The term "only" is clearly misplaced, for the opposition of these parties, in itself, should doom any significant STB "arbitration program."

The Board will observe that major rulemaking proceedings, such as embraced in the instant NPRM, usually draw many more than 12 comments to a N&RC.<sup>5/</sup> Of course, UTU-NY will attempt to reply to various comments at the appropriate time, presently June 18, 2012.

#### ARGUMENT

##### I. THE IMPOSITION OF A STB-MANDATED ARBITRATION PROGRAM WOULD CONTRAVENE THE STATUTORY SCHEME

The former Interstate Commerce Commission (ICC) was created and sustained in its formative years for a number of reasons, but a very important element was the failure of arbitration, particularly with respect to rates. Major disputes between rail carriers were placed in arbitration, but success was rare. Several primary reasons for the inadequacy of arbitration were (1) all of the interests with an important stake in the outcome were not in the arbitration, and (2) the availability of multiple sources of commodity originations or destinations, in different areas of the country, resulted in awards creating necessary adjustments for other carriers, shippers, and commodity sources and destinations. One of the leading pre-ICC rail arbitrators was Thomas M. Cooley, who was appointed Commissioner in 1887, and thereafter unanimously elected Chairman.

The choice of an Interstate Commerce statute, to be administered through the judicial system, on a case-by-case basis, on the one hand (Reagan bill), and a single national regulatory commis-

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<sup>5/</sup> At best, the N&RC might be termed an Advance Notice of Proposed Rulemaking (ANPRM), owing to its lack of specificity.

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sion administering an almost identical statute, on the other hand (Cullom bill), was the major split in the Congress. The Commission scheme prevailed in conference over individual treatment before various tribunals.

The arbitration scheme suggested by the NPRM would impose secret dispute resolution on a case-by-case basis without appropriate reference and relation to other individual arbitrations. Significant disparities between carriers, shippers, origins/destinations, ports, and commodities, would be the natural result, as occurred in the late 19th Century. In short, the NPRM for arbitration would reverse the scheme for railroad regulation enacted in 1887.

To be sure, present day "cost" gimmicks and reliance upon cost comparisons may serve to disrupt natural rate relationships, such as the disaster visited upon railway employee interests as a result of the so-called Basin Electric decision.<sup>6/</sup> However, these unfortunate situations likely would multiply with decisions achieved through individual arbitration.

UTU-NY recognizes that the NPRM, and the views of a number of interests, oppose arbitration for major proceedings, and also would not appreciate arbitration for various types of disputes. However, limiting arbitration to minor proceedings is not a desirable outcome. The Board should reject arbitration as an administrative function of the agency. The funds expended to appoint arbitrators is not an adequate substitute for reinstatement of the Administrative Law Judge (ALJ) process. Board staff

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<sup>6/</sup> See: Ex Parte No. 705, Competition in the Railroad Industry (Stmt. of R.A. Scardelletti, Pres. TCU/IAM, June 3, 2011).

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would naturally prefer control over arbitrators, rather than have experienced ALJs. The later often assist Board Members. UTU-NY would prefer Government responsibility, rather than private sector personnel, be the front line of the administrative process, even if the private personnel are retired or former Government personnel appointees.

## II. THE NPRM HAS MANY FEATURES THAT WOULD BE UNDESIRABLE

The NPRM contains a number of undesirable features, even if one would support expanded mediation or arbitration, which UTU-NY does not at this time. At the outset, UTU-NY must emphasize the lack of rail industry and practitioner support for changing or extending the arbitration "program." The NPRM's reference to the STB's Rail Customer and Public Assistance Program (RCPA), as something for which "there appears to be a consensus" to further promote is not shared by UTU-NY; however, the NPRM declines to offer proposals for refining or expanding RCPA at this time, so UTU-NY will not submit extensive comments on the RCPA. (RCPA, 6).<sup>7/</sup>

1. Mediation. The NPRM proposes to permit STB mediation for labor protection disputes. (NPRM, 6). UTU-NY opposes this authority, over labor-management disputes, which is best left to other agencies or other statutes or private resolution. Ironical-

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<sup>7/</sup> It appears that RCPA is often engaged in service matters over which the STB does not have statutory authority. Prior to ICCTA, service matters frequently were handled by state transportation agencies as local matters. The provisions of 49 U.S.C. 10501 seem to supersede state jurisdiction over many such traditional matters, but do not confer authority in the STB. Of specific interest to rail employees, RCPA sometimes involves itself in employee protective matters at issue within employee subordinate organizations.

ly, the NPRM would not permit arbitration of matters involving labor protective conditions. (NPRM, 7,14 §1108.2(b)).

2. Arbitration. The NPRM would exclude arbitration of adjudicatory disputes in which the Board is statutorily required to determine the "public convenience or necessity" (PCN), and implementation of related labor protective conditions. (NPRM, 7). UTU-NY suggests that "public interest" be mentioned, so that the exclusion would read "PC&N or Public Interest." The two terms are frequently interchangeable, have an historical basis, and possess a similar meaning, such that it would be unfair not to embrace "public interest" within the exception for use of arbitration.

3. Unapproved Transactions. The NPRM has few restrictions concerns the applicability of matters subject to the Board's arbitration. Arbitration is wide-open. (NPRN, 15-16). This is impermissible. The arbitration should be confined to a transaction otherwise subject to the STB's initial jurisdiction, and which would allow a proposed intervenor to dismiss the arbitration, and force a formal proceeding. The rail carriers, or parties, cannot themselves agree to arbitration at the STB, instead of elsewhere, where the STB does not have authority to entertain a complaint or other proceeding, either by statute or other authority.

An example of the potential adverse impact on employees is perhaps illustrated by the recent action of the Director, Office of Proceedings, in Docket No. 42135, Denver Rock Island Railroad Company v. Union Pacific Railroad Company, decided May 10, 2012 (served May 11, 2012), sending a dispute to arbitration, pursuant to the Rail Industry Agreement (RIA), between two rail carriers. This dispute could have an impact upon a shift in work or work

opportunities between the employees of two or more rail carriers. The RIA agreement apparently provides for arbitration under the Board's arbitration rules, so the Board has assumed jurisdiction to provide for arbitration. Yet the STB specifically did not approve the non-rate provisions of the RIA agreement. See: Assn. of American Railroads, Et Al.-Agreement-49 U.S.C. 10706, 3 S.T.B. 910 (1998).<sup>8/</sup> UTU-NY is not involved in the RIA proceeding, yet is concerned about rail carrier invocation of arbitration.

CONCLUSION

The rules proposed in the NPRM should not be adopted.

Respectfully submitted,



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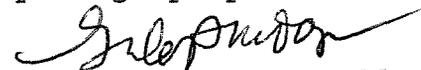
May 17, 2012

Attorney for Samuel J. Nasca

Certificate of Service

I hereby certify I have served a copy of the foregoing upon all parties of record by first class mail postage prepaid.

Washington DC



Gordon P. MacDougall

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<sup>8/</sup> Moreover, the subordinate UTU unit on BNSF opposed approval of the RIA agreement. 3 S.T.B. at 910, 912.