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Reply Comments of the American Chemistry Council
on
Surface Transportation Board Docket No. EP 730
Revisions to Arbitration Procedures
Notice of Proposed Rulemaking

July 1, 2016

The American Chemistry Council (ACC) is pleased to provide reply comments on the Surface Transportation Board's (STB or Board) proposed revisions to its arbitration procedures. ACC represents the leading companies in the business of chemistry. The chemical industry is one of the largest customers of the U.S. freight rail system. Thanks to the shale gas revolution, our industry is projected to grow significantly in the coming years, with more than \$140 billion in new factories, expansions, and restarts already announced, meaning that our reliance on the U.S. freight rail system will only increase in the future.

ACC commends the Board for proposing revised arbitration procedures as an important step to implement the *STB Reauthorization Act* and provide a more useful arbitration program. We again urge the Board to consider our specific recommendations and to continue seeking innovative solutions to minimize barriers and make arbitration as accessible as possible under the law. These reply comments address additional issues raised in opening comments, primarily those submitted by the Association of American Railroads (AAR).

Arbitration Should Not Be Limited to Cases When Market Dominance Is Conceded

ACC does not agree with comments by the Association of American Railroads (AAR) that arbitration should be available only when market dominance is conceded. When market dominance is in dispute, parties should have the option to bifurcate the case into a market dominance proceeding before the Board and, if market dominance is demonstrated, an arbitration process to determine rate reasonableness. We concur with the AAR that this would add complexity to a case. However, it is possible that parties would still see this as a preferable option to litigating both market dominance and rate reasonableness before the Board. There is no benefit to foreclosing consideration of this alternative.

AAR's Proposed Changes to Sections 1108.9 and 1108.11 Are Not Warranted

In its opening comments, the AAR asks the STB to add language stating that arbitration decisions "must give due consideration to the need for differential pricing to permit a rail carrier to collect adequate revenues." Although the AAR acknowledges that this language already has

been included by the Board in proposed § 1108.4(g), AAR seeks to repeat this language in §§ 1108.9 and 1108.11. ACC believes this addition is both unnecessary and inappropriate.

Section 1108.9(a) implements § 11708(d) of the statute, which does not contain this additional language. Therefore, adding this language to § 1108.9(a) could be misconstrued to be an added requirement beyond what is in the statute. Consistent with the statute, the proposed rule already requires decisions to be “consistent with sound principals of rail regulation economics.”

Differential pricing is well-recognized in railroad regulation economics. However, it is not the only sound principle of rail regulation economics and the statute does not require this to be the exclusive consideration. If included by itself, this language could inject an implicit bias towards the economic interests of railroads.

The potential for bias is even greater for § 1108.11. This section of the proposed rule implements the standards of review that Congress adopted in § 11708(h) of the statute. Congress narrowly defined the Board’s standard for review by focusing on statutory violations and abuse of discretion to prevent parties from simply re-litigating an unfavorable ruling. If the Board were to adopt AAR’s proposal, it effectively would be broadening the standard of review that Congress adopted. That standard requires the decision to be consistent with “sound principles of rail regulation economics,” among other provisions. In contrast, AAR’s added text comes from a provision of the statute that requires arbitrators to “consider” the Board’s methodologies for rate cases, giving “due consideration” to the need for differential pricing. Requiring consideration of certain factors is not the equivalent of a standard of review. The Board should not elevate the former to the status of the latter by adopting AAR’s proposal.

If STB chooses to add AAR’s proposed language to Section 1108.9(a), the Board should also include the following text:

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)) and the need maintain reasonable rates where there is an absence of effective competition and where rail rates provide adequate revenues.

This language would appropriately balance the U.S. freight rail policy goals related to railroad revenues and reasonable rates in 49 USC §10101. It is also consistent with the economic principles of rail regulation adopted in the Board’s 1985 *Coal Rate Guidelines*.

STB Should Protect Confidential Information Contained in Draft Decisions

ACC shares the concern raised by the AAR regarding the potential for a draft decision to contain highly confidential information. Such information should be made available only to opposing outside counsel and not be made available to in-house personnel. We support AAR’s proposed revision to Section 1108.9,

The arbitrator shall provide an unredacted draft of the arbitration decision to the parties to the dispute, in accordance in accordance with any protective orders governing the release of confidential information pursuant to Section 1108.7(e).

STB Should Adopt Objective Qualification Criteria for Arbitrators

In its opening comments, AAR states that the Board should “revise its proposal and establish an objective set of criteria that would qualify individuals to serve as arbitrators.” We agree that all qualification criteria should be objective. However, the criteria proposed by AAR include a requirement for individuals to demonstrate “a professional reputation for fairness, integrity and good judgment.” ACC questions how an individual’s “professional reputation” can be objectively measured, and how such criteria could be practically applied.

ACC supports AAR’s recommendations for developing a transparent process to add qualified individuals to the roster. We agree that the Board should post applications submitted by potential arbitrators on its website, and allow a set time for objections. If any objection is raised, the Board could issue a written decision setting forth its reasons for accepting or rejecting the application.

The Strike Process Proposed By AAR for Selecting Arbitrators Is Reasonable

In our opening comments, ACC supported the Board’s proposed rules for the parties’ selection of arbitrators. In its opening comments, the AAR suggests an alternative process that: 1) provides an opportunity to remove individuals from the roster for cause in a particular dispute, and 2) requires parties to submit a final-offer list of potential arbitrators that are agreeable to them. ACC believes that the AAR proposal is reasonable and worthy of consideration. However, if this alternative process is adopted, the standard for removing any arbitrator from the roster must be defined narrowly and require clear evidence of bias.