

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

Decided May 20, 2002

The Board amends Part 1111 of title 49 of the *Code of Federal Regulations*.

BY THE BOARD:

By decision served September 20, 2001, and published in the *Federal Register* on September 24, 2001, we initiated this proceeding and sought comments from interested parties on several matters relating to the use of arbitration as an effective means of resolving disputes that are subject to the Board's jurisdiction. This proceeding, which reflects our preference for private-sector resolution of disputes outside of our formal processes where possible, had three specific objectives:

- (1) To update our information on qualified persons who are available and willing to serve as arbitrators;
- (2) To amend our regulations at 49 CFR Part 1111 governing formal complaints to add a requirement that formal complaints contain a statement that the complainant considered arbitration under our voluntary arbitration process (49 CFR Part 1108), where applicable, and either decided against it or was unable to obtain the agreement of the other party or parties to the dispute; and
- (3) To explore, and provide a record to Congress on, the issue of whether (and how) binding arbitration should be mandated, through legislation, for small rail rate disputes.

ROSTER OF ARBITRATORS

We asked all persons who possess the requisite qualifications (i.e., experienced in rail transportation or economic issues similar to those arising before the Board) and who are currently available to serve as an arbitrator to submit their name and qualifications. Responses have been received from 29

persons so far, and a list of their names and addresses has been prepared. This roster will be made available to any party interested in pursuing arbitration under the procedures of 49 CFR Part 1108. Requests for a copy of the list should be made to the Board’s Office of Public Services.¹ Information regarding arbitral fees can be obtained by contacting persons included on the list directly. Interested parties are reminded that this list is not exclusive and that, under 49 CFR 1108.6(b), they may select (and have added to the roster by request to the Chairman) any other qualified person(s) to arbitrate a particular dispute.

STATEMENT REQUIRED IN RAIL COMPLAINT CASES

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, we proposed to add a new requirement in 49 CFR 1111.1 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.²

We have reviewed and fully considered all comments received on this proposal. A number of commenting parties supported the proposal as a useful reminder of the availability of our voluntary arbitration procedures. One party, the 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.³ 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. But a simple requirement that they state that they have made such a determination in an individual case is not burdensome. Accordingly, we will adopt the amendment to 49 CFR Part 1111, as set forth in the Appendix to this decision.

¹ Office of Congressional and Public Services, Suite 840, Surface Transportation Board, 1925 K Street, NW, Washington, D.C. 20423-0001; telephone (202) 565-1592.

² A technical revision to 49 CFR 1109.3 to update a statutory reference was also discussed in our September 20, 2001 decision, and will be addressed in a separate *Federal Register* notice.

³ *Coal Rate Guidelines, Nationwide*, 1 I.C.C. 2d 520 (1985), *aff’d sub nom. Consolidated Rail Corp. v. United States*, 812 F.2d 1444 (3d Cir. 1987).

COMMENTS RELATING TO MANDATORY BINDING ARBITRATION

We sought to initiate a dialogue to explore whether binding arbitration of small rail rate disputes should be mandated through legislation, in order to provide a record for Congress on this subject. By petition filed October 9, 2001, the National Industrial Transportation League asked us to broaden the inquiry to address mandated arbitration for a broader range of disputes — potentially to include disputes about rail classifications, rules and practices, allowances, demurrage, common carrier obligation issues, car service, loss and damage issues, and others. In a decision served October 26, 2001, we reaffirmed our intent to focus on small rail rate cases. But we stated that we would not preclude interested parties from discussing a broader range of issues, including the merits of arbitration in general, mandatory arbitration for issues other than small rail rate cases, or broader issues related to how arbitration should work.

We received comments and/or reply comments from 21 parties. These included governmental entities, railroads and rail groups, shippers and shipper groups, and others. The comments reveal basic differences of opinion as to whether or not legislative change to mandate arbitration of disputes that are subject to our jurisdiction would be appropriate or desirable. Further significant differences of opinion are evident regarding which types of disputes should be covered, what standards (if any) should apply, the scope of review of arbitral awards, and other matters.⁴

When we invited comments on the subject of arbitration, we hoped that the resulting dialogue of interested parties could serve to narrow the issues, find some common ground, or identify at least a few non-controversial areas. However, that has not turned out to be the case. The comments do not reflect areas of consensus on the subject. We will provide a report to Congress, summarizing the comments we received in this proceeding.⁵

⁴ The comments of the Association of American Railroads support private-sector solutions, and take the position that non-binding mediation under the auspices of expert Board staff could be helpful in addressing small shipper concerns. Indeed, the Board does perform such a function in appropriate situations, making its expert staff available to help parties work through concerns and attempt to devise appropriate solutions. Our Office of Compliance and Enforcement, for example, administers an informal complaint resolution program, the Rail Consumer Assistance Program, and other agency staff informally assist members of the public in a variety of ways. Furthermore, the Board has directed parties to pursue non-adjudicatory remedies in specific cases.

⁵ In this regard, we note that just recently Senator Conrad Burns (R-MT) introduced legislation providing for final offer arbitration at the request of a shipper or non-railroad party to resolve (continued...)

Our actions here will not significantly affect either the quality of the human environment or the conservation of energy resources; nor will they have a significant effect on a substantial number of small entities.

List of Subjects

49 CFR Part 1111

Administrative Practice and Procedure.

Authority: 49 U.S.C. 721(a)

It is ordered:

1. Part 1111 of title 49 of the *Code of Federal Regulations* is amended as set forth in the Appendix, effective June 21, 2002.
2. Notice of this decision will be published in the *Federal Register*.
3. This proceeding is discontinued.

By the Board, Chairman Morgan and Vice Chairman Burkes.

⁵(...continued)

disputes in a number of areas (not just small rate cases). We hope that the record the Board has compiled will provide helpful information as Congress considers this legislation.

6 S.T.B.

APPENDIX

Title 49, Chapter X, Part 1111 of the *Code of Federal Regulations*, is amended as follows:

PART 1111 — COMPLAINT AND INVESTIGATION PROCEDURES

§1111.1 Content of formal complaints; joinder

* * * *

(a) * * *

(11) 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.

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