

**STB Chairman Daniel R. Elliott III**  
**North American Rail Shippers Association**  
**May 30, 2013**

Two-thousand twelve was an extremely busy year for us at the Surface Transportation Board. 2013 is shaping up the same way, so I appreciate your invitation and this opportunity to tell you about it.

As you know, the Board is charged with regulating America's freight-railroad system. In the decades since that system was largely deregulated by the Staggers Act of 1980, it has become a model of business efficiency. Our railroads are among the most well-regarded and profitable entities in this nation. Other nations admire at their operations, achievements, and progress while U.S. shippers have seen their average rail rates drop significantly. And for many shippers, overall service has improved dramatically.

At the same time, we know that the story for shippers and railroads is an uneven one.

Deregulation worked so well that many shippers say there is now a lack of real competition. They say mergers have left the country dominated by two regional duopolies that increasingly offer high, take-it-or-leave-it rates to companies that have no other transportation alternative.

Our job at the STB is to strike a balance among all stakeholders, including shippers and railroads, that enables carriers to maintain economic viability while ensuring efficient, competitive, and cost-effective transportation for shippers. We strive to help parties innovatively solve their freight-transportation disputes so that freight keeps moving, businesses keep growing, and commerce flows.

It's this innovation that's been driving my tenure at the Board. Much has changed since the current rules on rail competition were put in place. I'm taking a hard look at current regulations and have asked our stakeholders how, if, and where the Board should update its rules and procedures in light of the many changes in the rail industry.

I want railroads to continue to invest in their infrastructure and provide the most efficient, environmentally sound freight transportation possible. I also want American companies and farmers to be able to ship their goods anywhere and anytime at reasonable rates. The Board is here to ensure that happens.

Now to some specifics about our work.

In 2011, the Board held a two-day public hearing on competition issues. Last summer, we issued two decisions based on what we learned at that hearing and from the public comments submitted to us.

We proposed several reforms for how the Board resolves rate disputes, to ensure that all captive shippers have a meaningful way to challenge rates. Captive shippers have long told us that they don't bring rate disputes to the STB because of high litigation costs associated with the Board's complex Stand Alone Cost (SAC) test traditionally used to resolve big rate cases.

You may recall that a couple of years ago, the Board simplified its evidentiary procedures to provide rail customers with a lower-cost, expedited alternative to the SAC test. The methodologies used in the simplified procedures are less precise than those used in the full-SAC cases, so the Board capped the amount of relief available under them.

The centerpiece of the Board's proposal is to remove that limitation on relief for cases brought under the Simplified Stand-Alone Cost, or SAC, alternative, hoping that this will

draw more usage. The Board also proposes to double the relief available under its other simplified rate approach, the Three-Benchmark method. Included in our plan is to make certain technical changes to the Full-Stand Alone Cost test, such as curtailing the use of cross-over traffic, and to raise the interest rate that railroads must pay on reparations to shippers if the railroads are found to have charged unreasonable rates.

Recently, the Board proposed several changes to its key costing methodology, the Uniform Rail Costing System. We're proposing to adjust the manner in which URCS calculates certain system-average unit costs to better reflect railroad operations. Our proposal will automatically reflect economies of scale relative to shipment-size increases, eliminating the current need for a separate mathematical adjustment referred to as the "make-whole adjustment."

This is important because URCS enables the Board to determine a railroad's variable costs of providing rail transportation service, to determine the jurisdictional threshold in rate disputes between railroads and their customers, and to determine whether challenged rates are reasonable.

The Board is also busy considering a proposal submitted by the National Industrial Transportation League to increase rail-to-rail competition through reciprocal switching. Under NITL's proposal, certain shippers located in terminal areas that lack effective transportation alternatives would be granted access to a competing railroad if there is a working interchange within 30 miles. The Board conducted a lengthy preliminary analysis of NITL's proposal and found that it is in the public's interest to obtain empirical information from stakeholders before we could determine how to proceed.

Opening comments were filed on March 1 and replies were due by May 30. In order to fully evaluate the proposal, we asked stakeholders for information on the impact on rates and service for shippers that would qualify under the proposal; the impact on rates and

service for captive shippers who would NOT qualify; the impact on the railroad industry's financial condition and network efficiencies; and for proposals on competitive access pricing. We look forward to reviewing the opening and reply submissions from our stakeholders.

Also this past November, we issued proposed rules on interchange commitments, or paper barriers. The Board's rules currently require that a party seeking STB authority to sell or lease a line disclose an interchange commitment in the transaction. The proposal requires a party to file additional information on the interchange commitment's impact on shippers and on the purchaser or lessee railroad. The goal of the disclosures is to encourage transactions that are in the public interest, while ensuring that we have enough information to judge whether competitive issues require a harder review.

We're also getting a lot done outside of the realm of rate cases and competitive access.

In May of 2012, we proposed new rules to clarify liability for railcar demurrage. Conflicting decisions by the Courts of Appeal for the 3<sup>rd</sup> and 11<sup>th</sup> Circuits created uncertainty regarding the party ultimately responsible for demurrage. Under our proposal, a person receiving rail cars from a rail carrier for loading or unloading who detains the cars beyond the "free time" provided in the carrier's tariff will generally be responsible for paying demurrage if that person has had actual notice of the demurrage tariff prior to rail car placement. The comment period for this has concluded, and the matter is now under active consideration.

As I've mentioned in the past, I've worked hard to emphasize alternative dispute resolution efforts between railroads and shippers. I see the Board's role as encouraging greater cooperation—and through it more harmony—between railroads and shippers.

It is certainly better for solutions to freight disputes to come directly from parties instead of having one imposed on you by the STB. A large part of my tenure has been dedicated to channeling our tremendous human resources to solve disputes before they result in formal case filings.

The Rail Customer and Public Assistance Program has proven itself to be a worthy resource to our stakeholders. Some of you in the room have probably used its services-- it helps shippers informally settle disputes with their rail carrier at no cost. The number of disputes and public informational inquiries handled by this program was around 1,400 last year.

And our very successful formal mediation program is continuing to grow. We've conducted mediation in a new area this year—passenger rail on-time performance—and expanded our staff trained to conduct mediations.

This month, we adopted final mediation and arbitration rules that establish a new arbitration program under which shippers and railroads may agree in advance to voluntarily arbitrate certain types of disputes with clearly defined liability limits in matters coming before the agency. Let me give you some specifics on how this will work.

Arbitration will be voluntary, but binding. Parties such as shippers and railroads can agree in advance to arbitrate certain types of disputes with a limit on potential liability and relief of \$200,000. Parties can opt into the program at any time. Parties can also arbitrate on a case-by-case basis without opting into the overall program. Parties can also opt out, but they can't quit an arbitration they are in the middle of—it will take 90 days to release them from the program.

The types of disputes that are arbitrable are those about demurrage; accessorial charges; misrouting or mishandling of rail cars; and disputes involving a carrier's published rules and practices as applied to particular rail transportation. If there are other disputes under our jurisdiction that parties want to arbitrate, they can agree to do that. But, parties can't arbitrate over licenses or other authorizations or exemptions the Board would routinely review.

I said before that the cap on liability or relief is a default of \$200,000. But if parties want to agree to a different cap, they can do that.

There's a lot of flexibility built into this program—we really want parties to use arbitration wherever and however it's appropriate for the situation, and we want them to be able to tailor our framework to their needs.

Arbitration will start when a party files a complaint, and a request for arbitration of the dispute. A panel of three arbitrators will conduct the arbitrations, unless the parties agree to use a single neutral arbitrator. Each party will appoint an arbitrator and pay for that arbitrator. Then, the Board will give the parties a list of five arbitrators from which they can select the third, neutral arbitrator, using a "strike" methodology, which is a typical process for arbitrator selection. The Board will supply this list of possible neutrals from the professional arbitration associations, and will foot the cost of getting that listing. The parties will split the cost of the neutral arbitrator.

Arbitration will move quickly. Selection of the arbitrators will take place within a matter of weeks, and the time for developing and submitting evidence will be just 90 days.

What happens then? The arbitrators will decide the case and will write up their decision and get it to the parties within 30 days after the close of evidence. The Board will get a redacted copy of the decision within 30 days after that. We will publish this redacted

decision through our website, but that decision won't be able to be used as precedent for future similar disputes.

If a party is unhappy with the arbitration decision, it will have 20 days to appeal it to the Board, but we will take a very, very narrow look at the decision. We will only make a change if the arbitration award reflects a clear abuse of discretion on the part of the arbitrators, or directly goes against our statutory authority. A party can also seek judicial review of the arbitration decision under the Federal Arbitration Act.

For mediation, we made a few similar change, The new rules establish procedures under which the Board may order parties to participate in mediation in certain types of disputes, on a case-specific basis, even if they do not both agree to mediation. The Board will be able to order mediation, or grant a mutual request for mediation, at any time in an eligible proceeding.

We will appoint Board staff as mediators, unless the parties want to use a non-Board mediator. They can do that, but they will share the costs. The Board is especially well-suited to mediate disputes because we have the experts on staff who understand the issues backwards and forwards, making each side feel comfortable. Not to mention that the use of Board-mediators is free to the parties!

These new rules reflect our preference for alternative dispute resolution in lieu of formal proceedings, wherever possible.

Of course, shippers and railroads still have recourse to formal proceedings before the Board. The cases that do go formal are often the most difficult, complex and time-consuming ones. But we have a highly educated, highly motivated workforce at the Board that works through these difficult cases in an efficient but careful way.

While it has been a productive year, there are challenges. Like many federal agencies, budgets are becoming even tighter, and we are being charged to do more with less. We

are fortunate in that we haven't seen a wave of retirements, despite the fact that a large portion of our workforce is eligible to retire. I think that this speaks volumes as to the diligence and dedication of our staff. When people do leave, we get the best folks to replace them. And the fact that the STB has been named the Best Place to Work in the federal government for the past four years has helped retain our talented workforce and aided in the recruitment of the best.

While we work on these many key issues, it is important that we conduct ourselves in ways that are as open and transparent as possible. We will continue to hold oral arguments on important and controversial cases. It gives both parties and the Board a valuable opportunity to talk face-to-face before we rule on a dispute.

My goal is that the Surface Transportation Board continues to be seen as an honest broker by shippers, railroads and Congress.

We all share a common interest in preserving a national railroad system that serves our economy efficiently and expeditiously.

While there are still serious disagreements over rates and service, there is a lot going on at the Board not only to settle these disputes, but also to enable fair, innovative industry practices to thrive within an updated regulatory framework.

Thank you again for your gracious invitation and I would be pleased to answer any questions.