

BEFORE THE
SURFACE TRANSPORTATION BOARD

Ex Parte No. 699

ASSESSMENT OF MEDIATION
AND ARBITRATION PROCEDURES

COMMENTS OF
CONSUMERS UNITED FOR RAIL EQUITY

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In its Notice and Request for Comments (“Notice”) served August 20, 2010 in this proceeding, the Surface Transportation Board (“Board”) sought comments on its mediation and arbitration procedures. Consumers United for Rail Equity (“CURE”) hereby submits these comments in response to the Notice.

Interest of CURE

CURE is an incorporated, non-profit advocacy group with the single purpose of seeking federal rail policy favorable to rail-dependent shippers, who are often referred to as captive rail customers or captive shippers. CURE is sustained financially by the annual dues and contributions of its members, who are individual captive rail customers and their trade associations. Included in CURE are electric utilities that generate electricity from coal, chemical companies, forest and paper companies, cement companies, agricultural entities, various manufacturers and national associations, including both trade associations and associations of state governmental institutions whose members work to protect consumers. CURE members may invoke the Board’s dispute-resolution procedures, and for that reason, have an obvious interest in this proceeding.

Background

In the Notice (at 2), the Board sought comments on the following:

“The Board seeks input regarding measures it can implement to encourage greater use of mediation and arbitration procedures, including changes to the Board’s existing rules and establishment of new rules. The Board also seeks input regarding possible changes to its rules to permit the use of Board-facilitated mediation procedures without the filing of a formal complaint. In addition to being reviewed by the Board, the Railroad-Shipper Transportation Advisory Council (RSTAC) will review the comments and prepare a report to the Board reflecting the input of its members on this issue.”

In its Summary to the Notice (at 1), the Board further explained:

“Depending upon the Board’s assessment of the comments received, the Board may propose revisions to its current rules or propose new rules in order to encourage the use of mediation and arbitration in the resolution of disputes. If so, the proposed changes or new rules would be published and made available for review and comment in a subsequent notice.”

The Board’s Notice and request for comments is commendable, because there are many captive shippers, including members of CURE, who do not file complaints with the Board due to: (1) the high cost of such proceedings (in legal and consulting fees, including a likely appeal if the shipper prevails), (2) great concern over retribution by the railroad(s) to which the shipper is captive, and (3) the reality that many shippers’ businesses are too dynamic, and the need for a ruling on a rail rate is too immediate, to permit the shipper to accept a common carrier rate (which is almost certainly higher than any contract rate the shipper would be offered, thereby making it more difficult for the shipper to be competitive in its own industry) simply to be able to challenge the rate at the Board.

However, mediation and arbitration are two very different procedures, and there are reasons that many shippers have invoked the Board’s mediation procedures, but no shipper has ever invoked the Board’s arbitration procedures. We would like to provide some perspective on those reasons herein. We understand arbitration, as it is used in this country in any setting, generally to be voluntary on the part of both parties. (Where “compulsory arbitration” exists, it generally exists as a result of a contract or other agreement between two or more parties to use that form of alternative dispute resolution, so in that sense, even “compulsory arbitration” is voluntary.) Because rail customers are not defendants in STB proceedings, CURE’s Comments will address those situations

where a shipper is the party – whether a “complainant,” “petitioner,” or “plaintiff” – in a proceeding brought to the STB.

Comments

1. Mediation. Mediation is, generally speaking, a non-binding process, usually voluntary,¹ for a defined period of time, before a neutral party. The mission of mediation is to assist the parties in attempting to resolve their dispute in a way that not only may eliminate the dispute that the parties are, or may be, unable to resolve on their own, but which also almost necessarily fosters an improved relationship between the parties. *See* 49 C.F.R. § 1109.1 (inviting parties to any Board proceeding to seek mediation or arbitration of the matters at issue in the proceeding). Various parties, generally shippers, have asked the Board for mediation in STB proceedings (other than SAC proceedings) in which mediation is not compelled.² The very fact of such filings is testament to the value – both perceived and real - of mediation.

Moreover, the Board’s proposal to permit requests for mediation by shippers without the necessity of filing a complaint is commendable, because the very fact of preparing and filing a complaint challenging a rate as unreasonable carries with it three

¹ The Board does compel the parties to a large – *i.e.*, “stand-alone cost” (“SAC”) -- rate proceeding, to participate in mediation, so in that sense, mediation at the STB in some instances is not “voluntary.” 49 C.F.R. § 1109.4. CURE does not object to the Board requiring certain disputes to be mediated. Indeed, CURE believes that the Board should make it clear that it is willing to provide mediation in any dispute before it is brought by a shipper (given the nature of such disputes). In contrast, various matters brought by railroads are either uncontested or do not lend themselves to mediation (such as mergers and acquisitions).

² *E.g.*, *Bell Oil Terminal, Inc. v. BNSF Railway Co.*, STB F.D. 35302 (served June 4, 2010) (granting parties’ joint Petition for Mediation); *see also*, May 19, 2010 Joint Petition for Mediation in F.D. 35302 at 2 n.2 (citing various STB proceedings in which mediation was successful, including *BP Amoco Chemical Co. v. Norfolk Southern Ry. Co.*, the first Board rate proceeding in which an STB employee was the mediator).

unavoidable facts: (a) an attorney and consultants must now be retained, whereas previously the dispute may have involved only the in-house employees of the shipper and railroad, (b) additional transaction costs (including attorney's fees and consultants' fees) will be involved, and (c) the commercial relationship between the shipper and railroad is likely to suffer, at least for a time, because they are now in litigation against each other, with the high probability that the act of presenting a case, or defending it, will cause hard feelings to develop between or among the parties and their employees.

Accordingly, the Board should provide for informal mediation, even before the filing of a complaint alleging a rate or practice is unreasonable, overseen by Board Staff. Such a process could be as informal as service disputes are now, *i.e.*, with the submission of an email to Board Staff assigned to mediate service disputes.

Of course, if parties desire to use mediation in Board proceedings in which it is not already compulsory, the Board should amend its Rules of Practice to permit such mediation to occur simply upon request of any party to the proceeding, by so stating (together with a short and clear description of the dispute requiring Board intervention) but without the necessity to prepare and submit argument to justify the request for mediation.³ If the Board simply states that it will always grant a request for mediation made by one party to a proceeding pending before it (assuming that the matters at issue are properly before the Board), if the other parties to the proceeding agree to mediation, the Board will then eliminate the necessity for preparing a pleading attempting to justify the request for mediation.

³ *See, e.g.*, the May 19, 2010 Joint Petition for Mediation in STB F.D. 35302, which took some several hours of one of the counsel appearing herein on behalf of CURE, given the need to arrive at language mutually acceptable to both Bell Oil and BNSF Railway Company.

Parties are generally not concerned about the identity of the mediator, and any potential bias his or her background implies, because any bias – known or undisclosed – may simply mean that the proceeding is less likely to settle, with any party free to say “no” if the result advocated by the mediator is not acceptable to that party.

2. Arbitration. Arbitration is, however, an entirely different matter. Arbitration is generally binding,⁴ whereas mediation is generally non-binding.⁵ For that reason, the parties generally are far more concerned about the identity and background of the arbitrator(s), because the decision will be binding and is generally non-appealable, outside the Board’s processes. Intermountain Power Agency v. Union Pacific R.R. Co., 961 P.2d 320 (Utah 1998) (holding that the standards for review of an arbitration award are very restricted). Outside the Board’s processes, arbitration awards (even if accompanied by written decisions) generally cannot be challenged on judicial review unless there is “fraud” or “bias” toward one side or the other. In other words, unlike a decision of the Board or another regulatory agency, one cannot cause an irrational arbitration award to be reversed or set aside on judicial review, simply by showing that the decision was arbitrary and capricious (that is, irrational, unsupported by the evidence, contrary to other policies of the agency, the product of a process that cannot be ascribed to agency expertise, or otherwise contrary to law). 9 U.S.C § 9 (judicial review of awards in arbitrations brought under the Federal Arbitration Act is limited to clear and convincing evidence of fraud or bias).

⁴ See 49 C.F.R. § 1108.9 (b)(providing that by “agreeing to arbitrate pursuant to these procedures, each party agrees that the decision and award of the Arbitrator shall be binding and judicially enforceable in law and equity in any court of appropriate jurisdiction, subject to a limited right of appeal to the STB as provided below.

⁵ See 49 C.F.R. § 1109.4 (referring to mediation as “non-binding”).

However, notwithstanding the potential for an arbitrary arbitration award that in nearly all circumstances cannot be challenged on judicial review, many parties – both shippers and railroads – have chosen to use arbitration. Despite the risk of an arbitrary arbitration award, they do so for various reasons, including a desire for confidentiality, the perception that arbitration is cheaper than litigation, the presumed expertise of the arbitrator(s), and the fact that the issuance of an arbitration award generally resolves the dispute without an appeal.⁶ Where parties have chosen arbitration as their contractual process for resolving their disputes, CURE obviously does not object to that or propose that the Board become involved in such matters (nor does CURE understand that the Board is suggesting that it should be involved in such matters). Indeed, under the statute, such parties, because their contract provides for arbitration, have necessarily chosen to accept the risk of an irrational arbitration award, for any number of reasons.

Also, such entities as the National Grain and Feed Association (“NGFA”), under an agreement between NGFA and the railroads, have agreed to arbitrate certain disputes, in at least some instances without the necessity of hiring an attorney. Obviously, CURE has no objection to NGFA and its members and various railroads agreeing to arbitrate disputes between or among them, just as CURE has no objection to shippers agreeing to arbitration in their railroad transportation contracts.

Moreover, as the Board knows, S.2889, the bipartisan compromise Surface Transportation Board Reauthorization Act of 2009, that was unanimously ordered reported on December 17, 2009 by the Senate Commerce, Science and Transportation

⁶ Counsel for this pleading have not seen such a contract that provides for STB-sponsored arbitration. Among the reasons for that may be that shippers who choose to submit a dispute to arbitration generally do not intend to litigate the resulting award, whereas in Board-administered arbitration proceedings, an appeal to the Board is provided by rule (49 C.F.R. § 1108.11).

Committee, addresses the issue of arbitration. S.2889 provides for arbitration of certain disputes, not to exceed \$250,000 and two years in duration, and subject to review by the Board to determine if the arbitration award was consistent with the statute and the limitations on such arbitration proceedings. CURE supports S.2889, including the arbitration provisions, and applauds the efforts of the bipartisan leadership of the Senate Commerce, Science and Transportation Committee to provide alternative means of resolving disputes between shippers and railroads, so long as the shipper can choose the procedure that best fits its circumstances.

However, Board-supervised arbitration is necessarily different than arbitration elsewhere. First, established “alternative dispute resolution” services, such as that of the American Arbitration Association (“AAA”), or JAMS, have rules that require the disclosure of any potential bias on the part of the arbitrator, whereas the current Board procedure does not address this important issue.⁷

⁷ In fairness, the Board’s response may be that those listed on its list of approved arbitrators (all of whom are from outside the Board) are not biased, for at least some disputes. But several of those on the Board’s roster of arbitrators previously were direct employees of the railroads, or exclusively (or nearly exclusively) represented railroads before the Board. Those individuals, although known to CURE counsel as upstanding members of the bar, would nevertheless be persons who could be presumed to be biased in favor of a railroad’s arguments. Yet, that person may believe that he or she could serve as an arbitrator without bias toward either party and would therefore not admit to being unqualified for service as an arbitrator in a shipper-railroad dispute, just because they once were employed by a railroad. Nevertheless, most shippers generally would not take the chance that such a person would be chosen to serve as an arbitrator. That is a major reason why STB-sponsored arbitration is not likely to be commenced.

In any event, although the Board’s rules do require that an arbitrator “be qualified” (49 C.F.R. § 1108.6(b)), there does not appear to be any means provided under the Board’s rules to ensure that an arbitrator will disclose any potential conflicts or matters that may give rise to the perception of a conflict, so that parties can make an informed decision about the possible bias or lack thereof of the potential arbitrator. An arbitrator who is selected can only be replaced at the behest of the parties “if both parties agree that the arbitrator should be replaced” (49 C.F.R. § 1108(e)). So, if a shipper selected someone from the Board’s roster of approved arbitrators who later, through his

Second, a decision of an arbitrator can be challenged before the Board, whereas in a private arbitration, the arbitration award generally cannot be challenged except on the narrowest possible grounds, which are almost never present. Moreover, the standard of review by the Board, while not *de novo*, is whether the result of the arbitration comports with the statute or the Board's policies in carrying out the statute. This Board standard permits challenges to the arbitration award not available in most private arbitrations. Therefore, arbitration before a Board-appointed arbitrator is likely to lead to a second layer of litigation that is not as likely in private arbitrations. And, following the Board's decision, under the current Board rules it would appear that the decision could be challenged in court, just as any other Board action is subject to judicial review.

Given that an arbitration before the Board may then lead to an additional layer (or two) of litigation, but under perhaps different "ground rules" than shipper parties are accustomed, it is no wonder that shippers and their counsel who do not have a private means of resolving their dispute with a railroad do not use the Board's current arbitration process. Rather, most shippers strongly prefer simply to file a complaint with the Board

or her actions, revealed a pro-railroad bias, it appears that the Board's rules do not permit one party (in that instance, the shipper) to seek replacement of that arbitrator.

Also, as the Board knows, many rail-dependent rail customers are on public record as criticizing certain ICC and Board actions that they believe are not sufficiently even-handed between shippers and railroads. Given that perception among a wide range of rail customers, it therefore stands to reason that many shippers would be reluctant to rely on someone on the Board's roster of arbitrators (*see* 49 C.F.R. § 1108.6(a)), if the arbitrator were to apply Board policies to which shippers are opposed. Yet, under the Board's rules, any award that an STB-provided arbitrator might issue could be appealed to the Board (thereby adding to the cost and time associated with the arbitration process); the Board would be expected to apply its interpretations of the Interstate Commerce Act to the dispute, including those policies of which shippers groups have long objected). This is yet another reason that Board-sponsored arbitration, at least as currently provided, is not likely to be invoked by shippers.

and rely on accepted procedures that are more predictable and may, in the end, prove to be less expensive.

Conclusion

CURE encourages the Board to promote mediation, by the Board's Staff, of disputes between shippers and railroads, even without the necessity of filing a complaint challenging a railroad rate or practice. CURE also supports arbitration either (1) when a shipper and one or more railroads have agreed to arbitrate a particular dispute in a contract, or (2) under an arbitration procedure that reflects the provisions in the arbitration sections of S.2889. CURE believes that the STB should ensure that complainants are not pressured to enter the arbitration process. Arbitration must always be voluntary when a rail customer brings a complaint to the Board. Any new rules should ensure that a shipper's ability to pursue direct relief from the Board through the agency's regular complaint processes is not impeded.

Respectfully submitted,



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