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January 3, 2002

Via Messenger

The Honorable Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, N.W.
Washington, D.C. 20423-0001



RE: *STB Ex Parte No. 586 Arbitration—Various Matters Relating To It's Use As An Effective Means Of Resolving Disputes That Are Subject To The Board's Jurisdiction*

Dear Secretary Williams:

Enclosed please find an original and ten (10) copies of the Motion to Reply Comments of The Dow Chemical Company to be filed in the above-referenced case. Also, enclosed is one additional copy of the Motion for stamp and return. Kindly date-stamp the additional copy for return to this office by messenger.

If you have any questions, please do not hesitate to call. My direct dial number is (202) 263-4107.

Sincerely,

Jeffrey O. Moreno
Counsel for The Dow Chemical Company

ATTACHED
Office of the Secretary

204266

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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

**REPLY COMMENTS OF
THE DOW CHEMICAL COMPANY**



ENTERED
Office of the Secretary

JAN 3 2002

STB
MAIL ROOM

The Dow Chemical Company (“Dow”) respectfully submits these Reply Comments in response to the inquiry of the Surface Transportation Board (“STB” or “Board”) into issues related to requiring, through legislation, binding arbitration of small rail rate disputes, which was served in the above-captioned proceeding on September 20, 2001. Dow submitted initial comments on November 23, 2001.

I. The Vast Majority of Commenters Support Legislatively-Mandated Binding Arbitration of Small Rate Disputes.

Arbitration of small rate disputes is not a panacea, but if implemented properly, it will make statutory remedies more attainable for a greater number of shippers who currently pay unreasonably high rates. Dow shares the sentiments expressed by the Western Coal Traffic League (“WCTL”) that, in order to work, arbitration must be expedited and have streamlined evidentiary guidelines.¹ Moreover, Dow agrees with

¹ WCTL at 10.

WCTL that the unavailability of existing statutory remedies also is due to other STB decisions that have unduly restricted the availability of bottleneck and competitive access relief.² Those decisions, ironically, have forced shippers to rely more upon the Board than upon private sector dispute resolution. Arbitration is only the first step toward making statutory remedies widely available to every shipper for whom those remedies are designed to protect.

The vast majority of commenters echo Dow's concerns and sentiments regarding arbitration of small rate disputes. Of particular common concern is the Board's focus on small shippers, as opposed to small rate disputes. This focus is improper because large shippers who have small rate disputes are just as vulnerable as small shippers.³ As PPL observes, an emphasis on small shippers establishes an unjustified presumption of no market dominance for large shippers.⁴

NGFA points out that the Board's proposed system-wide carload measure of eligibility is inconsistent with market dominance determinations. Market dominance is measured for the challenged rate and is commodity and geographic specific.⁵ By contrast, a system-wide carload measure mixes commodities and rates beyond those challenged by the shipper. There is no rational basis to assume that a shipper who tenders a greater number of cars to a railroad has greater leverage. The Board does not recognize such leverage in its market dominance determinations and should not do so to determine arbitration eligibility.

Most commenters also favor some form of final offer arbitration.⁶ Although the suggested procedures vary, the commenters favor shipper-option arbitration, prompt resolution, limited or tightly controlled discovery, and appeals only under Federal

² *Id.*

³ PPL Generation ("PPL") at 4; National Grain and Feed Assoc. ("NGFA") at 4-5; The Fertilizer Institute ("TFI") at 6; American Chemistry Council ("ACC") at 2; Alliance for Rail Competition ("ARC") at 5-6; National Industrial Transportation League ("NITL") at 7-10.

⁴ PPL at 4.

⁵ NGFA at 6.

⁶ PPL at 7; NGFA at 10; TFI at 10; ACC at 2-3; ARC at 6; NITL at 12.

Arbitration Act standards.⁷ Many commenters also oppose the use of Constrained Market Pricing factors.⁸

In summary, the comments reflect widespread concern, across various shippers of different commodities by rail, over the unavailability of existing statutory remedies to the vast majority of captive shippers. They all agree that mandatory, binding arbitration, if implemented properly, is a valuable means to expand these remedies to a greater number of shippers. Dow urges the Board not to dismiss these concerns lightly and to support legislatively mandated arbitration of small rate disputes.

II. The Railroads Desire to Preserve the Expensive and Lengthy Status Quo That Effectively Has Deprived Most Shippers of Their Statutory Remedies.

The railroads commented from two perspectives. Canadian National and Canadian Pacific ("CN/CP") jointly submitted comments that were mirrored by the Association of American Railroads ("AAR"). The only other railroad commenter, the Genessee & Wyoming ("G&W"), presented a shortline perspective. These comments seek to preserve the status quo.

CN/CP and AAR, not surprisingly, object to mandatory, binding arbitration of small rate disputes. CN/CP, in particular, attack Canadian style final offer arbitration as complex, costly, time-consuming, biased toward shippers, and overly confrontational.⁹ If these were reasons for rejecting arbitration, then the Board should have rejected its current rate reasonableness standards long ago. Constrained Market Pricing is more complex, more costly, more time-consuming, and more confrontational than arbitration ever could become. All of these factors have biased the current system in favor of railroads, which is one reason why there is a pent up demand for an arbitration alternative.

⁷ WCTL at 10; PPL at 7-8; NGFA at 10-11; TFI at 9-11; ACC at 2; ARC at 5-7; NITL at 11-12.

⁸ PPL at 6; TFI at 10; NITL at 12.

⁹ CN/CP at 1-2.

Moreover, the ACC presents evidence that final offer arbitration has been successful in Canada.¹⁰ This evidence comes from the Canadian Chemical Producers Association who note that the process promotes settlement. Of particular significance, more than half of the arbitrations initiated in Canada have reached settlement. This evidence stands in stark contrast to the self-serving comments of CN/CP, who have a vested interest in preserving the status quo in the United States.

AAR makes the absurd proposition that the need for arbitration is illusory because small shippers are not using the existing arbitration procedures or small rate dispute procedures.¹¹ Shippers are not using those procedures because they suffer from the same types of procedural deficiencies as a full-blown rate case. Moreover, the existing arbitration procedures are not mandatory, are appealable, and add an extra layer of cost and procedure.

AAR also objects to mandatory arbitration because it would not foster private sector resolution of disputes due to its coercive nature.¹² This argument assumes, however, that the current system is any better at fostering private sector dispute resolution. Clearly it is not. The railroads are able successfully to use the existing costly and time-consuming rate reasonableness procedures to discourage all but the largest and most lucrative rate complaints. A railroad dictating terms to a captive shipper is not private sector dispute resolution.¹³ If the railroads knew that statutory remedies were more readily available to shippers, it stands to reason that they might be more willing to engage in private dispute resolution, as appears to be the case in Canada.

In place of arbitration, the AAR and CN/CP propose non-binding mediation.¹⁴ This is little more than an attempt to preserve the status quo, while appearing to be conciliatory and compromising.

¹⁰ ACC at 3.

¹¹ AAR at 4-5.

¹² AAR at 5.

¹³ ARC at 2-4.

¹⁴ AAR at 11; CN/CP at 9-11.

From a shortline perspective, G&W opposes mandatory arbitration because that would subject shortlines to more rate challenges. This, in turn, G&W argues, will give large shippers the same leverage over shortlines that Class I railroads now exercise over shippers in rate cases.¹⁵ This argument, however, is a red-herring. That same purported leverage exists for large shippers today against shortlines under existing rate case procedures, but there has not been a panoply of rate cases brought against shortlines. Shortlines are subject to similar rate pressures from Class I railroads as shippers, and both groups share many similar concerns. For example, most Class I railroads dictate the divisions of a shortline on joint movements. Any rate case arbitration will be brought against the Class I railroad who sets the divisions, not against a shortline.

IV. Conclusion

For the foregoing reasons, Dow supports legislative efforts to establish mandatory arbitration for small rail rate disputes. Dow urges the Board to recognize that large shippers have "small rate disputes" that should be eligible for arbitration. Dow supports Canadian style Final Offer Arbitration of rail disputes. Discovery must be limited and conducted under strict guidelines. Decisions must be prompt and appeals should be limited. Only by eliminating the railroads' ability to discourage rate challenges through costly and time-consuming barriers will all shippers truly benefit from the requirement that rates be reasonable.

Respectfully submitted,



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January 3, 2002

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¹⁵ G&W at 4.