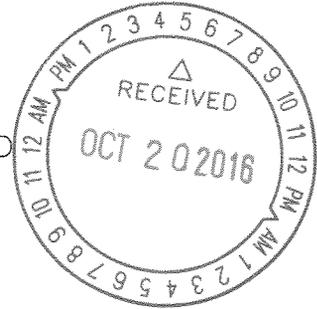


Before the
SURFACE TRANSPORTATION BOARD



Ex Parte No. 730

REVISIONS TO ARBITRATION PROCEDURES

241831

PETITION FOR RECONSIDERATION

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Attorney for Samuel J. Nasca

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Preliminary Statement

Samuel J. Nasca,^{1/} for and on behalf of SMART/Transportation Division, New York State Legislative Board (SMART/TD-NY), submits this petition for reconsideration for the decision of the Surface Transportation Board (STB or Board), decided September 28, 2016 (served September 30), 81 Fed. Reg. 69410-17 (Oct. 6, 2016), as corrected and served October 11, 2016).^{2/}

The STB's decision constitutes material error, and the STB is requested to make such determination, 49 CFR 1115.3.

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

^{2/} Corrected decision not published in Federal Register.

GROUNDNS FOR RECONSIDERATION

SMART/TD-NY has a particular interest in the labor provisions of the new and revised arbitration rules, particularly in light of the enabling legislation's command that the arbitration rules of P.L. 114-110, §13, shall not apply to disputes involving the enforcement of labor protective conditions, now codified at 49 U.S.C. § 11708. See also: 49 CFR 1108.(2)(b)(2015ed), which extends the prohibition to all disputes involving labor protective conditions.

1. Standard for Review of Labor Arbitration Awards. The decision imposes a standard for review of labor arbitration cases involving employee protective conditions-the so-called Lace Curtain proceeding cited at 3 I.C.C.2d 729 (1987), aff'd 862 F.2d 330 (D.C. Cir. 1988). Decision, 8, 17-18). The STB reasons that the lack of a standard in its existing regulations is due to an oversight over three years ago in Ex Parte No. 699, supra at 8. The decision errs in the imposition of a standard in the instant proceeding instituted to carry out the mandate of P.L. 114-110, §13, involving disputes involving employee protective conditions. Moreover, the

Lace Curtain decision, made 30 years ago, involved an Oregon Short Line Article I, Sections 11-12 arbitration, rather than the more numerous disputes arising under Article I, section 4 referee decisions. As borne out in a number of the agency's own citations, the agency does not have labor dispute expertise to act without the input of parties versed in such disputes resolutions.

The STB should vacate that portion of the proposed revised §1115.8 beginning with "For labor," and ending with "1988."

2. Power of STB to Delegate Authority to Arbitrators to Adjudicate Disputes. The decision cites the three-judge appellate court action in Association of American Railroads v. Surface Transp. Bd., 162 F.3d 101, 107 (D.C. Cir. 1998), for the proposition the Board can delegate authority to arbitrators to adjudicate disputes-subject to Board review-over appropriate employee conditions. (Decision, 8).

The cited court action was the subject of three separate opinions, and was bottomed upon "circuit precedent" in dealing with arbitration for disputes in labor relation. 162 F.3d at 107. However, the Board's

delegation of labor disputes is not to arbitrators, but rather to arbitration. The arbitrators in the labor field are not named by the STB, but are named by the parties, or by the National Mediation Board. Cf. New York Dock, 360 I.C.C. 60, 78, 80; Oregon Short Line, 360 I.C.C. 91, 99, 101.

It is error for the STB to claim it can refer disputes over labor protection to arbitrators.

3. Market Dominance and Intervention. Railroad employees have experienced concern with rail rate disputes. However, the decision permits parties to arbitration of rate disputes to concede the threshold issue of market dominance. (Decision, 6-7). This ability to concede market dominance can lead to all sort of discriminatory and preferential treatment between carriers and shippers throughout the Nation, inasmuch as there are many competing sources of origins and destinations for numerous commodities and services.

The STB's action to now allow waiver of market dominance for some, while others are not in arbitration, is contrary to the express language of P.L. 114-110 that the arbitration process is available only to the parties

if the rail carrier has market dominance as determined under section 10707. 49 U.S.C. 11708(c)(1)(C).

The STB's action adds to the discriminatory and undemocratic feature of its arbitration by denying intervention to third parties, claiming that to permit the usual intervention in arbitration proceedings would contravene the voluntary and informal nature of the arbitration process. (Decision, 8).

The STB's decision errs. It fails to recognize the importance of the character of the Nation as a large common market, and the benefit from the free flow of commodities and services. Rail employees, communities, ports and the public must be heard regarding rail rates which may affect their interests.

CONCLUSION

The Board should grant reconsideration and revise or cancel the revisions as requested herein.

Respectfully submitted,


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October 20, 2016

Attorney for Samuel J. Nasca

CERTIFICATE OF SERVICE

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

Washington DC



Gordon P. MacDougall