

BEFORE THE
SURFACE TRANSPORTATION BOARD

ASSESSMENT OF MEDIATION AND)	STB Ex Parte No. 699
ARBITRATION PROCEDURES)	
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COMMENTS OF THE WESTERN COAL TRAFFIC LEAGUE

The Western Coal Traffic League (“WCTL” or “League”)¹ hereby submits the following comments in response to the Notice and Request for Comments (“Notice”) that the Board served in the above-captioned proceeding on August 20, 2010. The Notice seeks “input regarding measures [the Board] can implement to encourage greater use of mediation and arbitration procedures, including changes to the Board’s existing rules and establishment of new rules.” Notice at 2. WCTL appreciates the opportunity to submit these comments.

¹ WCTL is a voluntary association, whose regular membership consists entirely of shippers of coal mined west of the Mississippi River that is transported by rail. WCTL members presently ship and receive in excess of 175 million tons of coal by rail each year. WCTL’s members are: Ameren Energy Fuels and Services, Arizona Electric Power Cooperative, Inc., CLECO Corporation, Austin Energy (City of Austin, Texas), CPS Energy, Kansas City Power & Light Company, Lower Colorado River Authority, MidAmerican Energy Company, Minnesota Power, Nebraska Public Power District, Omaha Public Power District, Texas Municipal Power Agency, Western Farmers Electric Cooperative, Western Fuels Association, Inc., Wisconsin Public Service Corporation, and Xcel Energy.

I.

SUMMARY

WCTL agrees with the Board that, private sector resolution of disputes as an alternative to the STB's formal processes, where possible, can provide the most favorable results for all involved parties. WCTL also agrees that the Board's past and present efforts to promote alternative dispute resolution ("ADR") programs have helped facilitate private resolution of disputes, and the League provides its views on possible continuing efforts to facilitate ADR, herein. However, the League respectfully submits that, as with the past efforts that have been attempted by the Board in pursuing mediation/arbitration, simply encouraging more ADR, without a demonstration from the Board that it is willing to strongly advance its statutory obligation to ensure that carrier rates, services, and practices are reasonable, will not adequately address continuing concerns from stakeholders about the lack of meaningful and efficient access to remedial relief from the agency. In this respect, ADR should not be seen as a replacement for the need for the implementation of robust and effective regulatory policies and decisions by the STB.

II.

DISCUSSION

A. The Board has Continually Promoted ADR Initiatives

In considering the development of possible new actions to promote ADR, it is useful to review past STB initiatives in this area and where the Board has been very

active. This is the sixth proceeding since the STB's inception considering ADR, under the leadership of four different Chairmen.² Under the leadership of then-Chairman Moran, in STB Ex Parte No. 560, *Arbitration of Certain Disputes Subject to the Statutory Jurisdiction of the Surface Transportation Board* (STB served Sept. 2, 1997), the STB adopted new rules providing for binding, voluntary arbitration of certain rate or practices disputes subject to the statutory jurisdiction of the Board. The new rules (implemented at 49 C.F.R. Pt. 1108), *inter alia*, addressed the matters subject to arbitration, the type of relief that might be granted, the selection of arbitrators, arbitration procedures, and fees and costs. *Id.*

In the Ex Parte No. 560 proceeding, as in each of the subsequent proceedings in which changes to ADR rules have been made, the Board lauded its new rules as a means of enabling parties to resolve disputes themselves, informally, saving costs and reducing litigation burdens. *Id.* at 1-2. Then-STB Chairman Morgan championed the new rules as “represent[ing] another effort by the Board to facilitate the resolution of disputes within its jurisdiction,” expressing the hope that the new rules would provide a means of promoting private-sector negotiation and facilitating resolution of controversies, adding that “the arbitration program adopted in this proceeding provides the kind of informal, private-party process that common-sense government should be

² Prior to the STB taking up ADR issues, the Interstate Commerce Commission implemented rules in the early 1990s to encourage the use of ADR procedures whenever agreed to by the parties and where practical to do so. *See Use of Alternative Dispute Resolution Procedures in Commission Proceedings and those in Which the Commission Is A Party*, 8 I.C.C.2d 657 (1992). Those rules are set forth at 49 C.F.R. Pt. 1109, as revised.

promoting, and that all interested parties seem to want.” *Id.* at 12-13.

Four years later, under the leadership of then-STB Chairman Nober, the STB again sought to advance use of ADR in 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*. Part of the purpose of the Ex Parte No. 586 proceeding was to “remind and encourage” parties to use the Board’s arbitration procedures. *Id.* (STB served Sept. 18, 2001) at 2. To further this objective of encouraging ADR procedures, the Board decided to add a requirement to its formal complaint procedures (at 49 C.F.R. Pt. 1111) that a complaint include a statement that the complainant considered seeking arbitration, but decided against it (or could not obtain the agreement of the other party or parties to the dispute). *Id.* (STB served May 22, 2002) at 2. As part of its Ex Parte No. 586 proceeding, the Board also updated its arbitrator list, and examined the issue of making possible recommendations to Congress on whether binding arbitration should be legislatively prescribed by Congress for small rate disputes. However, citing a lack of areas of consensus on possible Congressional recommendations, and “significant differences of opinion [on possible legislative changes and] . . . which types of disputes should be covered, what standards (if any) should apply, the scope of arbitral awards, and other matters,” the Board ultimately decided to take no further action to address binding arbitration or to provide policy recommendations to Congress. *Id.* at 2-3.

At this same time, the Board further promoted arbitration as part of its implementation of new rules governing applications for approval of railroad mergers. In STB Ex Parte No. 582 (Sub-No. 1), *Major Rail Consolidation Procedures*, (STB served June 11, 2001), the Board adopted a new rule (added at 49 C.F.R. § 1180(h)(5)) that, as part of the applicant railroads' Service Assurance Plans, the railroads must submit an appropriate protocol for handling claims relating to merger implementation and service problems, with "[c]ommitments to submit all such claims to arbitration . . . favored." *Id.* at 41. These procedures have not been used to date to WCTL's knowledge.

In 2003, the Board added a requirement (at 49 C.F.R. § 1109.4) in Stand-Alone Cost ("SAC") cases that any shipper bringing a SAC rate case must engage in non-binding mediation of its dispute with the railroad upon the filing of a complaint. *See* STB Ex Parte No. 638, *Procedures to Expedite Resolution of Rail Rate Challenges to Be Considered Under the Stand-Alone Cost Methodology* (STB served Apr. 3, 2003) at 2. The Board duplicated this approach in *Simplified Standards for Rail Rate Cases*, STB Ex Parte No. 646 (Sub-No.1), (STB served Sept. 5, 2007) ("*Simplified Standards*") by requiring parties to complaints brought under *Simplified Standards* to engage in mandatory mediation. *Id.* at 103. Thus, today, every small or large rate case that is brought contains a mediation component.

As the above Board proceedings clearly demonstrate, the Board has long encouraged use of ADR procedures as a means of resolving disputes outside of the Board's formal complaint processes, and the Board has noted some success with its ADR

rules initiatives, at least with mediation. *See, e.g.*, STB Release, “Surface Transportation Board Dismisses Large Rate Case Based on Parties’ Voluntary Settlement After Board Mediation,” (May 11, 2009).³ As discussed below, the Board has not found the same success with STB-sponsored arbitration.

B. Enhanced Use of Mediation

WCTL notes that the Board is already doing a good job of promoting the availability of Board-assisted mediation, and the availability of the Board’s Rail Customer and Public Assistance Office to informally intervene in matters. Additionally, WCTL members that have brought maximum rate (SAC) cases generally have found the Board’s current 49 C.F.R. § 1109.4 procedures requiring non-binding mediation at the outset of SAC proceedings useful, even if few cases ultimately have been successfully resolved under these procedures. However, WCTL urges caution about the expanded use of, or unnecessary changes to, the mandatory § 1109.4 procedures.

The Board should be very wary of changing its procedures, including advancing suggestions made by railroad parties in the past, that could lead to complex, costly, and uncertain litigation at the outset of proceedings and would involve a mediation process that is skewed in favor of the railroads (who usually have almost all of the information needed to successfully litigate claims under the Board formal complaint standards). The Board’s current complaint processes are complex, lengthy, and

³ *See also* STB Docket No. 42122, *NRG Power Marketing LLC v. CSX Transportation, Inc.*, (STB served July 8, 2010) (SAC complaint dismissed at early stage based on settlement); STB Docket No. 42093, *BP Amoco Chemical Co. v. Norfolk*

expensive enough. Shippers do not need yet another hurdle blocking their ability to obtain reasonable rates, practices, etc. In this respect, WCTL believes that it would be appropriate to limit mandated mediation to rate cases under the rules as they stand today, and for other cases allowing only shippers the option to mediate rate or other disputes that are subject to the Board's jurisdiction.

The Board seeks input concerning the possible use of Board-facilitated mediation without the filing of a formal complaint.⁴ Formally providing by rule for voluntary, shipper-elect, pre-complaint mediation could potentially assist the parties in resolving differences in individual disputes through the Board's involvement in the matter, prior to having to bring an actual complaint.⁵ However, any efforts to advance pre-complaint mediation should be crafted so as to ensure that mediation does not

Southern Ry. Co., (STB served June 28, 2005) (small rate complaint dismissed at early stage based on settlement reached through Board-sponsored mediation).

⁴ To be clear, any suggestion that pre-complaint mediation is necessary because a shipper may not have fully considered and discussed with the railroad its dissatisfaction with rates, service, or practices, or attempted to negotiate a consensual agreement over the rates and/or terms of service, prior to bringing a maximum rate reasonableness case at the Board (based on WCTL members' experiences) would be erroneous. Shippers that bring rate cases before the Board do so only as a last resort, and (in the experience of WCTL members) only after considering all other options, and only after they have been unsuccessful in resolving disputes with the railroads through private negotiations. Those negotiations can last months or longer, and often involve numerous proposals and counter-proposals. Accordingly, mediation should not be viewed by the Board as a tool to allow shippers the opportunity to air their grievances with railroads for the first time, or to allow parties the opportunity to resolve major "missed opportunities" for private sector resolution of rate or service disputes.

⁵ WCTL notes that the filing of a complaint is a big step for many shippers, with unreasonable STB filing fees (e.g., STB unreasonable practice complaint fees of

prejudice or subvert any possible future formal complaint challenge. That would include assurances that mediation would be short in duration (e.g., 30 days), with extensions strictly limited to instances where all parties agree, and with assurances that the statute of limitations applicable to challenges is tolled (e.g., perhaps through establishing by rule that a request for mediation constitutes a separate “complaint” for purposes of the statute). Again, this should be at the election of the shipper, as a shipper should not be pressured into mediation if it comes at the price of curtailing the scope of available relief, or its statutory right to bring a formal complaint. If such prejudices cannot be avoided, then the proper response is to have the mediation period begin after the complaint is filed.

Further, if the Board creates formal mechanisms for pre-complaint mediation, then the Board should ensure that shippers have available to them the information needed to make such sessions as productive as possible. For example, as noted above, mediation is already required today in rate cases, but mediation commences post-complaint. In those complaints brought under the *Simplified Standards*’ Three-Benchmark approach, which standards rely very heavily on the waybill data, the Board’s rules provide for the waybill data to be provided to the parties at the commencement of mediation. *See Simplified Standards* at 104; 49 C.F.R. § 1111.9(a)(1). Providing for pre-mediation dissemination of the waybill data was done purposely, and for good reason, in order to promote and facilitate successful mediation. *See Simplified Standards* at 104 (STB remarks that providing for pre-mediation production of waybill can help “facilitate

\$20,600.00), and the other expenses, burdens, and delays of litigation remaining significant access barriers to shippers seeking formal administrative relief.

the mediation of those disputes”). Accordingly, if new pre-complaint mediation rules are to advanced by the Board, any new procedures should ensure that the involved parties be provided access to necessary data (e.g., to waybill data in Three-Benchmark cases), subject to appropriate protective orders.

C. Enhanced Use of Arbitration

WCTL recognizes that the Board’s arbitration process recently has been characterized by Chairman Elliott as “moribund,” and the Chairman has expressed some concern that “not a single party has used it” in the decade since the process was put in place. *See* Testimony of Daniel R. Elliott III, Before the U.S. Senate Committee on Commerce, Science, and Transportation, Hearing on the Federal Role in National Rail Policy (Sept. 15, 2010) at 7-8. WCTL supports continuing Board efforts to encourage arbitration. However, it should be recognized that, as the 10+ years of STB initiatives to encourage arbitration has revealed, even additional efforts to aggressively encourage arbitration is likely to do very little to solve shipper concerns over their inability to obtain meaningful relief, either through arbitration or through the Board’s regular formal complaint procedures. There are a number of reasons why this is so, which the Board should take into consideration when deciding what, if any, further actions to take in this area.

First, the Board’s existing arbitration rules are not well-suited for resolving complex cases, including large rate cases which are based on SAC. At least for cases falling under the *Coal Rate Guidelines*, governing precedents are important, there is a

need for extensive discovery, and there is greater complexity involved in presenting and evaluating the evidence. In fact, it would appear utterly infeasible to process a rate dispute that ordinarily would involve a formal complaint under the *Coal Rate Guidelines* on a 120-day “fast track” (SAC case proceedings are supposed to take a minimum of 16-months to complete) with no process for discovery, where governing legal precedent is possibly of limited use, where there is unlikely to be expert agency staff available to assist the decisionmaker, and where there is a very limited opportunity for appeal of a decision.

Because SAC cases require discovery of large amounts of information from the defendant carrier and involve significant complexity in presenting and evaluating the evidence, it is unlikely that a complainant in a SAC rate case would ever elect to invoke arbitration under the Board’s existing arbitration standards unless the underlying substantive standards for relief were changed. Since WCTL members move large volumes of coal, and would most likely invoke the SAC test if they were to bring a rate complaint, it is highly unlikely that the use of arbitration would be an option for any of them in such cases.⁶

Second, even if arbitration might be the preferred option for a shipper in a given case, the Board’s arbitration rules merely establish an expedited alternative dispute resolution process for deciding cases; they do not provide for the use of any substantive

⁶ The Board should already know this, as no shipper to a SAC case to date to WCTL’s knowledge has informed the Board as part of their complaint filing requirements (under 49 C.F.R. § 1111.1(a)(11)) that they have availed themselves of arbitration since the Board implemented its complaint reporting procedures in 2001.

streamlined or simplified evidentiary guidelines/methods. If anything, the relatively small number of rate complaints that have been brought by shippers under the Board's formal procedures to obtain relief over the years demonstrates that the procedures and evidential requirements remain too demanding and restrictive, the outcomes remain too uncertain, and/or the restrictions on relief remain too severe, not that the process needs to be expedited through improved access to arbitration.

Third, shippers have long asserted that strong Board leadership and actions are needed to assist consumers in obtaining reasonable rates and services, and to promote competition in order to carry out the goals of the Staggers Act. And if there is a lack of available remedies, WCTL submits that it is in large part attributable to some key underlying substantive decisions of the agency (e.g., on rates, access, etc.) that have inhibited shippers' ability to negotiate acceptable competitive rate and service arrangements with carriers, either privately or through Board-sponsored mediation/arbitration. Because of these underlying decisions, there is often very little incentive for a railroad to want to meaningfully negotiate, mediate, or arbitrate many rate and service disputes when they believe that the relevant underlying Board decisions greatly favor them and/or that the agency is likely to "go their way" if a formal complaint is ever actually brought. The increased availability and encouragement of ADR will likely not overcome those substantive decisional barriers that continue to confront shippers seeking to engage in meaningful negotiations with railroads.

While recognizing the above limitations to the effective use of ADR in the current regulatory environment, WCTL still stresses that it does not object to the continued availability and promotion of arbitration as an important ADR alternative for stakeholders.⁷ However, after review of the record, if the Board believes further initiatives are necessary at this time to promote arbitration, then WCTL submits that any such efforts should ensure that arbitration remains voluntary, at the election of the shipper only.⁸

The STB has previously stated that “[t]he Board on its own cannot mandate arbitration under the current statute,” which requires Board adjudication of complaints. 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* (STB served Sept. 20, 1001) at 3 n.7 (emphasis added). Thus, in the past, the Board has limited its consideration of mandated arbitration to possible recommendations to Congress. In any

⁷ Of course, even if STB-initiated arbitration has not been actively utilized, stakeholders should still retain the ability to use arbitration or any other alternative forms of dispute resolution, should they believe that such an extra-agency option is more appropriate for resolving disputes. WCTL notes that shippers and carriers are free, should they jointly elect to do so, to pursue arbitration of rate disputes (or to pursue other appropriate alternative dispute resolution methods) subject to agreed upon terms and conditions, or, if they so choose, to utilize the Board’s existing arbitration procedures, although, as indicated below, the latter are not well-suited for complex litigation.

⁸ In the past, there has been some discussion by the Board about whether a “small rate case” should be subject to mandatory arbitration. While some WCTL members’ movements are eligible to use the Board’s *Simplified Standards*, in most cases the higher amounts in dispute and the severe caps on relief provided under these standards will not allow coal shippers to avail themselves of these rules. WCTL submits that for small, medium, or large rate cases, and for all other cases, the decision to elect arbitration,

event, it is rail customers who are in need of a more expedited and less costly means of resolution of disputes with the railroads. For maximum rate reasonableness and other cases involving rates, services, and practices where shippers are the intended beneficiaries of the Board's authority to decide disputes, a shipper should not be forced into an unwanted arbitration proceeding against its will where it believes that the Board, rather than an arbitrator, is better suited to decide its case.

CONCLUSION

WCTL supports continuing Board efforts to promote ADR and private sector resolution of stakeholder disputes. However, ADR should not be viewed as a "catch-all" cure to resolving shipper complaints or the underlying substantive problems facing shippers in obtaining agency relief. There is still a vital need for the STB as the expert agency appointed by Congress to resolve disputes and advance policies to protect railroad consumers. WCTL respectfully submits that, to achieve its intended result in the present proceeding, any actions to be evaluated by the Board should not only be limited to possible initiatives to expand the use of ADR, but also on a whole range of other important substantive competitive and regulatory issues. Without such active leadership, monopoly rail carriers will continue to have little incentive to come to the table in good faith to amicably resolve shipper disputes either through private resolution or through

regardless of the size of the case, should be voluntary at the option of the complainant shipper only.

Board-assisted ADR, and the hope for increased use of ADR will not be realized.

Respectfully submitted,

WESTERN COAL TRAFFIC LEAGUE

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