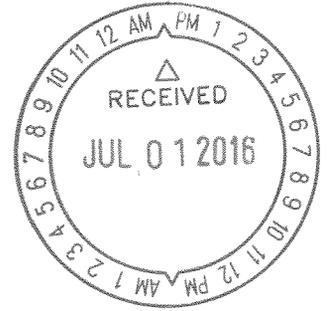


ORIGINAL

Before the
SURFACE TRANSPORTATION BOARD



EX Parte No. 730

REVISIONS TO ARBITRATION PROCEDURES

241034

REPLY COMMENTS

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Attorney for Samuel J. Nasca

July 1, 2016

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REPLY COMMENTS

Preliminary Statement

Samuel J. Nasca,^{1/} for and on behalf of SMART/
Transportation Division, New York State Legislative
Board (SMART/TD-NY), submits these Reply Comments
in response to the initial comments of other parties,
submitted on or about June 13, 2016.^{2/}

^{1/} New York State Legislative Director for SMART/TD,
with offices at 35 Fuller Road, Albany, NY 12205.

^{2/} In addition to SMART/TD-NY, six comments were filed,
although an unidentified, unknown, and unsigned document
from "Rail Customer Coalition" is among these six. This
SMART/TD-NY reply does not address such unlawful filing.
Cf. 49 CFR 1102.1, 1103.4(b), 1104.1(b), 1104.4.

I. THERE IS LITTLE SUPPORT FOR THE BOARD'S NEW ARBITRATION RULES

The minimal response to the Board's Notice of Proposed Rulemaking (NPRM), as indicated by only six submissions, confirms the SMART/TD-NY initial comments that arbitration of rate disputes by the STB is not favored by the transportation industry. (SMART/TD-NY, 6/13/16, at 6-7). The pitiful number of responses in this proceeding is in sharp contrast with the number of filings in previous attempts at arbitration.^{3/}

The problem is suggested to stem, in part, from the Board's deference to the views of the Railroad-Shipper Transportation Advisory Council (RSTAC), where as indicated by RSTAC's minutes, meetings frequently are held without participation by Board members--who are still referred to as "commissioners" more than 20 years after termination of the Interstate Commerce Commission. It would appear preferable for the Board to make its views public to Congress directly, rather than by Staff through RSTAC. This may more likely permit subsequent

^{3/} Cf. Ex Parte 560; Ex Parte 586; Ex Parte 699.

presentation of public comment to the Congress and reduce the likelihood of unwise legislation.

II. THE BOARD SHOULD NOT ADOPT WAIVER OR STIPULATION OF MARKET DOMINANCE

The five entities, other than SMART/TD-NY, filing initial comments, all favor allowing parties to waive or stipulate that market dominance exists, so as to satisfy the statutory requirement that the binding arbitration process in rate disputes be available only if the rail carrier has market dominance as determined under 49 U.S.C. 10707. These parties would agree to stipulate market dominance exists regardless of the facts.^{4/} ACC at 3; NITL at 2; NGFA at 3-4), Growth Industry at 2; AAR at 3.

Although parties may stipulate or waive market dominance in rate cases conducted by the Board's normal process, the Board should not extend such option to arbitration disputes. The standards governing rate decisions are more strict in direct STB actions, whereas

^{4/} The Board suggested the partes may comment on any opportunity for waiver of the market dominance requirement in rate arbitration. (NPRM, 3).

rate arbitration decisions have a loose "consistent with sound principles of rail regulation economics" standard. 49 U.S.C. 11708(d). Moreover, instead of complaints under Board practice, rate arbitration could be by written consent or notice. 49 USC 11708(c); NPRM 12.

The voluntary arbitration process, with looser standard for decision, lack of intervention, along with an absence of traditional safeguards, and in the face of a statutory requirement for market dominance, renders it mandatory that the Board not deviate from the statutory requirement that rate arbitration may only be utilized with market dominance.

III. ORAL ARGUMENT SHOULD BE HELD

Oral argument is requested due to the issues involved.

Respectfully submitted,


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July 1, 2016