



ASSOCIATION OF  
AMERICAN RAILROADS

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October 25, 2010

Honorable Cynthia T. Brown  
Chief, Section of Administration  
Surface Transportation Board  
395 E St., S.W.  
Washington, DC 20423

Re: Ex Parte No. 699, Assessment of Mediation and Arbitration Procedures

Dear Ms. Brown:

Pursuant to the Board's Notice served August 22, 2010, attached please find the Comments of the Association of American Railroads ("AAR") for filing in the above proceeding.

Respectfully submitted,

Louis P. Warchot  
Counsel for the Association of  
American Railroads

Attachment

BEFORE THE  
SURFACE TRANSPORTATION BOARD

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STB Ex Parte No. 699

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ASSESSMENT OF MEDIATION AND ARBITRATION PROCEDURES

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COMMENTS OF THE  
ASSOCIATION OF AMERICAN RAILROADS

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October 25, 2010

BEFORE THE  
SURFACE TRANSPORTATION BOARD

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STB Ex Parte No. 699

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ASSESSMENT OF MEDIATION AND ARBITRATION PROCEDURES

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COMMENTS OF THE  
ASSOCIATION OF AMERICAN RAILROADS

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**Introduction**

In a Notice and Request for Comments (“Notice”) served August 20, 2010, the Surface Transportation Board (“Board”) sought comments 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.” Notice at 2. The Board also sought input “regarding possible changes to its rules to permit the use of Board-facilitated mediation procedures without the filing of a formal complaint.” *Id.*

The Notice indicated that, in addition to Board review, “the Railroad-Shipper Transportation Advisory Council ... will review the comments and prepare a report to the Board reflecting the input of its members on this issue.” *Id.*<sup>1</sup> Based upon the comments

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<sup>1</sup> RSTAC is an advisory Council established under the provisions of 49 U.S.C. § 726 to advise the U.S. Department of Transportation, the Surface Transportation Board, and the U.S. Congress “with respect to rail transportation policy issues it considers significant, with particular attention to issues of importance to small shippers and small railroads...” 49 U.S.C. § 726 (f) (1). RSTAC members are appointed by the Board’s Chairman. 49 U.S.C. § 726 (a). The nine voting members of RSTAC consist of a minimum of four representatives of small shippers and a minimum of four representatives of Class II and III carriers. 49 U.S.C. § 726 (a) (2). Representatives of Class I railroads and large shipper organizations serve as RSTAC members in a “non-voting, advisory capacity only.” 49 U.S.C. § 726 (a) (3). The U.S. Secretary of Transportation and members of the Surface Transportation Board are *ex officio*, non-voting members of the RSTAC. 49 U.S.C. § 726 (a) (4).

submitted and the Railroad-Shipper Transportation Advisory Council's ("RSTAC") input, the Board will decide whether to issue a Notice of Proposed Rulemaking ("NPRM") on the issues raised. *Id.*

The Association of American Railroads ("AAR"), on behalf of its member railroads, submits these comments in response to the Board's August 20, 2010 Notice. The AAR believes that the Board's current rules governing mediation and arbitration are already structured to encourage the use of such alternative dispute resolution mechanisms where they are deemed potentially useful and cost-effective by the parties. Accordingly, the AAR does not believe that modifications to the Board's existing rules or adoption of new rules would serve to incent greater participation.

The AAR also believes that the Board's proposed requirement for RSTAC review of the public comments and issuance of a report reflecting the input of RSTAC members as a prerequisite for a Board decision whether or not to issue an NPRM is not a proper function for the RSTAC.

## Discussion

### **I. The Board's Current Rules Provide Parties with a Wide Array of Alternative Dispute Resolution Mechanisms Which Already Promote Mediation and Arbitration Where It Is in the Parties' Interest**

In its Notice, the Board sought comments 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." Notice at 2.<sup>2</sup> The AAR

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<sup>2</sup> As the Board recognizes, it has no authority under the ICC Termination Act ("ICCTA"), Pub. L. No. 104-88, to require parties to Board proceedings to submit rate and service disputes to mandatory arbitration. See e.g., 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*, (served Oct. 26, 2001), Slip op. at 1 ("current law permits arbitration of disputes within the Board's jurisdiction only where the parties agree to use that process"). The Board's arbitration rules accordingly can provide only for voluntary arbitration procedures.

submits that the Board's existing rules establishing mediation and voluntary arbitration procedures for the resolution of disputes, and providing for other informal means of resolving disputes on issues within the Board's jurisdiction, already encourage the parties' use of alternative dispute resolution ("ADR") procedures when such procedures are deemed potentially useful and cost-effective in individual cases. Accordingly, the AAR believes that modifications or additions to the Board's current rules are neither necessary nor likely to be more efficacious in encouraging greater use of ADR procedures.

**A. The Board's current rules provide for a wide array of ADR procedures that provide parties full opportunity to resolve disputes outside the formal administrative process**

The Board currently has a wide array of rules in place providing ADR procedures (including mediation and voluntary arbitration) for parties to resolve disputes outside the formal administrative process should the parties choose to do so.

First, the Board's rules provide for mandatory, non-binding mediation in rate cases to be considered under the Board's stand-alone cost methodology. See 49 C.F.R. § 1109.4. As required under the Board's rules, "[a] shipper seeking rate relief from a railroad or railroads in a case involving the stand-alone cost methodology must engage in non-binding mediation of its dispute with the railroad upon filing a formal complaint under 49 CFR Part 1111." 49 C.F.R. § 1109.4 (a). The Board's rules also require mandatory, non-binding mediation with respect to rate cases brought by shippers under the alternative simplified methodologies adopted by the Board in *Simplified Standards* (i.e., in Three-Benchmark or Simplified-SAC cases).<sup>3</sup>

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<sup>3</sup>STB Ex Parte No. 646 (Sub-No. 1), *Simplified Standards for Rail Rate Cases* (STB served Sept. 5, 2007) ("*Simplified Standards*"). See *Simplified Standards*, Slip. Op. at 103-104.

Secondly, the Board has mediation rules applicable to all other proceedings that provide for voluntary, non-binding mediation on mutual consent of the parties. Pursuant to the Board's rules governing voluntary, non-binding mediation, "[a]ny proceeding may be held in abeyance for 90 days [and additional 90 day periods on request] while administrative dispute resolution (ADR) procedures (such as arbitration and mediation) are pursued." See 49 C.F.R 1109.1. The CFR part 1109 ADR procedures, including voluntary, non-binding mediation, are available for use in any proceeding already before the Board.<sup>4</sup>

Third, the Board has general rules providing for "binding, voluntary arbitration of disputes" as set forth at 49 CFR. § 1108.1 et seq. The procedures are "intended for the resolution of specific disputes between specific parties involving the payment of money or involving rates or practices related to rail transportation services subject to the statutory jurisdiction of the STB." 49 CFR § 1108.2 (b).

These arbitration procedures under 49 CFR part 1108 are separate from and in addition to the ADR mechanisms available under 49 CFR Part 1109 (which include both arbitration and mediation).<sup>5</sup> The Board's arbitration rules under 49 CFR Part 1108 are intended for disputes that have not yet been brought to the Board in a formal proceeding, while the arbitration provisions under 49 CFR Part 1109 are applicable to proceedings currently pending before the Board.<sup>6</sup>

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<sup>4</sup> See Ex Parte No. 560, *Arbitration of Certain Disputes Subject to the Statutory Jurisdiction of the Board* (served Sept. 2, 1997), Slip Op. at 2-3.

<sup>5</sup> See 49 CFR § 1108.2 (c).

<sup>6</sup> See Ex Parte No. 560, *Arbitration of Certain Disputes Subject to the Statutory Jurisdiction of the Board* (served Sept. 2, 1997), Slip Op. at 2-3. Arbitration under the Board's rules under 49 CFR Part 1109 are conducted pursuant to the provisions of the Administrative Dispute Resolution Act ("ADRA"), 5 U.S.C.A.

Fourth, the Board has also established a Rail Customer and Public Assistance Program (“RCPA”) that informally addresses “concerns, complaints and inquiries” involving rail carriers and shippers on matters under the Board’s jurisdiction.<sup>7</sup> The RCPA is staffed with experienced Board employees whose role is to assist in informally resolving railroad-shipper issues before a formal complaint is filed with the Board. The RCPA’s activities range from providing information to shippers to “lengthy informal mediation efforts” on issues such “rates and other charges, railroad-car supply service issues, claims for damages, [and] interchange issues....”<sup>8</sup>

According to the Board’s website, the RCPA program, which began in 2000, “has grown dramatically since, as both shippers and railroads increasingly recognize the value of resolving disputes before they give rise to formal complaints and legal challenges.”<sup>9</sup> As noted in RCPA’s “Full Year 2009 Rail Consumer Complaint Statistics”, a total of 1470 inquiries were handled by RCPA staff in 2009, including numerous rate and service issues involving a wide variety of commodity shipments.<sup>10</sup> According to recent

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§§ 571 et seq. *Id.*; see also Ex Parte No. 55 (Sub No. 83), *Use of Alternative Dispute Resolution Procedures*, 8 I.C.C. 2d 657 (1992) (adopting Part 1109 rules); 49 CFR § 1108.2 (c). Arbitration awards under 49 CFR Part 1109 may be challenged before the Board on the basis that they do not take their essence from the Interstate Commerce Act or are not limited to the matters referred by the parties for arbitration. 49 CFR §1109.2. Judicial review of arbitration decisions under 49 CFR Part 1109 is provided for under 5 U.S.C. § 581; 9 U.S.C. § 10.

<sup>7</sup> See STB, “The Rail Customer and Public Assistance Program” (“RCPA”), at 1 (STB website); see also Surface Transportation Board, *FY 2007-2008 Report* (Sept. 1, 2009), at 3. The RCPA is part of the Board’s Office of Public Assistance, Governmental Affairs & Compliance.

<sup>8</sup> See RCPA , at 2; see also Surface Transportation Board, *FY 2007-2008 Report* (Sept. 1, 2009), at 3.

<sup>9</sup> RCPA, at 2.

<sup>10</sup> See RCPA’s “Full Year 2009 Rail Consumer Complaint Statistics” report (STB website).

Congressional testimony by STB Chairman Elliott, “2010 has seen a similar level of activity.”<sup>11</sup>

Lastly, in addition to the ADR procedures established by the Board, the parties are also free, similarly to other business entities in the private sector, to establish private dispute resolution mechanisms to resolve disputes based on mutual agreement if they choose to do so. The Board both recognizes and promotes the establishment of such private-sector dispute resolution mechanisms. As noted in the Board’s decision establishing its existing rules governing voluntary arbitration, “[the Board’s arbitration rules] are not intended to displace existing private dispute resolution mechanisms that may be available.”<sup>12</sup> The Board, in furtherance of its policy goals, also “promotes private-sector negotiations and resolutions where possible and appropriate...”<sup>13</sup>

An example of a private dispute resolution mechanism established by mutual agreement between shippers and rail carriers to address disputes on specific issues is the agreement to which the AAR and the National Grain and Feed Association (“NGFA”) are parties regarding the use of arbitration for certain disputes between NGFA and AAR members.<sup>14</sup>

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<sup>11</sup> See STB Chairman Elliott’s Sept. 15, 2010 testimony before the U.S. Senate Commerce, Science and Transportation Committee at its “Hearing on the Federal Role in National Rail Policy,” at 7. (“Senate Hearing”).

<sup>12</sup> See Ex Parte No. 560, *Arbitration of Certain Disputes Subject to the Statutory Jurisdiction of the Board* (served Sept. 2, 1997), Slip Op. at 2.

<sup>13</sup> See Surface Transportation Board, *FY 2007-2008 Report* (Sept. 1, 2009), at 1.

<sup>14</sup> See January 3, 2002 AAR Reply Comments in Ex Parte No. 586, at 3.

**B. The Board's current rules already encourage the use of mediation and voluntary arbitration procedures in specific matters under dispute where such ADR processes are considered potentially useful and cost-effective by the parties.**

1. The Board's current rules make a wide array of ADR procedures readily available to parties and encourage parties to use them.

The AAR submits that, in light of the wide range of opportunities that parties are afforded under the Board's rules to resolve their disputes through ADR mechanisms (including mediation and voluntary arbitration) outside of the formal administrative process, it is difficult to envision ways for the Board to modify or adopt additional rules to further encourage use of such ADR mechanisms. The parties to disputes under the Board's jurisdiction are fully aware of such ADR mechanisms and have full incentive to use them when it is in their interest to do so. Indeed, the Board's voluntary, non-binding mediation procedure under 49 CFR Part 1109 was recently invoked in a proceeding filed by numerous shippers against the AAR, Class I railroads, and numerous Class II and Class III railroads pertaining to "unreasonable practice" claims relating to the interpretation and application of "mileage allowance" tariffs.<sup>15</sup> The voluntary, non-binding mediation procedure has also been invoked in numerous other Board proceedings.<sup>16</sup>

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<sup>15</sup> See STB Docket No. 42117, *Cargill, Inc., et al v. Aberdeen & Rockfish Railroad Co., et al* (complaint filed January 29, 2010 (as amended February 17, 2010)) (mediation involving complainants and defendant AAR and Class I railroads currently ongoing).

<sup>16</sup> See, e.g., STB Docket No. 42112, *E.I. du Pont de Nemours & Company v. CSX Transportation, Inc.* (complaint filed Nov. 10, 2008) (case voluntarily dismissed on May 11, 2009 after Board mediation); STB Docket NOR 42119, *North America Freight Car Association v. Union Pacific Railroad Company* (complaint filed April 15, 2010) (mediation currently under consideration by the parties); *Ag Processing Inc. A Corporation, et al – Petition for Declaratory Order, Finance Docket No. 35387* (mediation involving Ag Processing and other agriculture shipper and Norfolk Southern wherein Ag Processing is requesting a declaratory order concerning the application of a NS tariff provision); *Ameropan Oil Corp.—Petition for Declaratory Order—Reasonableness of Demurrage Charges*, STB Docket No. 42106 (petition for declaratory order filed March 19, 2008) (petition voluntarily dismissed on Dec. 17, 2009 after Board mediation); *Williams Olefins, L.L.C. v. Grand Trunk Corp.*, STB Docket No. 42098 (complaint filed Nov.

Moreover, not only are the Board's voluntary, non-binding mediation procedures widely available to the parties in numerous proceedings, the Board's rules specifically mandate non-binding mediation in all rate cases (see supra at 4). The Board also prominently promotes on its website the use of mediation and other informal ADR procedures under the RCPA program as a means of resolving disputes before they reach the complaint stage. Indeed, the RCPA program is widely used and is considered by the Board as "represent[ing] a highly successful model" for the informal resolution of disputes.<sup>17</sup>

Further, "to serve as a reminder to parties of the availability of voluntary arbitration pursuant to 49 CFR Part 1108, and to encourage use of those procedures where appropriate," the Board's rules require that, in complaint cases that are potentially arbitrable under Part 1108, the complaint must include a statement that arbitration was considered, but rejected, as a means of resolving the dispute. See 49 CFR 1111.1 (a) (11)<sup>18</sup> The AAR submits that there is no need for modifications of or additions to the Board's rules already making a wide range of ADR procedures readily available to the parties, and encouraging the parties to use them.<sup>19</sup>

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22, 2006) (case voluntarily dismissed Feb. 15, 2007 after Board mediation). See also STB Chairman Elliott's Sept. 15, 2010 Senate Hearing testimony, at 8 (noting that "within the last two years, Board staff was able to successfully mediate a settlement in two large rate cases, while a settlement has been reached in principle in a third [rate] case" and "that there are currently several [non-rate complaint] cases where we have put litigation on hold while the parties, with the aid of Board staff, discuss private resolution of their disputes.")

<sup>17</sup> See STB Chairman Elliott's Sept. 15, 2010 Senate Hearing testimony, at 7.

<sup>18</sup> See Ex Parte No. 586 (served May 22, 2002), Slip op. at 1. 49 CFR 1111.1 (a) (11) provides as follows: "For matters for which voluntary, binding arbitration is available pursuant to 49 CFR Part 1108, the complaint shall state that arbitration was considered, but rejected, as a means of resolving the dispute."

<sup>19</sup> The AAR would recommend, however, that the Board update its roster of arbitrators on a regular basis. Many of the names on the Board's roster may no longer be currently available, and it would be useful for the Board to solicit new applicants for the roster on a periodic basis.

The AAR does have one suggestion, however. The AAR notes that the availability of the Board's mediation and voluntary arbitration programs could be better publicized on its website. For example, although there is a link on the STB website providing further information on the Board's informal ADR services under the RCPA program, there is no special link providing specific information on the Board's formal mediation and arbitration services available under its regulations at 49 CFR Parts 1108 and 1109. The AAR suggest that the addition of such a link may be helpful in further publicizing the Board's formal ADR services.

2. The limited use by parties of binding arbitration procedures may result from perceived drawbacks of the binding arbitration process rather than deficiencies in the Board's rules.

The AAR further submits that limited use by parties of binding arbitration in specific cases may not be due to any deficiency in the Board's current rules (which are fully adequate), but may instead be due to perceived drawbacks of the binding arbitration process vis-à-vis a Board proceeding.

The use of arbitration procedures deprives the parties of the benefits of the Board's expertise and authoritative determination of applicable legal standards.<sup>20</sup> An arbitrator (or arbitration panel) selected by the parties is likely to bring far less expertise to the table and to be far less versed in the legal and policy aspects of a dispute than the

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<sup>20</sup> As the Supreme Court has recognized, "one of the purposes which led to the creation of [expert administrative agencies] is to have decisions based on evidential facts under the particular statute made by experienced officials with an adequate appreciation of the complexities of the subject which is entrusted to their administration." See *Beth Israel Hospital v. National Labor Relations Board*, 437 U.S. 483, 504 (1978), quoting *Republic Aviation Corp. v. National Labor Relations Board*, 324 U.S. 793, 800 (1945); see also *Pejepscot Indus. Park, Inc. v. Maine Central R.R. Co.*, 215 F. 3d 195, 205-206 (1<sup>st</sup> Cir. 2000) (noting (in the context of application of the primary jurisdiction doctrine) that "[T]he STB's expertise is clearly involved in the question of whether Guilford's actions constitute unlawful refusal to 'provide ... service on reasonable request,' 49 U.S.C. 11101 (a)," and that "referral to the STB will promote uniformity in the standards governing refusals to provide service.")

Board itself; and the arbitrators do not have the depth of staff experience to assist them as is available at the Board.<sup>21</sup> As a result, the outcome of an arbitration proceeding is likely to be far more unpredictable than a formal proceeding before the Board. Also, unlike Board decisions, arbitration decisions have no precedential value, so that parties requiring clarification or establishment of general and uniform legal standards applicable outside the context of the specific dispute would obtain little or no benefit from resort to arbitration. A majority of the decisions that are issued by the Board address issues of general importance to the rail industry and provide guidance to persons not directly involved in the litigation but who are nonetheless affected by the substance of the Board's decision. Arbitration decisions, on the other hand, can not provide such guidance because they are private to the arbitration, and are not precedential. Thus, obtaining a precedential ruling from the STB can actually eliminate future litigation by providing all affected parties with a rule of law from which to be guided. In addition, the basis for appeals from erroneous arbitration decisions are far more limited than if a decision of the agency were under direct review.<sup>22</sup>

Moreover, because there is less predictability of outcome, use of voluntary arbitration procedures may present increased risks to one or the other party to a dispute (or to both parties) depending on the specific issues in dispute and the relative strengths of the parties' respective legal positions. Where a party believes it has a sound legal

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<sup>21</sup> For example, if the proceeding involves resolution of a complex costing issue, the arbitrator(s) would not have the resources available to adequately analyze the evidence and resolve the issue.

<sup>22</sup> Ex Parte No. 560 (served September 2, 1997), Slip op. at 10 (noting "[The Board] will exercise [its] review powers sparingly.... We will not review the reasonableness of an arbitrator's decision. We will look at an arbitral decision only to determine whether it must be vacated or amended on the two narrow grounds listed."); See 49 CFR § 1108.11(c) (Board may review and vacate or amend an arbitration award only on the grounds that such award "(1) exceeds the STB's jurisdiction; or (2) does not take its essence from the Interstate Commerce Act"); see also 49 CFR § 1109.2 discussed at note 6 supra.

position and the amount at issue is significant (or the case otherwise involves important and potentially recurring issues), such party has strong legal and economic incentives to seek an authoritative decision from the Board (whether by filing a complaint or petitioning for a declaratory order). Under such circumstances, an arbitration proceeding would likely not be selected as a substitute for a formal Board proceeding.<sup>23</sup>

Finally, while an arbitration may be conducted with less formality than a Board proceeding, it is still an adversarial proceeding and the parties may bear similar burdens to those that they would bear in a formal Board proceeding.<sup>24</sup> There may be instances where parties engaged in ADR proceedings may be able to agree on cost-saving measures, such as limiting discovery, the use of experts or the number or length of filings. However, those cost savings are not guaranteed by virtue of a transition from formal adjudication before the Board to arbitration.

In short, the AAR believes that the Board's current rules, which provide parties a wide range of ADR procedures (including mediation and arbitration) for the informal resolution of disputes if the parties find it in their interest to use them, effectively fulfill the Board's role in encouraging the informal resolution of disputes where possible. The

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<sup>23</sup> The Board itself explicitly recognized, in adoption of the "arbitration statement" requirement of 49 CFR 1111.1 (a) (11), that the arbitration process has inherent drawbacks as perceived by the parties. See Ex Parte No. 586 (served May 22, 2002), Slip op. at 2 ("[T]he Western Coal Traffic League (WCTL)...suggested that we consider not applying the requirement to rate cases that would be handled under our Coal Rate Guidelines. WCTL argues that the Board's expertise is essential to have in large rate cases. We see no need to carve out such an exception. *If WCTL's members do not regard arbitration as desirable, they will not choose to use it....*"). (emphasis added)

<sup>24</sup> Some studies comparing the costs of arbitration and litigation have shown that arbitration is not necessarily less costly than litigation. See, e.g., Michael Z. Green, *Debunking the Myth of Employer Advantage From Using Mandatory Arbitration for Discrimination Claims*, 31 Rutgers L.J. 399, 401, 421-22 (Winter 2000); see also, e.g., Gary Grenley, *Weigh Cost of Arbitration as Carefully as Cost of Trial*, Portland Business Journal (September 26, 2008) (available at <http://portland.bizjournals.com/portland/stories/2008/09/29/focus7>).

AAR accordingly does not believe that modification of the current rules or adoption of additional ADR procedures would incentivize greater utilization by parties to disputes before the Board.

## **II. There Is No Need for the Board to Modify Its Existing Rules to Permit Use of Board-Facilitated Mediation Procedures Without the Filing of a Formal Complaint**

The Board also sought input “regarding possible changes to its rules to permit the use of Board-facilitated mediation procedures without the filing of a formal complaint.” Notice at 2. The AAR believes such rule changes are unnecessary and would in fact be counterproductive.

As noted supra, the Board currently has procedures in place, through its RCPA program, for informal Board-facilitated mediation of disputes without the filing of a formal complaint. Based on the Board’s own assessment, the RCPA process is in wide use and is a “highly successful model.” Accordingly, should a party to a dispute seek Board assistance in resolving a dispute through an informal mediation process at the pre-complaint stage, that mechanism is already in place. And if the parties to a specific dispute believe that Board-facilitated mediation under the RCPA program would be potentially useful, the RCPA mediation facilities will likely be used.

The AAR further submits that not only are rule changes formalizing a pre-complaint Board-assisted mediation process unnecessary, but also that formalization of the existing procedures would have potentially significant drawbacks. Under the existing RCPA program, Board-facilitated mediation of disputes is conducted informally and cost of participation to the parties is not now a significant factor. The AAR believes that the more formalized the pre-complaint mediation process becomes, the more likely it is to

increase costs of participation and discourage one or more parties to a dispute from participating in pre-complaint mediation efforts.

Formalization of a Board-assisted mediation process at the pre-complaint stage also has the potential to be significantly counterproductive in other ways as well. The Board has noted its strong policy support for “private-sector negotiations and resolutions [of disputes] where possible and appropriate....”<sup>25</sup> The AAR strongly endorses the Board’s interest in encouraging private-sector *negotiated resolutions* of disputes wherever possible. Indeed, the AAR’s members recognize the value of negotiated resolutions and maintain an active dialogue with their customers on a range of commercial matters designed to prevent disputes from arising, and work to resolve them informally when they do. The AAR submits that the vast majority of disputes that would be otherwise subject to the Board’s jurisdiction are in fact informally resolved by the parties themselves through negotiated solutions (including use of agreed-upon private ADR mechanisms).

Any formalization of a Board-assisted mediation process at the pre-complaint stage that would allow Board assistance to be invoked at the request of only one party to a dispute (as is currently the case under the informal RCPA process) would likely serve as an impediment to privately-negotiated resolution of disputes rather than as an improvement upon the Board’s existing informal procedures under the RCPA program. Formalization of Board-assisted mediation at the pre-complaint stage of a “dispute” necessarily has the potential to interject the Board into the *negotiation* process itself. There is no bright line distinction to indicate clearly when negotiations between the parties have actually ended or not. The Board should not adopt rules that would make it

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<sup>25</sup> See note 23, *supra*.

more attractive to a party engaged in ongoing negotiations to seek to substitute Board-assisted mediation for the negotiation process.

In short, the AAR believes that the RCPA program is fully sufficient to provide for Board-assisted mediation at the pre-complaint stage and that additional procedures are unnecessary.

### **III. The Board's Proposed Requirement for RSTAC Review of the Public Comments and Preparation of a Report Reflecting Its Member Input as a Prerequisite for a Board Determination Whether or Not to Issue an NPRM is Inconsistent With the Administrative Procedure Act , Improperly Assigns an Extra-Statutory Role to RSTAC, and Is Otherwise Unnecessary**

As a procedural matter relating to the Board's proposed process in this proceeding, the AAR is concerned with the Board's proposal to use RSTAC as an intermediary "advisory board" through its request that RSTAC review the public comments and prepare a report for the Board reflecting RSTAC member input as a predicate for a Board decision whether or not to issue an NPRM. The AAR submits that such procedure: (1) is improper under the Administrative Procedure Act ("APA") (5 U.S.C. §§ 551 et seq.); (2) conflicts with the statutory scheme delineating RSTAC's functions; and (3) is unnecessary for the Board to obtain the information and suggestions from public input that it seeks.

#### **A. The procedure proposed by the Board is improper under the APA.**

RSTAC was established as an advisory council under the provisions of 49 U.S.C. § 726 for the specific purpose of furthering the particular interests of "small shippers and small railroads" regarding rail transportation policy issues deemed significant to such groups. 49 U.S.C. § 726(f) (1). In furtherance of such objective, RSTAC's voting membership is restricted by statute to small shippers and small railroads: Class I carriers

and large shippers have no votes on the Council and are not represented by it. 49 U.S.C. § 726 (a) (2-3).<sup>26</sup> Accordingly, any recommendation or endorsement of a rulemaking proposal by RSTAC in this proceeding, or any alternative agency action urged by RSTAC in this proceeding, cannot be construed by the Board as reflecting the position of the general rail transportation community regarding any aspect of the public comments filed in this proceeding.

The mediation and arbitration issues raised in the Board's Notice as potential subjects of a Board rulemaking are not limited in potential scope or interest to small shippers and small carriers (as represented by RSTAC), but involve matters of potential general application to the *entire* rail transportation community. The Board's request for comments is accordingly directed at *all* interested parties and includes both small shippers and small railroads as well as large shippers and large railroads (and organizations representing both groups). As such, all interested parties in the transportation community have been invited by the Board to contribute their views and suggestions on the potential rulemaking issues raised in the Notice with the expectation, as in all Board proceedings, that *all* valid proposals and concerns raised by interested parties in their comments will be equally considered and fairly weighed on their merits by the Board.

The AAR submits that, for the Board to provide for a separate review and recommendations by RSTAC regarding the public comments as a prerequisite for Board review of the public comments and a determination whether or not to issue an NPRM, is inconsistent with the APA. In effect, small shippers and small carriers, through

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<sup>26</sup> RSTAC has nine voting members, of which at least eight are representatives of small shippers and small railroads. The ninth voting member may be a small shipper or railroad or an "at large" member who is not a representative of a Class I railroad or large shipper. See 49 U.S.C. § 726 (a) (2)-(3).

RSTAC's comments and recommendations at the RSTAC report stage, are provided greater participation and weight in the Board's decision-making process than other members of the rail transportation community that would be potentially affected by a Board rulemaking decision. Such procedure cannot be squared with the APA's requirement that Board proceedings relating to the rulemaking process be conducted in a procedurally fair manner and by the agency itself.<sup>27</sup>

**B. The procedure proposed by the Board also assigns extra-statutory functions to RSTAC in conflict with the statutory scheme under 49 U.S.C. § 726 establishing RSTAC as an independent advisory council.**

The AAR further submits that the Board's proposed procedure also contemplates RSTAC performing an extra-statutory function in conflict with the statutory scheme under 49 U.S.C. § 726 establishing RSTAC as an independent advisory council not subject to Board direction.

Unlike the Rail Energy Transportation Advisory Committee (RETAC) and the National Grain Car Council, RSTAC is not an advisory committee established by the Board under the Federal Advisory Committee Act ("FACA") and subject to advisory

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<sup>27</sup> The APA provides all interested parties an equal opportunity to participate in the rulemaking process through the submission of written comments and rulemaking proposals. See, e.g., 5 U.S.C. § 553 (c) ("After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments ...."); 5 U.S.C. § 553 (e) ("Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.") Although an agency has broad discretion to fashion rules of procedure to carry out its administrative functions, it must comply with the APA's general requirement of procedural fairness. See, e.g., *Maine v. Shalala*, 81 F. Supp. 2d. 91, 95-96 (D. Me. 1999) ("[P]rocedural unfairness has been held by courts as a basis to overturn an agency action under the APA"); *U.S. v. District Council of New York City and Vicinity of United Bhd. Of Carpenters and Joiners of America*, 880 F. Supp. 1051, 1066 (S.D.N.Y. 1995) (accord). The APA neither contemplates nor sanctions agency use of special procedures to unfairly vest one category of interested parties (e.g., small shippers and small carriers) with greater participatory rights than other potentially affected parties (e.g., large shippers and large carriers) in the rulemaking process.

functions delegated by the Board under the provisions of FACA.<sup>28</sup> The make-up and functions of RSTAC, and that of advisory committees established under FACA, are governed by distinctly different regimes.

Both RETAC and the National Grain Car Council, as FACA advisory committees to the Board in their respective areas of expertise, are required to be composed of a *balanced representation* of industry interests—including large and small railroads and shippers—to reflect the views of the general rail transportation community on the issue addressed.<sup>29</sup> As advisory committees to the Board under FACA, both RETAC and the National Grain Car Council are also subject to Board direction. The charter of both advisory committees, in conformity with FACA, specifically require that each committee “shall, *on request by the Board*... suggest to the Board appropriate policies or regulations” in their specific fields of expertise (emphasis added).<sup>30</sup>

RSTAC, which was established under the provisions of 49 U.S.C. § 726 (and not FACA), is instead an independent advisory council to the Department of Transportation, the Board, and the Congress with a focus on “issues of importance to small shippers and small railroads...” 49 U.S.C. 726 (f) (1). RSTAC, as an independent advisory council

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<sup>28</sup> See 5 U.S.C. App. 2, § 1 et seq.; see also 49 U.S.C. 726 (a) (4) (“The Council [RSTAC] shall not be subject to the Federal Advisory Committee Act”).

<sup>29</sup> Under FACA, membership of an advisory committee is required to be “fairly balanced in terms of the points of view represented and the functions to be performed by the advisory committee.” 5 U.S.C. App. 2 § 5(b) (2). See also September 24, 2009 RETAC Charter, at p.1, Section C (providing for “balanced [voting] representation of individuals experienced in issues affecting the transportation of energy resources”); September 24, 2009 National Grain Car Council Charter, at p.1, Section C (accord)).

<sup>30</sup> See September 24, 2009 RETAC Charter, at p.1, Section B; September 24, 2009 National Grain Car Council Charter, at p.1, Section B; see also 5 U.S.C. App. 2, § 8 (b) (agency that has advisory committee must designate an Advisory Committee Management Officer who shall “exercise control and supervision of the establishment, procedures, and accomplishments of advisory committees established by that agency...”); 5 U.S.C. App. 2, § 10 (f) (“[a]dvisory committees shall not hold any meetings except at the call of ...a designated officer or employee of the Federal Government ...with an agenda approved by such officer or employee.”).

(with voting representation limited to small shippers and small railroads) is *self-governing* and is *not* subject to directives by the Board to “suggest ... appropriate policies and recommendations” of general concern to the transportation community as is an advisory committee under FACA.<sup>31</sup>

Indeed, RSTAC’s role under the statutory scheme is not to assist the Board in the regulatory process by reviewing public comments and providing advice and recommendations at the request of the Board, but instead to *independently develop and make policy recommendations to the Board on its own initiative*. See 49 U.S.C. § 726 (f) (3).<sup>32</sup> The statutory role of RSTAC, as established under 49 U.S.C. § 726, accordingly does not involve or contemplate RSTAC playing an intermediary advisory role in the Board’s decision-making process on assignment of the Board—as contemplated in the Notice—and the Board should not assign it that extra-statutory role in this proceeding.

**C. The procedure proposed by the Board is unnecessary for the Board to obtain the information and suggestions from public input that it seeks.**

The AAR further submits that the special procedure proposed by the Board in its Notice not only is inconsistent with the APA and assigns extra-statutory functions to RSTAC, it is unnecessary. Small shippers and small carriers, similarly to other interested

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<sup>31</sup> Under 49 U.S.C. 726 (c), “[t]he Council Chairman shall serve as the Council’s executive officer and shall direct the administration of the Council, assign officer and committee duties, and shall be responsible for issuing and communicating the reports, policy positions and statements of the Council.” The Secretary of Transportation and the Board’s Chairman are only authorized “to cooperate with the Council in providing research, technical and other reasonable support.” See 61 FR 2866 (Jan. 29, 1996) (Board Notice establishing RSTAC); see also 49 U.S.C. § 726 (d) (5). The Council is also allowed to “solicit and use private funding for its activities.” 49 U.S.C. § 726 (d) (3). Compare September 24, 2009 RETAC Charter, at p.1, Section B; September 24, 2009 National Grain Car Council Charter, at p.1, Section B.

<sup>32</sup> The legislative history regarding the establishment of RSTAC further makes clear that Congress intended the RSTAC to perform an entirely independent advisory function free from Board or other government direction. See H.R. Conf. Rep. 104-422, 1995 U.S.C.C.A.N. 850, 919-920 (1995) (“The Council would be directed to prevent or address obstacles to effective and efficient transportation through private sector mechanisms, where possible, and where unsuccessful, to suggest appropriate regulatory or legislative relief.”)

parties, have been invited by the Board to identify their interests and contribute their suggestions to the Board on the mediation and arbitration issues raised in the Notice at the public comment stage. The Board accordingly will have the benefit of the views and suggestions of small shippers and small carriers –and can determine an appropriate course of action based on those comments in the context of the entire public record-- without the need for a special procedure assigning RSTAC an improper intermediary role in this proceeding.

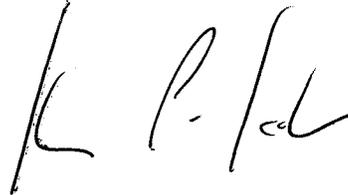
In this regard, RSTAC itself can also file comments; and the AAR wishes to make clear that it does not take issue with RSTAC filing any comments in this proceeding. RSTAC, based on a vote of approval of its small shipper and small carrier members, is free at any time to make whatever recommendations to the Board it sees fit on the mediation and arbitration issues raised in the Board’s Notice. The AAR, for the reasons explained above, only takes issue with respect to the Board’s proposal to use RSTAC as an intermediary “advisory board” for evaluating and making recommendations regarding the public comments submitted in this proceeding.

### **Conclusion**

The Board’s current rules provide parties with a wide array of ADR mechanisms (including mediation and arbitration) and are fully sufficient to encourage the use of such mechanisms where they are deemed potentially useful and cost-effective by the parties.

Accordingly, modifications to the Board's existing rules or adoption of new rules by the Board are unnecessary.

Respectfully Submitted,



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