

PART 1109–USE OF MEDIATION IN BOARD PROCEEDINGS

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Authority: 49 U.S.C. § 721(a) and 5 U.S.C. § 571 et seq.

§ 1109.1 Mediation statement of purpose, organization, and jurisdiction.

The Board favors the resolution of disputes through the use of mediation and arbitration procedures, in lieu of formal Board proceedings, whenever possible. Parties may seek to resolve a dispute brought before the Board using the Board’s mediation procedures. These procedures shall not be available in a regulatory proceeding to obtain the grant, denial, stay or revocation of a request for construction, abandonment, purchase, trackage rights, merger, pooling authority or exemption related to such matters. The Board may, by its own order, direct the parties to participate in mediation using the Board’s mediation procedures. The Board’s mediation program is open to all parties eligible to bring or defend matters before the Board.

§ 1109.2 Commencement of mediation.

(a) *Availability of mediation.* Mediation may be commenced in a dispute before the Board:

- (1) Pursuant to a Board order issued in response to a written request of one or more parties to a matter;
- (2) Where the Board orders mediation by its own order; or
- (3) In connection with a rate complaint, as provided by § 1109.4 and Part 1111 of this chapter.

(b) *Requests for mediation.* Parties wishing to pursue mediation may file a request for mediation with the Board at any time following the filing of a complaint. Parties that use the Board’s mediation procedures shall not be required to pay any fees other than the appropriate filing fee associated with the underlying dispute, as provided at 49 C.F.R. § 1002.2. The Board shall grant any mediation request submitted by all parties to a matter, but may deny mediation where one or more parties to the underlying dispute do not consent to mediation, or where the parties seek to mediate disputes not eligible for Board-sponsored mediation, as listed in § 1109.1.

§ 1109.3 Mediation procedures.

(a) *Mediation model.* The Chairman will appoint one or more Board employees trained in mediation to mediate any dispute assigned for mediation. Alternatively, the parties to a matter may agree to use a non-Board mediator if they so inform the Board within 10 days of an order

assigning the dispute to mediation. If a non-Board mediator is used, the parties shall share equally the fees and/or costs of the mediator. The following restrictions apply to any mediator selected by the Board or the parties:

- (1) No person serving as a mediator may thereafter serve as an advocate for a party in any other proceeding arising from or related to the mediated dispute, including, without limitation, representation of a party to the mediation before any other federal court or agency; and
- (2) If the mediation does not fully resolve all issues in the docket before the Board, the Board employees serving as mediators may not thereafter advise the Board regarding the future disposition of the remaining issues in the docket.

(b) *Mediation period.* The mediation period shall be 30 days, beginning on the date of the first mediation session. The Board may extend mediation for additional periods of time not to exceed 30 days per period, pursuant to mutual written requests of all parties to the mediation proceeding. The Board will not extend mediation for additional periods of time where one or more parties to mediation do not agree to an extension. The Board will not order mediation more than once in any particular proceeding, but may permit it if all parties to a matter mutually request another round of mediation. The mediator(s) shall notify the Board whether the parties have reached any agreement by the end of the 30-day period.

(c) *Party representatives.* At least one principal of each party, who has the authority to bind that party, shall participate in the mediation and be present at any session at which the mediator(s) request that principal to be present.

(d) *Confidentiality.* Mediation is a confidential process, governed by the confidentiality rules of the Administrative Dispute Resolution Act of 1996 (ADRA) (5 U.S.C. § 574). In addition to the confidentiality rules set forth in the ADRA, the Board requires the following additional confidentiality protections:

- (1) All parties to Board sponsored mediation will sign an Agreement to Mediate. The Agreement to Mediate shall incorporate these rules by reference.
- (2) As a condition of participation, the parties and any interested parties joining the mediation must agree to the confidentiality of the mediation process as provided in this section and further detailed in an agreement to mediate. The parties to mediation, including the mediator(s), shall not testify in administrative or judicial proceedings concerning the issues discussed in mediation, nor submit any report or record of the mediation discussions, other than the settlement agreement with the consent of all parties, except as required by law.
- (3) Evidence of conduct or statements made during mediation is not admissible in any Board proceeding. If mediation fails to result in a full resolution of the dispute, evidence that is otherwise discoverable may not be excluded from introduction into the record of the underlying proceeding merely because it was presented during mediation. Such materials may be used if they are disclosed through formal discovery procedures established by the Board or other adjudicatory bodies.

(e) *Abeysance*. Except as otherwise provided for in 49 C.F.R. § 1109.4(f) and Part 1111, any party may request that a proceeding be held in abeyance while mediation procedures are pursued. Any such request should be submitted to the Chief, Section of Administration, Office of Proceedings. The Board shall promptly issue an order in response to such requests. Except as otherwise provided for in 49 C.F.R. § 1109.4(g) and Part 1111, the Board may also direct that a proceeding be held in abeyance pending the conclusion of mediation. Where both parties to mediation voluntarily consent to mediation, the period during which any proceeding is held in abeyance shall toll applicable statutory deadlines. Where one or both parties to mediation do not voluntarily consent to mediation, the Board will not hold the underlying proceeding in abeyance and statutory deadlines will not be tolled.

(f) *Mediated settlements*. Any settlement agreement reached during or as a result of mediation must be in writing, and signed by all parties to the mediation. The parties need not provide a copy of the settlement agreement to the Board, or otherwise make the terms of the agreement public, but the parties, or the mediator(s), shall notify the Board that the parties have reached a mutually agreeable resolution and request that the Board terminate the underlying Board proceeding. Parties to the settlement agreement shall waive all rights of administrative appeal to the issues resolved by the settlement agreement.

(g) *Partial resolution of mediated issues*. If the parties reach only a partial resolution of their dispute, they or the mediator(s) shall so inform the Board, and the parties shall file any stipulations they have mutually reached, and ask the Board to reactivate the procedural schedule in the underlying proceeding to decide the remaining issues.

§ 1109.4 Mandatory mediation in rate cases to be considered under the stand-alone cost methodology.

(a) *Mandatory use of mediation*. 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 C.F.R. Part 1111.

(b) *Assignment of mediators*. Within 10 business days after the shipper files its formal complaint, the Board will assign one or more mediators to the case. Within 5 business days of the assignment to mediate, the mediator(s) shall contact the parties to discuss ground rules and the time and location of any meeting.

(c) *Party representatives*. At least one principal of each party, who has the authority to bind that party, shall participate in the mediation and be present at any session at which the mediator(s) requests that the principal be present.

(d) *Settlement*. The mediator(s) will work with the parties to try to reach a settlement of all or some of their dispute or to narrow the issues in dispute, and reach stipulations that may be incorporated into any adjudication before the Board if mediation does not fully resolve the dispute. If the parties reach a settlement, the mediator(s) may assist in preparing a written settlement agreement.

(e) *Confidentiality.* The entire mediation process shall be private and confidential. No party may use any concessions made or information disclosed to either the mediator(s) or the opposing party before the Board or in any other forum without the consent of the other party. The confidentiality provision of § 1109.3(d) and the mediation agreement shall apply to all mediations conducted under this section.

(f) *Mediation period.* The mediation shall be completed within 60 days of the appointment of the mediator(s). The mediation may be terminated prior to the end of the 60-day period only with the certification of the mediator(s) to the Board. Requests to extend mediation, or to re-engage it later, will be entertained on a case-by-case basis, but only if filed by all interested parties.

(g) *Procedural schedule.* Absent a specific order from the Board, the onset of mediation will not affect the procedural schedule in stand alone cost rate cases set forth at 49 C.F.R. § 1111.8(a).