UNITED STATES OF AMERICA

SURFACE TRANSPORTATION BOARD

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HEARING

IN THE MATTER OF:	:	
ASSESSMENT OF MEDIATION AND	:	Docket No.
ARBITRATION PROCEDURES.		EP 699
	:	

Thursday,
August 2, 2012

Surface Transportation Board
Suite 120
395 E Street, S.W.
Washington, D.C.

The above-entitled matter came on for hearing, pursuant to notice, at 9:30 a.m.

BEFORE:

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FRANCIS P. MULVEY	Vice Chairperson
ANN D. BEGEMAN	Member

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P-R-O-C-E-E-D-I-N-G-S

9:31 A.M.

CHAIRMAN ELLIOTT: Good morning. Welcome, everyone. Today, we'll hear oral presentations in our proposed rulemaking concerning the assessment of mediation and arbitration procedures in Docket EP 699.

The Board launched this proceeding with a notice and request for comments in late 2010 as part of its initiative to enhance the use of alternative dispute resolution for matters coming before this Agency. We greatly appreciate the effort that members of the public devoted to responding to that notice. After reviewing and evaluating the many thoughtful comments provided by the public, we followed up this past spring with a Notice of Proposed Rulemaking on a specific set of proposed new rules, as well as modifications to our existing rules, involving the Board's mediation and arbitration procedures.

This hearing will address the

further comments filed by the parties in response to the Board's specific rulemaking proposals in response to our June 28, 2012 notice announcing today's hearing.

We received requests for participation from nine parties. The order of appearance in one of two panels and the requested times to speak were set out in our subsequent July 25, 2012 decision. Copies are available at the back of the hearing room. We ask that all parties come up to the table -- you're already up there, we don't have to worry about that.

We will hear from each member of the panel and the Board will then subsequently ask questions. Any party making a PowerPoint presentation or using similar hard copy aids using materials previously placed in the record should have provided those materials in hard copy to the Board. We will have any pages used today in such presentations bound into the transcript to this proceeding.

Speakers, please note the timing lights are in front of me. You will see a yellow light when you have one minute remaining and a red light when your time has expired. The yellow one-minute light will be accompanied by a single chime and a red light signifying that your time has expired will be accompanied by two chimes. Please keep to the time that you have been allotted. When you see the red light and hear the double chime, please finish your thought and take a seat.

In addition, I would like to remind everyone today to please turn off their cells phones.

And I believe Vice Chairman Mulvey has some opening comments.

VICE CHAIRMAN MULVEY: Thank you, Dan. I want to welcome our panelists to our hearing this morning.

The Board has looked at ways to encourage less formal resolution of disputes ever since we were created back in 1995 under

ICCTA. In 1997, we established procedures for voluntary binding arbitration based upon recommendations we received from our Rail Shipper Transportation Advisory Committee in Ex Parte 560.

In 2001, we updated our list of arbitrators. We built a record for the Congress to consider legislative action to require non-voluntary binding mediation and we did that through Ex Parte 586.

And today, we're looking at ways to increase participation in our arbitration program and to improve our mediation procedures. This is Ex Parte 699.

Now some of the Board's efforts in the past have paid some dividends. We've had some cases resolved through the Board's mediation processes and sometimes in rate cases the parties will resolve some of the issues before us, thus streamlining and reducing the cost and time involved in a full SAC case.

One full SAC case, NRG v. CSX back in July of 2010, was fully resolved through mediation. And we've also beefed up our Rail Customer and Public Assistance Program. Growth in the number of cases that are resolved by our very capable staff has been fairly dramatic over the last few years. But there's been no movement at all towards increased use of the Board's arbitration procedures. In fact, there's been no use at all of the Board's arbitration procedures, and despite the fact that arbitration is widely recognized as an effective alternative to dispute resolution and many federal agencies do have arbitration procedures.

Arbitration of service disputes is used by Canadian regulators, although I understand that the railroads up there are not always happy with the way that goes forward, in part because of the final offer arbitration process and the Canadian railroads' feeling that sometimes the arbitrators aren't fully

aware of the uniqueness of railroad operations.

A significant private mediation program also exists in Montana. The National Grain Dealers Program has gotten a lot of praise from both shippers and railroads alike as an effective alternative dispute resolution process.

I'm looking forward today to hearing the testimonies. I'd like to get to the core of why arbitration has not been pursued at the Board, why there are continued reservations about our arbitration process. I want to hear what changes can be made to the Board's current procedures that can be made to address these core concerns, and finally, I want to hear if there are any new ideas that could increase the use of arbitration.

I would like to hear from both shippers and carriers as to what a perfect program might look like in their eyes. And as some believe that no arbitration program at

all is the most desirable, that's the perfect one is none at all, no matter how we design it, well, I want to hear that also.

With that, back to you, Mr. Chairman.

CHAIRMAN ELLIOTT: Commissioner.

MEMBER BEGEMAN: Thank you. I'll be very brief. First, I want to thank everyone who is here today and also the folks on the second panel and everyone else who has been participating in the whole record, even though they may not be testifying today.

I think the Vice Chairman really summed up the questions that I have as well. When we put out the Notice of Proposed Rulemaking, I had a couple of questions myself, actually a number of questions, but the reason that I supported putting it out when we did is because we would have an opportunity to have input from any interested party.

I'm not looking to support only

the proposal we issued. I'm open minded. We all want a workable program, particularly an arbitration program that can be utilized, if we can get there. And if we can't get there, I'd like to hear why not. None of us are really interested in wasting additional time and resources. Thank you.

CHAIRMAN ELLIOTT: Thank you, Commissioner, now we'll begin with Panel I. I assume we're going to go in this order. I would ask you if this is possible (I know one of you has a plane to catch), to stay around afterwards, after your panel goes, just in case we do have some follow-up questions because this is kind of a unique circumstance where there may be some need for give and take. Because really as the other members mentioned, we're trying to get something that works here, not shove anything down someone's throat. That doesn't ever work. I think we've already succeeded in doing that since we have a program that's never been used.

Our hope today is to really bring everyone together and have willing participants in a program. So we would appreciate anybody that can, please staying around in case we have some follow-up questions. Thank you.

I assume we're beginning with Mr. Gordon?

MR. GORDON: Good morning, Chairman Elliott and Vice Chairman Mulvey and Commissioner Begeman. It's my first opportunity to testify before this Board and I'm honored at the opportunity to do so. And I will be staying for the entire panel and to respond to your questions.

I am accompanied today by Thomas Wilcox who serves as one of the NGFA's transportation outside counsels and is here to assist in responding to any questions the Board may have about the NGFA submittal in this petition.

The National Grain and Feed

Association commends this Board for conducting both this public hearing and to further explore ways to improve upon its proposed regulations that are intended to increase the use of mediation and arbitration as a means for resolving commercial disputes between rail carriers and shippers.

As you know, the NGFA consists of more than a thousand member companies that operate more than 7,000 facilities and handle more than 70 percent of the U.S. grain and oil seed crop. Our members include all sectors of the industry including grain elevators, feed, and feed ingredient manufacturers, bio fuels companies, grain and oil seed processors, and millers, exporters, livestock and poultry integrators and associated firms that provide goods and services to our nation's grain and feed industry.

That latter category of our members includes rail carriers who are associate trading members of the NGFA. In

addition, we have 26 state and regional affiliates that are members of the NGFA and Vice Chairman Mulvey mentioned one of those in his opening comments.

The NGFA supports the STB's efforts to expand the availability of and improve upon its arbitration program. We generally believe that providing more access to arbitration for rail shippers would be a very positive development and will facilitate the ability of both shippers and carriers to resolve disputes in a business-like manner.

Today, I want to amplify on the NGFA's written statements previously submitted for the record as part of this proceeding and to share our association's experiences in offering private sector rail arbitration services for agricultural commodities. We have no further comments at this time on the mediation aspects of the Board's proposed rules which we also support.

The NGFA's rail arbitration system

has been in place since 1998 and has functioned extremely well. All of the Class 1 carriers and a number of shortline and regional carriers are participating in NGFA's rail arbitration system, as are most NGFA member grain handling, feed processing, and exporting companies. In fact, the only NGFA members that have really opted out of the program are those that don't ship by rail.

I believe carriers and shippers alike view the success of our rail arbitration system as being attributable to the NGFA's century-long experience in offering arbitration services to the commercial grain and feed industry, as well as to the transparency, the integrity, the fairness, and the cost effectiveness of which the system operates.

The NGFA appreciates the fact that the Board, in its proposed regulations, references our rail arbitration system and proposes to adopt several components of that

system. We do, however, believe it is extremely important that the Board emphasize that the STB's rail arbitration program is not intended to impinge upon or dilute existing industry rail arbitration systems such as ours.

One particular area we ask the Board to reexamine is Section 1108.3(d) of the Board's proposed regulations, which we believe could be misinterpreted to apply only to arbitration clauses in rail transportation contracts. Our system, for instance, references arbitration as a condition of membership and is embodied in our bylaws, not necessarily in a transportation contract.

The NGFA respectfully requests that this section be clarified further in the final regulations to state that the Board's arbitration rules also do not preempt the applicability or otherwise supersede existing industry operated rail arbitration systems.

Let me touch very briefly on

several suggested improvements that the NGFA recommends be made in final regulations to be issued by the Board. First, we reiterate our belief that the STB rail arbitration should utilize a panel of three arbitrators with experience in the type of dispute involved in the case. The NGFA's experience is that this improves the likelihood of well-reasoned decisions, enhances the balance and fairness with which the system is viewed, and reduces the potential for inadvertent errors.

We are cognizant of the Board's financial limitations and operating its arbitration program. That is something NGFA system frankly doesn't confront because we use industry volunteers, both from the rail and the shipper sector who donate their time and talent to service arbitrators. But we do suggest that the Board further evaluate methods by which panels of three arbitrators would be utilized in all STB arbitration proceedings.

Second, the NGFA believes strongly that the final rule should require all arbitration decisions to be published with confidential material redacted. We recognize there's a difference of opinion on this point in the record of this proceeding, but our experience has shown that when arbitrators and parties to a case know that the arbitration decisions will be published and the names of the arbitrators attached to those decisions, the parties to a case know that the arbitration decision -- excuse me, it enhances the transparency and fairness of the system and facilitates commercial settlements. Our experience has been that most of these cases are resolved by the parties before they ever are submitted to the arbitrators and we think this is one of the reasons why.

Further, we believe written and publicly accessible arbitration decisions generally promote discipline and competence by the arbitrators, build confidence and trust in

the system, establish its credibility with stakeholders and have important educational value to the industry as a whole.

Third, as reflected in our written comments, we urge the STB to increase the $200,000 maximum per arbitrable dispute cap on cases. As noted in our comments, the NGFA's Rail Arbitration Committee has decided to review the NGFA's current $200,000 cap which was put in place 14 years ago. One of the reasons we're doing that, obviously, is because of the increased value of agricultural commodities and the fact that in our non-rail arbitration cases, the average claim well exceeds $200,000.

Fourth and finally, the NGFA encourages the STB to clarify and/or modify the appellate standards contained in its proposed regulations. While proposed rule Section 1115.8 states that the standard for STB review will be "whether there is a clear abuse of authority or discretion," proposed

Section 1108.3(c) states that arbitrators also are to be "guided by the Interstate Commerce Act and by STB precedent."

This language arguably holds arbitrators to a more restrictive standard of deciding cases based on Agency precedent, which we believe would remove some of the flexibility that makes arbitration an effective alternative and attractive alternative to formal litigation.

Further, as other parties involved in this proceeding have pointed out, the requirement that the Board decisions on arbitration appeals are reviewed under the Hobbs Act, appears to add another layer of potential confusion and uncertainty as to the standards to be applied in STB arbitration cases.

The NGFA's position as stated in its written submissions is that the Board should not instruct arbitrators to be guided by prior STB and ICC decisions, except for jurisdictional issues. In addition, this more

limited guidance should be coupled with the proposed "clear abuse of arbitrable authority or discretion" standard in Section 1108(3)(c) of your proposed regulations.

In closing, the NGFA again wishes to commend this Board for examining ways to improve on its rail arbitration program and hopes that our suggestions are viewed in the constructive intent in which they are offered. Thanks and again, we'll be pleased to respond to questions at the appropriate time.

CHAIRMAN ELLIOTT: Thank you, Mr. Gordon. Now we'll proceed with Mr. Warfel and Ms. Booth from NITL.

MR. WARFEL: Chairman Elliott, Vice Chairman Mulvey, and Commissioner Begeman, good morning. I am Curt Warfel, Sourcing Manager for Bulk Transportation for AkzoNobel's North American operations. I'm here today on behalf of the National Industrial Transportation League, the nation's oldest and largest organization of shippers.

Accompanying me is Ms. Karyn Booth, the League's general counsel, who will also present testimony on behalf of the League.

The League is no stranger to this Board, but for the benefit of everyone at the hearing let me note that the League was founded in 1907 and today represents more than 500 member companies which range from some of the largest to the smallest users of the nation's transportation systems. Rail transportation is vitally important for many League members and especially for those who ship chemicals, petroleum, cement, agricultural, and paper and forest products.

I personally have been a member of the League and its Rail Committee for 26 years. I also served as chairman of the Rail Committee from 1998 to 2001, served on the League's Board of Directors from 1998 to the present, and acted as chairman of the League's Board of Directors from November 2006 to November 2008.

The League commends the Board for opening this proceeding to reassess its mediation and arbitration procedures. Like the Board, the League strongly favors the private resolution of disputes between railroads and their customers whenever possible. In that regard, the League would like to express its strong support for the Board's proposals that are intended to increase the use of mediation and arbitration of railroad shipper disputes.

My testimony will focus on a number of important business considerations that may lead League member companies to engage in mediation or arbitration when a dispute with a rail carrier cannot be resolved through other commercial measures. I will also address a number of refinements to the Board's proposed arbitration program that have been recommended by the League and that we believe may encourage greater participation in such a program by League members and other

shippers.

Karyn will address certain legal and procedural issues as have been raised in this proceeding.

Let me state up front that the railroads are important business partners for many League members who depend on reliable rail service. Railroads and their customers must and typically do work together to facilitate the efficient and cost effective movement of freight throughout North America. But every now and then we don't see eye to eye and a disagreement may arise over service, rates, or other matters. When that disagreement escalates and can't be resolved through normal commercial dealings, shippers need to evaluate whether to bring a complaint before this Board to help resolve the problem. However, formal legal proceedings, whether in court or before this Board are time consuming and expensive and involve a risk that most companies would prefer to avoid. They require

companies to divert both personnel and financial resources away from their primary business needs, thus, having the option to resolve disputes informally using mediation or arbitration offers substantial benefits to all parties to the dispute.

If a company can resolve their railroad dispute quickly, they will be much further ahead than when forced to engage in drawn-out litigation. Certainly avoiding costly and time-consuming legal proceedings would benefit the railroads in a similar manner and it would also assist this Board in managing its resources and dockets.

Given these substantial benefits, the League supports the proposal to permit the Board to order mediation and adjudicatory proceedings brought before it upon the request of one or all parties to the dispute or upon the Board's own initiative, except for matters involving public convenience and necessity determinations for labor disputes.

The proposal for parties to engage in mediation over a 30-day period is reasonable since it provides the parties with sufficient time to try to work out their differences without causing an unreasonable delay in the formal proceeding commenced at the Board.

Additionally, providing the option to extend the mediation period if the parties are making progress toward resolving the dispute also is a sound proposal supported by the League.

I am aware that the Board's use of mediation in large rate cases has been successful on a number of instances, thus expanding the use of mediation in other formal proceedings may also reduce the need for parties to engage in expensive litigation before this Board.

Let me now turn to the issue of arbitration. Unlike the Board's experience with mediation, the current arbitration procedures have never been used. There could

be any number of reasons for this which I will not dwell on, rather, I would like to commend the Board for taking the initiative to reassess its current procedures and for proposing a voluntary arbitration program with the goal of encouraging parties to use such a process to resolve disputes in a faster and more cost-effective manner.

As you know from the League's filings in this proceeding, we agree with many of the elements of the arbitration proposal. The League did, however, suggest several modifications to help encourage even greater use of the arbitration procedures. Let me now highlight the key reforms supported by the League as well as certain changes we would recommend.

One, the League agrees with the Board's proposal to establish a voluntary arbitration program which Class 1 and 2 carriers would consent in advance to arbitrate a limited set of disputes unless they freely

choose to opt out of the program by providing notice to the Board. This proposal has the potential to lead to greater use of arbitration while preserving the right of the railroad to voluntarily consent to its participation in the arbitration proceedings. The notice period proposed by the Board for opting out by the railroads appears reasonable and is similar to the arbitration program establish by the National Grain and Feed Association for disputes between NGFA members and the major railroads.

Two, the League agrees with the limited types of matters that would be eligible for arbitration under the proposed program, including disputes involving demurrage charges, assessorial charges, misrouting or mishandling of rail cars, misapplication of published rules and practices to prior shipments and unreasonable practices for past service. These matters are similar to those that railroads and grain

shippers have already agreed to arbitrate under the NGFA program and thus should not be objectionable. But the League has also suggested that a proposed arbitration program be modestly expanded to include disputes over cargo loss and damage, damage to a shipper's rail cars, and service failures not covered by other categories of disputes. These matters were identified by members of the League's Rail Committee as those that shippers would be willing to arbitrate. Such matters are common disputes that involve monetary damages and they rarely implicate broad policy or regulatory issues which are properly excluded under the Board's proposal.

Three, the League agrees that other matters that fall outside the list established by the Board also should be subject to arbitration at the request of all parties. The League suggested that the Board even consider allowing contract disputes to be arbitrated, where the contract does not

already include an arbitration clause. However, because the Board lacks jurisdiction over contracts, the parties would need to consent to arbitration with an understanding that they would not likely have the right of appeal, the right to appeal an arbitration or to the Board.

Four, the Board has proposed to cap the relief that may be awarded in arbitration proceedings to $200,000 per dispute. We believe this proposed cap undercuts the usefulness of the program and should be increased to $500,000, thus expanding the number of disputes subject to arbitration.

Fifth, and finally, the League also proposed that the Board should publish on its website the names of all carriers who consent to participate in the proposed arbitration program so that shippers would know if a dispute with a particular carrier would be eligible for arbitration.

Now based on their comments filed in this proceeding, the railroads have taken issue with the fairness of the Board's opt-out proposal because shippers would be allowed to consent to arbitration on a case-by-case basis. While the League is sensitive to their concerns, since it may impact the extent to which railroads exercise their opt-out option, we believe that they are overstated for several reasons.

First, the carriers clearly have free choice to opt out of the program which places the control over their consent to arbitrate squarely in their own hands.

Second, the scope and size of disputes subject to the program will be limited and the railroads will have clear notice of the types of matters subject to arbitration - subject to their consent to be informed.

Third, the carriers currently participate in a similar arbitration program

with grain shippers and thus have already agreed to many of the same principles included in the Board's proposal.

And fourth, the opt-out approach appears to take into account the vast differences of the number of rail carriers versus shippers that may be involved in a dispute and appropriately establishes rules that could be effectively administered by the Board.

And with that, I'd like to thank you for the opportunity to provide this testimony on behalf of the League. I'd be happy to answer questions at the conclusion of all speakers and I'll yield the remainder of the time to Karyn.

CHAIRMAN ELLIOTT: Ms. Booth, you have ten seconds.

(Laughter.)

MS. BOOTH: Done. Good morning. I am Karyn Booth. I'm a partner at the law firm of Thompson Hine and I serve as general

counsel to the National Industrial Transportation League. It is a pleasure to appear before you today to provide the views of the League on the important issues raised in this proceeding.

My testimony will focus on several legal and technical issues that have been raised in the proceeding regarding the new arbitration program. And I will respond to a number of the concerns about that program raised by the railroads. I think you can see this is a little bit of good cop/bad cop here.

The railroads have challenged this Board's authority to adopt the proposed arbitration program. However, the statutory foundation used to establish the program here, namely 49 USC 721(a) provides this Agency with very broad powers to carry out its responsibilities and to promulgate rules. This broad authority set forth in Section 721(a) does not include any limitations or conditions that restrict the Board from

creating a narrowly defined arbitration program as you have done here to carry out its statutory duties. Indeed, the Board's current arbitration procedures published at 49 CFR Part 1108 were adopted in 1997 pursuant to this exact same statutory authority. The railroads were active participants in that prior arbitration proceeding, but they had no concerns and raised no objections to the Board's reliance on that section at that time.

Reduced to its core, the AAR's primary concern is not really with the Board's authority, but with the structure of the proposed opt-out program. The carriers claim that the program denies them the right to voluntarily consent to arbitrate disputes encompassed by the program. And in essence, they're claiming that they're being coerced against their will to arbitrate those disputes as defined.

But the AAR is glossing over the transparent and simple procedures that the

Board has built into the arbitration program that permit the carriers to freely decide whether to participate or whether to opt out. Presumably, in order to encourage the railroads to arbitrate what are really routine transportation disputes, the program is designed so that the railroads would consent in advance, but provides them with very clear right to revoke that consent by providing written notice within specified time periods.

Importantly, even if a railroad initially decides to remain in the arbitration program, it may change its mind and voluntarily decide at any time to opt out via a simple notice. Thus, the railroads alone, with full notice of the Board's procedures, can choose to stay in or opt out of the program which is plainly and obviously a voluntary decision that comprises voluntary consent.

Also, the arbitration program is not open ended, but is narrowly defined to

cover really five what are run-of-the-mill transportation disputes. The program applies only to money disputes. It caps the potential relief that may be awarded and it excludes disputes involving major policy issues. All of these factors ensure that the railroads have sufficient information to make a voluntary and informed decision whether to participate in the arbitration program.

The railroads claim that the program is unfair because shippers can evaluate whether to arbitrate on a case-by-case basis. They also fear that the shipper may seek to prevent a carrier from asserting a counter claim based on the shipper's refusal to consent to arbitrate that claim. These concerns are unfounded.

The Board is well aware that there are only seven Class 1 railroads and a reasonable number and a manageable number of Class 2 carriers, as opposed to many thousands of shippers that could be involved in a

dispute over demurrage, assessorial charges, railroad practices, or other matters governed by the program. Thus, the opt-out structure was a logical one and is workable as applied to the carriers, but would seemingly be unmanageable if applied to every possible railroad customer.

As to the concern over counter claims, this issue can be easily addressed. The League has suggested the Board permit counter claims in an arbitration if they (1) fall within the scope of arbitrable disputes as defined by the Board; and (2) are related to the same transportation events as the primary claim.

I will now turn to the issue of the standard of review of arbitration awards. The Board has proposed that an arbitrator is required to be guided by the Interstate Commerce Act and by the STB and ICC precedent in making its decision and that a decision can be overturned if it involves clear abuse of an

arbitrator's authority or discretion. The League believes that the standard is sound and it strikes the right balance. The standard provides protection against an arbitrator's clear abuse of authority and it restricts the arbitrator from straying too far away from statutory principles and precedent. However, it also provides appropriate flexibility required by an expedited dispute resolution process.

The railroads prefer a broader review standard that would overturn arbitration awards that are contrary to the statute. However, the League urges the Board to avoid adoption of this standard because it's much more likely to lead to frequent appeals and it would undermine the key reasons parties choose to arbitrate in the first place, to resolve disputes faster and cheaper.

If the Board was interested in broadening the standard of review, the League supports adoption of the Union Pacific's

recommendation to permit an appeal if an arbitrator fails to disclose a conflict of interest based on prior dealings with a party or a party's counsel.

Different viewpoints as to the number and selection of arbitrators have also been expressed by the parties in this proceeding. The League believes that a single arbitrator is sufficient and more cost effective, particularly for smaller disputes. But the parties should have the option to agree to use a panel of three arbitrators and to pay for the corresponding increased cost.

Another significant issue is the neutrality of the arbitrator and the transparency of his or her qualifications. In this regard, the League encourages the Board to update its list of arbitrators annually to strengthen its arbitrator qualification requirements and to provide a fair arbitrator selection process to ensure impartiality.

Regarding the appointment of

arbitrators, the League does not support the final offer approach proposed by the AAR, but rather the fair and transparent strike mechanism as proposed in our opening comments.

Finally, while the League supports keeping arbitration decisions confidential and not affording them precedential value, other parties have suggested that the Board publish a summary of arbitration decisions on its website. This is a good idea. We have no objection to that suggestion and believe it may even assist the public further in evaluating the Board's arbitration processes.

In closing, the League would like to commend your initiative and your creativity in this proceeding and I would be glad to answer any questions you may have. Thank you.

CHAIRMAN ELLIOTT: Thank you very much. Now we'll hear from Ms. Archuleta from the Western Coal Traffic League.

MS. ARCHULETA: Good morning, Chairman Elliott, Vice Chairman Mulvey,

Commissioner Begeman. My name is Stephanie Archuleta. I'm an attorney at Slover & Loftus and I'm here on behalf of the Western Coal Traffic League. WCTL is an association of electric utilities that collectively ship over 140 million tons of coal by rail annually. On behalf of WCTL, I'd like to thank the Board for taking comments and holding this important hearing on the proposed revisions to the Board's mediation and arbitration regulations.

WCTL believes that the Board's proposed NPRM rules are a serious effort to encourage ADR and to address concerns about the availability and use of ADR. WCTL also believes that the proposed NPRM rules may result in new opportunities for the Board-sponsored alternative dispute resolution of discrete disputes.

WCTL supports the STB's efforts to breathe new life into its ADR-related regulations. Nevertheless, WCTL continues to stress that while the Board should continue to

seek to promote ADR, it must also recognize that ADR is not a panacea for resolving shipper complaints or addressing the underlying substantive problems that shippers face in obtaining Agency relief.

Congress appointed the STB as the expert agency to resolve disputes in a timely manner and shippers need the STB to fulfill this role. In the earlier phases of this proceeding, before the Board issues NPRM, WCTL cautioned the Board to ensure that any proposed ADR rules would protect shippers' statutory right to bring complaints against carrier transgressions. WCTL also urged the Board to avoid adopting any procedures that would lead to complex, costly or uncertain litigation or delay proceedings.

WCTL believes that the Board's proposed NPRM rules, generally satisfy its concern and that the proposed rules should not unduly prejudice the rights of WCTL members in seeking resolution of complaints.

In its opening and reply comments, WCTL identified certain aspects of the proposed NPRM rules that it believes require clarification and modifications. WCTL respectfully requests that the Board favorably consider these comments when finalizing its rules.

The bulk of the participating railroads' criticism of the Board's NPRM rules is directed towards the proposed arbitration rules and in particular the proposed opt-out procedures. These criticisms appear to be largely overblown or off base. The proposed rules only allow for arbitration upon the parties' mutual consent and the proposed procedures ensure that affected railroads have a full opportunity to opt out of arbitration.

Affected railroads are sophisticated entities and the opt out procedures are very straight forward. The NPRM establishes the Class 1 or Class 2 carrier looking to opt out of the Board's

proposed arbitration program can simply file a notice with the Board to that effect. This opt-out provision should not be a cause for concern because individual carriers still have full discretion to opt out of the program and thus the program remains fully voluntary.

The railroads also argue that the proposed rules are lopsided, and put them at a substantive disadvantage vis-a-vis shippers by allowing shippers to decide when to pursue arbitration on a case-by-case basis. These arguments appear to be founded upon the mistaken belief that ICCTA affords the railroads the right to bring complaints against shippers for a violation of the law. That's not the case. The proposed rules recognize that shippers have the statutory right to bring a complaint against railroads and have the Board adjudicate that complaint, but not vice versa.

The railroads also criticized the proposed NPRM rules for inadequately defining

the disputes that would be subject to the proposed arbitration process. However, the proposed rules already provide sufficient notice of dispute eligibility. Arbitration-eligible disputes would include those that possess monetary value, but lack policy significance such as disputes relating to demurrage and assessorial charges; compensation from misrouting or mishandling of rail cars; redress for carriers; misapplication of its published rules; and practices as applied to particular rail transportation and other service-related matters.

The proposed rules explicitly provide a proposed Section 1108.7 that rate cases or other complex cases would not be arbitration eligible except on petition. Also, disputes raising novel questions or seeking injunctive or prospective relief would be ineligible. WCTL believes that the Board's proposed NPRM rules reasonably clarify the

types of disputes eligible for STB-sponsored arbitration.

WCTL also supports the Board's continuing efforts to promote Board-sponsored ADR and private sector resolution of stakeholder disputes. It appreciates the opportunity to participate in this proceeding and the Board's consideration of its comments. Thank you.

CHAIRMAN ELLIOTT: Thank you very much. Next, we'll hear from Mr. Whiteside.

MR. WHITESIDE: Is this on? Okay. Good morning Mr. Chairman, Vice Chairman Mulvey, Commission Begeman.

Thank you for bringing this innovative idea forward. It's an interesting problem in consideration of mediation arbitration to pursue innovative ways for carriers and shippers to resolve disputes.

The Alliance for Rail Competition includes many captive shippers, one of them is Montana Wheat & Barley Committee and similar

bodies from other states, a lot of Wheat & Barley Commissions throughout the Western United States, but also a number of utilities, manufacturers, and other producers of bulk commodities.

ARC continues to believe that alternative dispute resolution mechanisms hold a great promise for simplifying and possibly resolving disputes. ARC has, for example, supported final offer arbitration, the way the Canadian shippers and railroads and carriers are brought to the table in the form of ADR. It's interesting that Vice Chairman Mulvey talked about the final offer. Remember that what the railroads probably don't like is it deals with rates and that's not where this one is going. So this is a system that's utilized and mandated in the United States, however, in a lot of cases in many dispute mechanisms and jurisdictions where one party has dominance in the marketplace. We find it in insurance and things like that.

One thing is clear though. No one completely likes any ADR system, but it may provide a place for settling disputes. I quote Frank Schoonover who is one of the board members of the Montana Wheat & Barley Committee. He says it's a tool. It's like if we're going to build a garden, we needs lots of different tools. These provide more tools for starting to resolve resolution of disputes.

What is it we should be seeking for the quest of the ADR? The characteristic of this Board should keep as defining when developing an effective ADR is the flexibility and honesty and confidence that comes from looking forward and having the processes. Measuring the process' success may not be because -- may not be centered around how much it's utilized. It may be centered around how much are we getting accomplished in resolving disputes before we ever get there.

It's important that the system

utilize the experience of mediators and arbitrators. The goal needs to allow the preservation of commercial relationships. One of the things that I think is going forward in Montana that's very, very interesting and revolutionary is the system between the Burlington Northern and the Montana grain growers and Montana Farm Bureau. That came about because both the railroad and the grain producers wanted a system. They respected each other enough to come together and start to work on a system. Is it a panacea of everything, no, but it's a system that has worked and continues to work and it comes about because the single forum addresses multiple issues.

We believe it's important for the Office of Public Assistance, Government Affairs, and Compliance which by the way is a mouthful, should continue to be active and engaged in the process. We'd like to see that as being an initial -- providing the initial

stage, but also a stair stepping in the ADR process.

ARC appreciates the willingness of staffers of the Board's Rail Customer and Public Assistance Service to help. We found when we go over and look at the FMC and what they're doing, that whole process of consumer outreach is embodied in a stair-stepping process throughout all the way to formal cases. However, the RCPA cannot issue a ruling that's binding on the railroads today. That's something we may want to take a look at, at some point.

The services should be available to shippers at no charge and the ombudsmans' service should be encouraged in this development. I call it the OPAGAC. It works with people on a confidential basis at the onset and I think that provides another mechanism for the Board to continue to keep exploring.

Board staffers who assist in

mediation must be neutral and must share the goals of fair outcomes. Mediation to us could be one of the more important and useful steps for the parties going forward. I know we're concentrating on arbitration today, but I think -- remember that what happens is a lot of shippers want to maintain their relationships during and after the dispute and having a mediation process that's maybe informal, but moves the ball is important. So the process developed should allow the parties to utilize mediation in order to maintain existing relationships, but we need to integrate that procedure with arbitration.

Finally, arbitration needs to be a quick adjudicative process, but it's important to point out that the USDA and the National Grain and Feed filings all talk about fairness, neutrality, and openness to foster an atmosphere of trust. A transparent system is a must. And that's how it's worked in Montana.

Since there are many venues that are utilizing successful mediation and arbitration, ARC urges that the Board proactively reserve the shipper's option to have a disputed mediated arbitration in either its venue or in the venue chosen by the shipper. NGFA, the BNSF Montana system, or any other future mediation that is developed between the shipper and the carrier should be recognized by the Board and not have that process squashed.

The Board must choose a cap on relief that reflects true cost for which a party would seek remuneration in order to make the arbitration process available in the widest number of potential users. The disputes quite often exceed the $200,000. A cap of $1 million would seem to be reasonable. I'll up the ante $500,000 over what NITL wanted to talk about, but I think the key is that look at three benchmark. Why shouldn't there be a higher cap there and make this

worth the effort?

Since arbitration is essentially voluntary despite the opt-out concept, there's no reason to impose low caps on the awards. Arbitration entails its own costs and arbitration awards need to exceed in our minds by two or three times the cost of participation, otherwise, it's not worth it. And otherwise, the shippers might not participate, even if the chances for success are there.

So arbitration should involve, we think, three arbitrators at the selection of both sides. If both sides agree to use one, fine. But I think what the three arbitrators do is at least bring one from the shipper with expertise and one from the carriers and then we have one that's neutral. ARC and other members are familiar with and support the arbitration procedures adopted by National Grain and Feed in which they use three arbitrators. It's worked well. Decisions by

the -- and getting the three arbitrators is not a process that's turned out to be a detriment or some kind of problem for the ones that they're working with in Montana.

Decisions by arbitrators should also be published. We believe this fosters fairness and trust. We also support recommendations of USDA that any appeals process focus on the abuse of the arbitrator's discretion, but also maybe consider outright error, that that may on occasion be a problem.

Finally, it must be -- and I think you'll have less error if you have three arbitrators than you will if you have one. It must be recognized that mediation and arbitration will not always be available and advisable. There are many issues that will necessitate the formal proceedings such as complaints and petition for declaratory order even if the STB offers effective mediation.

I think, in general, the time has come for working with ADR. The example in

Montana between the BNSF and Montana Farm Bureau suggests that carriers can build trust relationships and make it work. When I go back to what Frank Schoonover says in Montana, "We're going to build a garden. We're going to need shovels. We're going to need hoes. We're going to need rakes. We're going to need lots of tools, and these are good tools to start with." Thank you, Mr. Chairman.

CHAIRMAN ELLIOTT: Thank you, Mr. Whiteside. Now we'll hear from Mr. O'Connor.

MR. O'CONNOR: Thank you very much. I'm glad to be here with you today, Chairman Elliott, Vice Chairman Mulvey, and Commissioner Begeman.

I am here basically based on my experience with STB mediation and my experience in arbitration in other venues. And I found the STB mediation to be a very positive addition to the dispute resolution process.

We participated, I participated in

three mediations, two of them were -- two of those cases, it was resolved, the case was resolved in mediation and the third case we went on to litigation. And the Board ruled and then the Court affirmed that ruling. And then some other issues that were involving the same two parties quickly settled in mediation and negotiation.

If I can bring my slides up, there we go, and you have hard copies of these slides and I have additional hard copies for anybody else who would care to pick it up today and I can provide it and include it in the record along with the white paper. I provided a copy of the white paper to the Commissioners and I have copies available for anybody else who would want one. And I'd be happy to have that included in the record as well.

To sum up, we've had positive experience with STB mediations in several small ship and reg cases as well as in other

applications. I have participated as an expert witness in an arbitration that did resolve quite successfully and it had very limited, if any, appeal as well.

The role of the mediator, the role of the STB mediator, in my view and based on this experience, was crucial, and just having the STB at the table proactively involved in seeking the solution helped a great deal. And one of the ways it helped us is it more or less moved us in the direction of principle and fact-based negotiating with partners. And the two choices as I've indicated here, the two choices on strategy are power-based bargaining with adversaries or principle-and-fact based negotiating with partners. And that was vastly preferable.

The approach that we recommend is identifying the underlying interests, agreeing on guiding principles which may vary from case to case and generating and evaluating alternatives using agreed criteria which again

may vary from case to case.

Some of the techniques, if I can go to the next slide, appear counter intuitive. Basically, a good deal of energy was devoted at the outset to asking why. "Why was the position taken?" points us in the direction of understanding something that may not be immediately obvious is what is the underlying interest that that party is seeking to meet? When the underlying interest is identified, then the energy of both parties and the mediator can be redirected to identify alternative positions that can help meet that interest. It's not a matter of shaping the interest. It's a matter of understanding interest and then moving accordingly.

Now the two options that we see quite frequently are sketched on the next slide. We have position-based hardline and we have interest-based collaborative. To the extent the Board can move us in the direction of interest-based collaborative in its

rulemaking that would be very positive. And that is basically what I've developed in the white paper in a little bit more detail and this is basically what worked, not only in those three mediations, but in any number of negotiations that we've done. In fact, it was actually fairly important in the arbitration as well.

So in conclusion, we've had a positive experience with STB mediations. We would urge the STB to encourage continued and expanded use of mediation. And in terms of getting folks to take a chance on arbitration, I think the more flexibility you can build into the process, the more likely you would be to have some use of it.

I appreciate the opportunity. Thank you so much.

CHAIRMAN ELLIOTT: Thank you, Mr. O'Connor. Now we'll proceed with questions.

Vice Chairman?

VICE CHAIRMAN MULVEY: Thank you,

Dan. I have a few. Many shippers have commented that the $200,000 cap is too low and we ought to have a higher one -- one suggested half a million dollars, others suggested a million dollars and some in their testimony have suggested no cap at all. The Board looked at a number of past demurrage cases which came before the Board, and one of the things the issue proposal would address is demurrage cases. The range of value of those cases before the Board was between $19,000 and $737,000.

In fact, of the last 15 cases, 11 of them would have been subject to arbitration under the Board's $200,000 cap, 4 would not have been.

My question to you is does that suggest that if the majority of these cases would have come under the Board's arbitration rules that the $200,000 cap was a reasonable one, or would you feel that the fact nearly of a third of them were not eligible would

suggest that the cap was too low.

Does anybody wish to take that? Ms. Booth.

MS. BOOTH: I'll take a stab at that, Vice Chairman Mulvey. I mean certainly in the example you've given, the vast majority would have fallen under the program as the cap is currently designed. But I think that as the League looked at the cap issue and the utility of the program across more than just demurrage disputes and I think establishing a program that if we could get this one off the ground could get instituted today, but would work in the future, I think a cap of $200,000 is just low when you're covering more than just demurrage as the issue.

On top of that, we heard from National Grain and Feed who has a program in place. And what they're seeing in their own program with the current $200,000 cap that it is becoming inadequate. And so I think that from our perspective and perhaps the League

has proposed the proper middle ground, we're hearing $1 million on one hand and $200,000 on the other, our proposal is for $500,000 really to try to capture more disputes, to improve the utility of the program so that it could be used more often rather than less often.

VICE CHAIRMAN MULVEY: Anybody else?

MR. GORDON: Vice Chairman Mulvey, I'll take a crack at that as well. Our review of our cap right now it actually was initiated at our March convention, so we're still in the process of evaluating that. But one distinction I might want to raise that the Board might want to look at is our cap is $200,000 right now per the current. So if there's a demurrage incident that is repeated three or four times that's multiple $200,000 potential caps under that kind of a dispute whereas the Board's language, as I understand it, is per arbitrable dispute. So that may be a distinction that needs to be made here to

kind of clarify what is meant by the Board.

The fact that we do it on a per occurrence basis, we've had nine arbitration decisions. We have reached fruition since our system was created in 1998. Some of those have ranged as high as $550,000 just because of this per incident type of treatment of it. So that would indicate that perhaps the Board's number is also too low depending on how you define that. And again, with the dramatically-increased value of agricultural commodities in this market and we don't see that going away, given the demand for food and feed and fuel and exports, we're in a new paradigm in terms of value right now on agricultural commodities that we don't think is going to slip back to previous eras. Thank you.

VICE CHAIRMAN MULVEY: Thank you. Obviously, you could have multiple occurrences of disputes so therefore the $200,000 could be a multiple of that, actually, when you take

into account all the times that it happened.

One of the hopes that the Board had in moving towards more use of ADR is that it could reduce the costs, not only for the shippers and the railroads, but also for the Board itself.

What has been your experience with the NGFA and the Montana agreements? Have you found that it's been cheaper to go through arbitration compared to going through litigation? Why would that be? If we had three arbitrators, only the incremental cost would be picked up by the shippers and the railroads, the Board would still be responsible for one arbitrator.

And we're not necessarily in agreement that there would be volunteers, that the arbitrators would want to be paid and I don't know what the going rate would be. But this is a town where we have lots of legal talent and the rates for that talent tend to not be low. So we don't know what it would

cost, but we'd like to have a sense as to what this process might cost and what the impact might be on the overall costs that the Board faces in resolving disputes.

MR. GORDON: Well, I think from NGFA's standpoint, one of the real values of arbitration is the cost component of it of not having to go to litigation through the court system and that applies to grain and feed contracts as well as to our rail arbitration system.

The other big benefit is that the decisions are being made by people who understand the issues in the cases, so you're more likely to get a more knowledgeable decision from a panel of arbitrators or whatever system the Board ends up with here than you would in a jury trial or a court system of some sort. I think our experience has been those two factors are ones that really draw people to our regular arbitration system as well as the rail arbitration

component of it, but I think the other real value we see in our arbitration system is just having a workable approach here that allows shippers and carriers to discuss their differences in this kind of a forum often means that the vast majority of these cases never even get submitted to an arbitrator just because they know that that system is available if one of the parties is unreasonable. And so that's another real value that we see.

VICE CHAIRMAN MULVEY: So it sort of follows Mr. O'Connor's approach that you have a principle rather than an adversarial basis for resolving disputes.

MR. GORDON: Yes, and it really helped in our situation, too. The rail carriers were very much at the table when we devised this system in 1998. They were -- our Rail Arbitration Rules Committee which oversees this system is comprised of equal numbers of carriers and shippers. And so

there's a 14-member panel and 7 are railroads. By our bylaws seven have to be rail carriers. So that, too, creates a system of fairness that the rules are going to be balanced.

VICE CHAIRMAN MULVEY: One final question in this round and that is that the qualifications of the arbitrators has been an issue. As I mentioned in my opening remarks, the Canadian system with the final offer of arbitration process is a problem for the railroads. And as Mr. Whiteside pointed out another problem the railroads have with is that rates are involved, but that would not be the case under our proposal. But the railroads, I also understand, are concerned that some of the arbitrators don't have proper knowledge of the railroad industry and they are chosen to be arbitrators because of their experience with arbitration as opposed to the experience with the needs of the industry.

Could you tell me what you consider to be the most important

qualifications, say your three most important qualifications that an arbitrator should have and are the railroads correct that industry knowledge is a critical one? And I guess along with that, would you disqualify anybody as an arbitrator who had an active role in the past as a consultant or working with a railroad or with a shipper community. That could leave us only with a few government people or some academics who have not served as consultants. That might be narrowing it too much. But I am interested in this whole qualifications issue for the arbitrator.

MR. GORDON: Well, I can tell you, Vice Chairman Mulvey, kind of how our system operates right now. We do use volunteer arbitrators in our rail arbitration system that includes carrier representatives as well as shipper representatives, under our approach, both within our regular arbitration system as well as the rail arbitration system. The parties to the case can object to an

arbitrator if they believe that arbitrator has a bias or has a commercial relationship. We take great care in forming an arbitration panel so that doesn't occur at the outset, so we have very -- rarely does an objection occur, but we provide that opportunity so that both the parties are agreeable that the arbitrator or arbitrators considering that case do not have a bias or an informational deficit, if I could say that, phrase it that way in terms of the applicability or the knowledge of the kind of dispute.

We do ask that arbitrators within our system be knowledgeable about the type of case being arbitrated and actively seek that kind of expertise. But again, our pool may be much larger than what the Board is able to put together.

VICE CHAIRMAN MULVEY: Anybody else want to comment on that? Mr. Whiteside?

MR. WHITESIDE: Yes. Vice Chairman Mulvey, if you look the arbitration

systems like the one they have in Montana, they have selected arbitrators that they both agreed to ahead of time and then they select from that pool. That's one way to do it. I think -- remember, if you've got an industry, industry being railroad, and then you've got industry being the shipper being represented in a three panel, you don't have the issue maybe that you would with the single finding, the single arbitrator that is all knowing and can walk on water is going to be really tough. And so I think what we have to do is recognize that that's why a three panel sometimes will at least be able to talk about both industries with expertise.

It's a toughy because if the railroads come forward and agree like they did in Montana ahead of time, then that issue kind of goes by the wayside. But it also lends itself to a trust level. What's most important to me about this whole process, the innovative process that the Board is taking is

developing the trust levels as we go because once the trust levels are there, you can expand on it, get it working, get it going. But I think we have to go back to the expertise is going to have to probably come in a three part instead of a one part.

VICE CHAIRMAN MULVEY: Thank you. Mr. O'Connor, did you want to comment?

MR. O'CONNOR: Yes. I would agree with the three panel. I think it's well worth the incremental cost, especially if the parties are picking it up. It vastly expands the experience available to you. And the arbitration that I referred to, not that particular sequence, but the prior sequence, Archibald Cox was the main arbitrator and each of the parties chose one. And in the arbitration that I took part in, they were following the same rule. They each agreed on the main arbitrator and then each of the parties chose number two and number three, respectively.

MR. WHITESIDE: One more idea. What we're trying to do is get to yes. That's what the whole process is all about. So anything that would promote that process of getting to yes, meaning we never go to arbitration, we always solve it at mediation would be perfect. It's not going to happen that way, but at least that's what the goal is here.

VICE CHAIRMAN MULVEY: Thank you. By the way in Washington, we always reduce everything to acronyms so it's called OPAGAC.

(Laughter.)

VICE CHAIRMAN MULVEY: Thank you.

CHAIRMAN ELLIOTT: Thank you, Vice Chairman.

Commissioner?

MEMBER BEGEMAN: Thank you. Could you tell me if any of you, or any of the folks that you represent, have actually tried to utilize the existing arbitration program and if you have, what ended up being the roadblock

and if you haven't, what is the roadblock?

MR. WHITESIDE: Commissioner Begeman, we are in the process right now of working with whatever the office is called in a mediation process. They haven't gotten to arbitration yet and hopefully we're going to try to get that mediation just to solve the problem. The one thing that we're noticing is at least at the mediation stage we can explore alternatives or new paradigms or new shifts of where we might go and that process, by having an ombudsman there, can facilitate such things. We wouldn't do that if were filing formal complaints on the issue.

MR. O'CONNOR: I just wanted to second Terry's comments earlier on the importance of both building on and maintaining the relationship through this process. The relationship is what's going to get you moving towards the solution and that's really vital.

MR. GORDON: Commissioner Begeman, I think from our experience we have not had

members that have gone outside our current arbitration system.

MR. WARFEL: The League doesn't have any experience. We did back in 2007, 2008 we were working on an arbitration mediation process that was similar to what NGFA had. We were working with the AAR and a number of the Class 1 railroads. Unfortunately, we were never able to come to an agreement on it.

MEMBER BEGEMAN: So we don't necessarily know what's broken, is that probably fair?

MS. BOOTH: I think that's right. I think the question, Commissioner Begeman is such an obvious one, but there's no easy answer and I think the commercial folks in the room can answer better than the lawyers, but perhaps from my perspective the one issue, and this is a hard one to fix, is uncertainty. The fact that no one has ever used the rules, there's no experience with the rules, and it's

a little bit of the chicken and the egg of who is going to be first and who is going to test them out.

MEMBER BEGEMAN: As would any new, improved program.

MS. BOOTH: That's right, but I do think the proposed program and the structure of it which is narrow and defined and has limits, maybe would get folks more comfortable to say well, for these types of disputes, let's give it a try and it might be an easier way to get started than just the broad overarching who is going to be first.

MR. WARFEL: I would agree with Karyn. The beauty to the proposal is the specificity. You're actually identifying the types of problems that a shipper could bring and it's not quite as open ended. We were talking at breakfast this morning. The one thing that scares corporate lawyers or chemical engineers is the unknown and this eliminates a little bit of that unknown.

MEMBER BEGEMAN: So not to put words in your mouth, but I had always been led to believe, when I've asked other folks during discussions on this issue, that it was that carriers wouldn't agree to arbitrate. But, that has not been anyone's experience, I think, is what you're telling me. All right, thank you.

Terry, it was very helpful, and as you discussed the Montana-BN arbitration process it occurred to me that perhaps one of the things that we should be discussing is a per carrier type agreement for participation. I assume that BNSF is comfortable participating with Montana because they have a certain set of issues that they are willing to negotiate.

Would it be worth pursuing an approach that perhaps lets the carriers agree on a case-by-case -- not necessarily on a case-by-case -- but issue by issue categories, that they will participate in so it's not a

one-size-fits-all, if that gets them to the table?

MR. WHITESIDE: Ms. Begeman, I'm not an expert in why the railroad came to the table. My sense is that in Montana they were trying to quell issues that kept bubbling up. And I don't know that that can be duplicated other places although when you look at one of the reasons, I sense that the Board is looking forward on this and looking into this issue is because there was at least a chattering on the Hill over and over about seeing if we can get ADR.

What will bring them to the table in many cases, it's going to be unique. The Montana situation may be unique in that situation. On the other hand, it may be that I know we've had discussions with other major railroads about some kind of ADR system and they're not running from it. So this is an evolution that's coming. It's -- as I think Vice Chairman Mulvey, Chairman Elliott talked

about, it's in other agencies. They're doing it in almost all the agencies now, some kind of form of ADR. And so I'm hopeful. I don't know that categorizing -- you could categorize the railroad would do this with a particular group of shippers. It may be worth exploring, but I don't think that that's -- I think the Montana situation was really quite unique and I can't speak for them because I wasn't part of that process when it went together, but my guess would be.

MEMBER BEGEMAN: Randall, could you sum up how your program was able to pinpoint or develop the issues the parties were willing to participate in?

MR. GORDON: Certainly, Commissioner Begeman. At the time that we had discussions with the rail carriers, and I believe that began in about 1996, and it took a year or two to come to fruition in terms of these specific rail arbitration rules, we brought all the carriers including all the

Class 1s and a number of the shortline and the association that represents shortline carriers to the table to talk about what kinds of cases should be arbitrable.

We, too, were at a teachable moment in terms of potential legislative action at that period of time so there was incentive, I think, from the carriers to come to the table and could we develop a commercial way to resolve a number of these kinds of disputes. And there was a lot of give and take that went back and forth during that process between grain company and feed company representatives and the rail carriers, but it was a good-faith effort on both parties to come to a balanced set of rules. And my sense is and I think it's reflected in some of the comments by some of the carriers to this docket is that they believe that system has worked very well and serves the needs of both shippers and carriers to resolve certain kinds of disputes.

And again, I can't over emphasize the fact that this type of a system does result in dialogue between carriers and shippers. It's very early on in the process. If there's a possibility that a case will be brought for NGFO arbitration, again, as I alluded to earlier, the vast majority of those we never see because the cases never get filed. But even those that are where an initial filing is made by one of the parties, very often those disputes are resolved within a couple of months before the case ever gets going into arbitration. That's been our experience. I know there's some concern of some that will we see an onslaught of cases at the STB if you go down this path. That certainly hasn't been our experience.

CHAIRMAN ELLIOTT: Just a few questions following up on Vice Chairman Mulvey's questions regarding the three-member panel. From what I'm hearing here, I think I'm hearing that everyone thinks a three-

member panel is a better way to go about arbitration or -- we have some shaking heads -- okay, that's exactly why I'm asking the question. Why is that?

MS. BOOTH: From the League's perspective, we would like there to be flexibility and we do not see as great a problem as the others, I guess, around the table see in having potentially a one-person arbitration take place. And from our perspective, we're looking at again the utility of the program and to bring in what could be very small disputes. We have some experience with arbitration and when you start having three-panel arbitration, it can actually get expensive just because the cost of the arbitrators themselves. And if you were to mandate that you always have three and that the parties have to pay for the cost of the arbitrator, it's possible that those $50,000 disputes, some of the small potato issues which it makes sense to arbitrate, have

it done in 120 days, and you have your decision and everybody goes home. It just may not work.

And so our position is that if we're careful on the qualifications of the arbitrators, it's transparent, the selection process works that one-person arbitration especially for smaller disputes should be available, but you have the option for the parties, as we hear around this table to agree to have three so that you could do that if you want, if everybody felt that was very important.

So in response to your question, Mr. Chairman, we might be an anomaly at the table here.

MS. ARCHULETA: No, Mr. Chairman, WCTL agrees with NITL on this issue. It's really a cost concern. If you're going to have a cap on the amount that is potentially to be arbitrated over at $200,000 which we believe is an appropriate amount, then if you

have to have each party paying for an additional arbitrator, it might freeze out some people who would really otherwise would want to arbitrate a dispute.

CHAIRMAN ELLIOTT: Sure. That makes sense.

MR. WHITESIDE: Mr. Chairman?

CHAIRMAN ELLIOTT: Mr. Whiteside.

MR. WHITESIDE: Just to make sure that there is unanimity on the table, we would agree with that, with those processes. The key is we should be available to have three, especially if the case is going to be a fairly in-depth or complicated one. But I don't know that we would object on starting with one and then having opt out to three if they need to be.

CHAIRMAN ELLIOTT: So what I'm hearing is -- well, a mandate of three is not universally wanted, but a possibility of three or one is acceptable.

MR. O'CONNOR: It may be the case,

too, that it relates to the cap and as the cap goes up, then the cost effectiveness of the three is easier to handle.

CHAIRMAN ELLIOTT: Sure.

MR. O'CONNOR: The arbitration I was referring to earlier dealt with tens of millions and on going tens of millions.

CHAIRMAN ELLIOTT: Sure. That was my easy question. My next question is the carriers' biggest complaint seems to be the opt in and opt out and they're opposed to the opt out part of our plan. And I gave this some thought.

If we move to an opt-in program, I mean one of the reasons we didn't do it was because as some of you have mentioned, the manageability of all of the different shippers that would be involved. There's just a lot of shippers. So that would be very difficult. But if we did do an opt in, and you opted in, the second you opt in, you're eligible to arbitrate, I would think that would cover most

shippers bringing a case because they could opt in before they brought the case and then proceed by filing their complaint with the Board.

Would that be -- and then obviously, we would allow the railroads also to opt in as long as they feel comfortable with it. Would that kind of method work for you or are you kind of pro opt out?

MS. BOOTH: It's, I guess, a difficult question to answer without having the opportunity to have consulted with the client and in our case the Rail Transportation Committee on that approach.

I thought you were going to say that maybe the shippers were in the same position, but the railroads would just opt in to your program and I think there are pros and cons to each of these approaches and we recognize that if the railroads are as uncomfortable as they presented themselves in their comments that they all may opt out and

then where are we? So we do need to look at alternatives.

So I mean I'm not going to be able to give you a clear answer on this. I think it's something we would look at and talk about at the League. I think the approach you have presented as the opt out would be preferable, but would that mean that we would be opposed to an opt in? I can't say that that would be the case either. And that trying to establish everyone on equal footing, I understand where you're trying to go with that and it would be a question of is it administratively feasible and what are the other, I guess, processes in the scope of the program that would go along with it.

So I'm sorry that's more specific, but --

CHAIRMAN ELLIOTT: I kind of sensed that that might happen, especially by the silence.

Anybody else?

MR. GORDON: Mr. Chairman, I think from NGFA's standpoint, your proposed rule really models what we have done as an association where the carriers, as a condition of membership, are in the arbitration system, have the opt-out capability.

You know, I would be a little leery of an opt-in approach, just based on our experience in terms of does that reduce the potential for your system to be operable and working, if you have this opt-in/opt-out metric going on all the time. Or if you do opt in, how long do you opt in for? So those would be some issues I think we'd have -- you know, carriers certainly have the opportunity to opt out of NGFA's system, but we have not had a rail carrier do that. So that's again just our experience. I thought the NITL's argument that they submitted on this issue were persuasive.

CHAIRMAN ELLIOTT: If only we could do what you do and have anybody that has

to appear before us have to be in, we'd be all set. I don't think that would be legal.

I have a couple more questions. It seems like everybody here is more comfortable from what I'm hearing with the strike method of choosing arbitrators as opposed to the railroads. I think they were okay with both, I'll ask them that later, as opposed to the final best offer, is that the general consensus that I'm hearing?

MR. WHITESIDE: Mr. Chairman, one thought that you might think about is having a pool of industry -- of shipper and industry and not having that strike capability. They would be able to bring forward their rep, if you had a three-party system.

I guess I'm thinking out loud and maybe I shouldn't be, but I think it's one way to solve that problem. What they've done in Montana, for example, is they have a pool of arbitrators that they can pick from and they don't have strike capability. They agreed

ahead of time what that pool would be. Now this is very limited system in the sense of dealing with just what they're doing there, but the strike system has worked very well in almost all the arbitrations that I've seen in other places. It's maybe at least a culling process. Because if you get an arbitrator that consistently is off the field somewhere, I think that strike system would make railroads more comfortable and the shippers probably more comfortable having that ability. But again, if you're working with a three-party system and you already have your pool of main arbitrators, I don't know that that's as important as it would be in a wide open we're picking all three kind of thing.

CHAIRMAN ELLIOTT: Anyone else?

MR. GORDON: Well, again, Mr. Chairman, I think from NGFA's experience, we like the concept that either party to a case can object to an arbitrator and have that arbitrator removed and a third new arbitrator

picked. That just works really well.

MS. BOOTH: Just very briefly, our position is to -- the League's position is to favor the strike methodology and I think the concern on our part is that the final offer approach has the potential of too much risk. The other person's selection is just automatically picked and you had no process by which to even strike or eliminate folks. It just appears too risky.

CHAIRMAN ELLIOTT: One other question. I'm also hearing, I think, generally, that people believe that once the arbitration awards are issued that it would be a good thing to have them published and made public, but without precedential value, is that also what I'm hearing from this panel?

MS. BOOTH: Go ahead, please.

MR. WARFEL: As a shipper, I would say yes. Knowing that other people have gone before you and that there is actually a process that's working would be invaluable.

MR. O'CONNOR: The only other factor -- first of all, I'm in favor of publishing also, but you would want to make sure that you allowed for what is now -- would now could occur and facilitate agreement in the mediation procedures that exist in the small shipment proceeding, is the parties can bring other issues to the table that they can agree on. And those can often break a stalemate. Now those would obviously not want to be published.

MR. GORDON: Mr. Chairman, could I interrupt just for a second?

CHAIRMAN ELLIOTT: Sure.

MR. GORDON: We, too, favor the published decisions for the reasons we articulated before and I believe they really help encourage shippers and carriers resolve the disputes so they don't go to arbitration or don't go through the full process.

CHAIRMAN ELLIOTT: I understand, sure. I'm getting near the end here. With

respect to the issues that we designated that can be arbitrated, we had a list and then at the end we had kind of a catch all that said other service matters. I know in NITL's comments they said they were, from what I recall, okay with removing that. Is there anybody else that has any objection to removing that last, I guess, catch-all clause?

Mr. Wilcox?

MR. WILCOX: NGFA does not have an objection. I think their view is that you can be specific. That's the way to go and that clause is a little too broad and could create enough uncertainty to kind of not be helpful in the final regs.

CHAIRMAN ELLIOTT: Go ahead, I'm sorry, Karyn, Ms. Booth.

MS. BOOTH: The League would be open to refining it and clarifying it and narrowing it, but I think we would not want to exclude the potential for service issues to be covered by arbitration.

CHAIRMAN ELLIOTT: Sure.

MS. BOOTH: So it's a drafting point.

CHAIRMAN ELLIOTT: Final question is for Mr. Gordon. How do you get all these people to volunteer?

MR. GORDON: That's a very good question, sir. They view this as a service to the efficiency of the industry. And they know that they may be having a case at some point in the future, too, that's going to require arbitration, so they willingly do arbitrate and spend quite a bit of time and effort in these different cases, knowing that they could be a beneficiary of this process and often are in the future as well when they have a dispute of a commercial nature with another company.

CHAIRMAN ELLIOTT: Thank you. Vice Chairman?

VICE CHAIRMAN MULVEY: Just briefly, I'm glad that the specificity issue got raised because I was going to raise that.

You mentioned, Mr. Warfel, that the proposal was specific, but the railroads are very concerned that it's not specific enough and that the railroads would have a hard time not opting out of something or effectively opting into something when they don't know what it would cover. From what I'm hearing now, you are all pretty much in agreement that it being more specific and as precisely as possible what would be subject to arbitration, if that would help the railroads, in fact, not opt out, you would be in favor of that? Is that generally agreed upon?

One thing I wanted to raise was about the standards of review. The Agency's review of arbitration awards are usually fairly narrow, unless some of the issues are relitigated whenever a party is disappointed with the arbitration result. And typically one party or the other will not be happy.

The Board's proposed standard, is for review if there is a clear abuse of

arbitrator authority or discretion? Can this standard encompass some of the other concerns that have been expressed? For example, BNSF's concern that an arbitrator might contravene the statute? Do you feel that that's covered in our proposal or should we be more specific in our proposal as to what the standards of review are?

Ms. Booth?

MS. BOOTH: The League believes that the standard you've proposed is adequate. We, I guess, interpreted the guide that the arbitrator is bound or must follow and be guided by the statute to be a little bit more flexible than the standard, however, that the railroads are proposing which is a much stronger -- they cannot contravene the statute. And we think that's a better middle ground that the Board has already struck than going further.

So we're comfortable with the

standard as currently proposed and would not advocate to broaden it to require the arbitrators to be entirely strict, I guess I would say, with every dotting every I and every t of that precedent. There needs to be some flexibility built in there.

VICE CHAIRMAN MULVEY: Anybody else on that?

Finally, one of the railroads argued that an arbitrator should be disqualified if the arbitrator has not disclosed any previous relationship. Do you agree that if there was a failure to disclose on the part of the arbitrator that the individual should automatically be disqualified from serving as an arbitrator?

MS. BOOTH: To the extent that there's a bias there, yes. Even a potential bias. There needs to be transparency and openness and so that the parties can make the right selection of an arbitrator with full knowledge of their prior dealings.

MR. WHITESIDE: I guess I would concur in that. What we're trying to build is trust in the system long term and it's only going to come about with people having full exposure to it. When you're selecting arbitrators it's tough as it is, but I think it would be really important to make sure that everything is on the table.

VICE CHAIRMAN MULVEY: Thank you very much.

MEMBER BEGEMAN: I just have one question stemming from what the Chairman asked about publishing the decision, but not having precedential value. In a practical sense, how does it actually not have precedential value? Is it that the published version provides such little information, you don't know what the facts were that led to the conclusion? I realize you don't want each case to be a rubber stamp based on a previous case and it really needs to be very case specific on the facts of that case. But if you publish it --

and again, we want transparency -- what is the real practical effect of that publication if there is no precedential value?

MS. BOOTH: I guess there are some legal implications to your question, Commissioner. The publication of the decisions, I think, has many benefits on the commercial side to see that the program has been useful, get a sense of how decisions are coming, hopefully get the public more comfortable.

The thought, however, that there's no precedential value given to the decisions does raise the question of whether the full decision should be released or not because there will be temptation to perhaps use and try to cite to these arbitration decisions even though the rules have said we're not going to give them precedential weight.

I think it's a little bit of the potential is there for folks to try to use those decisions, perhaps in a manner to argue

future cases based on those, but then it comes down to the weight that would be given. And under these rules there should be no weight. But I just think the temptation would be there to use those decisions.

From the League's perspective, we want transparency, but we're comfortable with a summary of the decisions being published as a middle ground, but we would also be okay with the full publication, just recognizing there might be some temptation to try and use them in the future.

MR. GORDON: Commissioner Begeman, if I could respond to that, too. I think I might take a little bit different tact on that. In our arbitration decisions, we do have a statement of the case and the facts of the case. And it's very factually based. And we do think that the facts of different decisions can vary, obviously, over the same kinds of cases. And our experience has been that those have tremendous educational value

to industry, but the contracts between the parties, the commercial trade practices may evolve over a period of time so that they really aren't precedent setting from that standpoint. Each case stands alone on its own factual basis and even involving the same type of complaint, you can have different facts that tilt the decision one way or the other.

By having a more full disclosure of the actual facts of the case, again, redacting confidential business information, we think has good educational value to the industry.

MEMBER BEGEMAN: And do each of the two parties get to decide what gets redacted?

MR. GORDON: That's a good question and we really haven't briefed on that. I don't have a really good response for you on that one yet. That would probably be an issue the arbitrator would have to decide with the two parties.

CHAIRMAN ELLIOTT: Thank you very much.

VICE CHAIRMAN MULVEY: Can I just have one clarification?

Ms. Archuleta, did I hear you say that WCTL supported the $200,000 cap?

MS. ARCHULETA: That's correct, Vice Chairman Mulvey. We believe that the $200,000 is an appropriate level and that if parties mutually agree to increase the amount, then they should be allowed to do so.

VICE CHAIRMAN MULVEY: Thank you.

CHAIRMAN ELLIOTT: Thank you very much, panel. We appreciate your testimony and your answers. They've been very helpful and hopefully moving this forward.

I would ask that Panel II come forward.

(Pause.)

Okay, now we'll hear from Panel II. I believe the AAR was supposed to go first, is that correct? Okay, we'll begin

with Mr. Warchot.

MR. WARCHOT: Good morning, Chairman Elliott, Vice Chairman Mulvey, and Commissioner Begeman. My name is Louis Warchot. I am Senior Vice President-Law and General Counsel for the Association of American Railroads. I'm also joined on this panel by AAR members, Norfolk Southern Corporation, Mr. Scheib; and Union Pacific Railroad Company, Ms. Rinn.

The AAR on behalf of all of its rate members appreciates the opportunity to present its views this morning on the Board's proposed modification of its mediation and arbitration rules. As the AAR stated in its written comments, the Association and its members fully support the Board's efforts to encourage the use of mediation and voluntary arbitration processes in lieu of more formal Board proceedings. Over the years, the STB and the ICC before it have implemented a comprehensive array of ADR programs such as

the activities of the Board's Rail Customer and Public Assistance Program which has been bolstered over the years and of course the Board's more formal mediation procedures. And in addition, at issue here the Board has two sets of arbitration rules under 49 CFR Section 1108 and 1109.

However, while the Rail Customer and Public Assistant Program in mediation proceedings have been successfully used as the Board noted, the arbitration procedures have basically not been utilized.

Commissioner Begeman asked why and the answer we are all searching for. In some cases, a ruling from the Board may be seen as by a party preferable to arbitration in view of the Board's expertise, especially if the dispute may turn on interpretations of provisions victa. Also difficulties in identifying qualified neutral arbitrators which has been noted by many parties in the comments of this proceeding may contribute to

the lack of arbitration.

However, whatever the reason may be as discussed in response to the question from Commissioner Begeman, there is no evidence in this proceeding or any proceeding that I am aware of that the lack of arbitration at the Board is the result of any general reluctance by the railroads to engage in arbitration before the Board or to engage in arbitration for that matter in any context and the railroads, the AAR's Class 1 railroads, and many other railroads' participation in the NGFA arbitration process, we believe is evidence of that.

This does lead to the concern of the AAR of the Board's proposed arbitration rules that treat Class 1 and Class 2 railroads differently than other parties. The Board's proposal deems Class 1 and Class 2 railroads to have consented to arbitrate a specific dispute if they fail to annually opt out of the proposed program while at the same time

allows all other parties to decide whether to arbitrate a specific dispute on a case-by-case basis.

The problem here is that first the requirement is unnecessary. There is no basis for the Board to conclude that Class 1 and Class 2 railroads should be treated differently than other parties before the Board. Second, this opt-out approach does not lead to a voluntary agreement to arbitrate a specific dispute. While Class 1 and Class 2 railroads would have the opportunity to generally opt out once a year, if a railroad does not opt out, it would be required if a shipper so chooses to arbitrate a specific dispute that the railroad might otherwise prefer to litigate if evaluated on a case-by-case basis.

Ms. Booth mentioned that a rail carrier, it is voluntary because a rail carrier any time -- at any time can opt out. That is not the case. If a railroad is in the

program and someone brings an arbitration case, it can't opt out. There's a 90-day window for that.

Third, the text of the proposed rule states that arbitration-eligible matters include in quotes and thereby by definition are not limited to the certain numerated disputes. A Class 1 or Class 2 railroad that did not opt out would thus have essentially an open ended and unclear commitment subject to the Board's discretion as to what disputes it must arbitrate. As a result, the AAR has fundamental concerns regarding the legality of the opt-out proposal because of the involuntary nature of it and because of the lack of clarity as to what subjects are covered.

As more fully discussed in our written comments, the AAR believes that the Board's proposal runs counter to the provisions of the Administrative Dispute Resolution Act and that the Board lacks

authority under its general powers pursuant to 49 USC 721(a) to create the proposed involuntary opt-out program.

The AAR did not object when the earlier arbitration rules were in effect as also mentioned earlier, because that was a voluntary program. While all of these concerns are important though the core problem with the opt-out proposal goes back to what I mentioned first and that is that there is no practical need for it and accordingly likely have little utility.

Assume for the sake of argument that the Board does have the legal authority for the opt-out proposal. I can't -- certainly, I can't speak for every Class 1 or Class 2 railroad as to whether they would or would not opt out. However, as we state in our written comments, it is likely that some or all Class 1 railroads would opt out and evaluate whether to participate in a specific arbitration on a case-by-case basis the same

way a shipper can. In fact, there seems little incentive for a Class 1 or Class 2 railroad to do otherwise. If that does turn out to be the case and the railroads opt out, and operate under essentially the same voluntary nature as the current rules, the current proposed rules become essentially irrelevant.

Accordingly, rather than attempting to effect an opt-out proposal which may ultimately be counter productive or have little utility for the purpose of encouraging ADR, the AAR continues to believe that the Board's existing voluntary arbitration rules, if modified, as suggested by the AAR's written comments would encourage arbitration. For example, the AAR and other parties noted in the comments a significant concern with the Board's current, as well as proposed arbitration rules and how the arbitrators are selected. The current arbitration roster is essentially dated and inefficient and Ms. Rinn

will discuss this in more detail in her testimony.

In that regard, the AAR suggests declaring the existing roster void and establishing a new list of arbitrators with required transportation experience, for example, ten years of familiarity with the Interstate Commerce Act and demonstrated neutrality. And alternatively, in lieu of a standing roster, the Board could also adopt a final offer type of the system.

However, if the Board concludes that it is necessary to move forward with its proposed rules when it intends Class 1 and Class 2 railroads to be subject to required arbitration for certain disputes in advance, the program should be required of all parties on an equal, reciprocal basis and at least have the following elements.

First, there should be a well-defined list of eligible disputes that the arbitration process will cover. This list

should be limited to specifically enumerated matters which do not rise to the level of policy significance and are factual disputes relating to the application, not the reasonableness or legality of a rule of practice. In that regard, the Board should also clarify its arbitration program to say that it will not displace or supersede other established arbitration regimes or agreements such as the NGFA suggests.

Also, allowing participants to opt into the program in writing and specify what particular types of disputes they would be willing to arbitrate would further encourage participation and ensure the smooth interaction with other arbitration regimes or agreements.

The Board should also modify its standard of review. The AAR and other parties have identified problems with the proposed standard of peer reviews of the arbitrator's authority or discretion. The Board should

adopt the standard in the AAR's written comments which would require that an arbitration decision does not contravene the statutory requirements to ensure that arbitration results are consistent with the statutory scheme.

Lastly, the Board should address the qualifications and neutrality of the arbitrators along the lines I discussed a moment ago.

In summary, the AAR fully supports the Board's efforts to encourage parties to voluntarily resolve their disputes and to use the Board's arbitration processes. However, the AAR does not believe that the proposed arbitration rules necessarily further that goal and sees practical concerns with aspects of the Board's proposal, especially the proposed opt- out provisions applicable in Class 1 and Class 2 railroads. Instead, the AAR believes that the Board's current arbitration rules would suggest that

modifications can be tailored to encourage more use of the process consistent with the Board's stated rules.

I'd be happy to answer any questions that you may have. Thank you.

CHAIRMAN ELLIOTT: Mr. Scheib.

MR. SCHEIB: Good morning, Chairman Elliott, Vice Chairman Mulvey, and Commissioner Begeman. I'm John Scheib, General Counsel of Commerce and it's my pleasure to represent Norfolk Southern this morning.

I'd like to make a few points briefly. First, Norfolk Southern supports a voluntary mediation provided under the Board's auspices. Norfolk Southern suggested mediation in its reasonable practices case with Ag. processing and we've participated in several mediations related to rate cases that were professionally handled by the Board. And we would continue to support voluntary mediation processes at the Board so long as

they remain confidential and inadmissable in formal Board proceedings.

Second, Norfolk Southern supports a voluntary arbitration program. The Board's current rules provide for such a voluntary arbitration program that allows both parties an opportunity, an equal opportunity, to decide whether arbitration is appropriate in a particular case.

Third, Norfolk Southern does not support the proposed rule. Arbitration is a nettlesome issue. Balance and consistency are very important. And Mr. Whiteside, on the prior panel, noted that what we're trying to do is get to yes. I think what we're trying to do is get to yes, even in the concept of an arbitration proposal. But Montana Grain notes at page two that there is a "bit of a stick for the Class 1 railroads" in the opt-out provision. Obviously, we view that as unbalanced and that is a detriment to us in this proposal.

In addition, we see that the arbitration really ultimately gets to be whether there will be arbitration is decided by the other side. Once a railroad opts in, it's completely at the discretion of the other side whether an issue is arbitrated. Within the list of topics that are in the rule, a demurrage comes to mind. You can envision an example where the railroad might want to pursue arbitration against a customer who hasn't paid demurrage. It's not clear that that would be possible under the program because none of the shippers are engaged or involved or in the process unless they file a case against the railroads.

And in addition, we have concerns about the unpredictability of arbitration results. Congress created an expert agency to deal with matters within the Agency's jurisdiction and frankly we mostly want to have the expert Agency opine because it gives us certainty on what the law is, how the

regulations are being applied, and that allows us to advise our business folks and the people within our company so that we can comply and stay within the bounds of the law which is Norfolk Southern's goal at all times.

So conceptually, Norfolk Southern is not opposed to a voluntary arbitration program. I would note, however, that the fact that there haven't been many arbitrations may not be a concern. Keep in mind that a substantial amount of rail traffic moves subject to confidential contracts and disputes related to those movements are going to be resolved through contract processes, whether that's at a court or through a contract arbitration clause.

In addition, you've heard that the NGFA has a process and that siphons off some number of claims as well. So it's not clear to me that the fact that there hasn't been many arbitrations or any arbitrations really means that there's not an available program.

I appreciate your time this morning and look forward to questions.

CHAIRMAN ELLIOTT: Thank you, Mr. Scheib. Now we'll hear from Ms. Rinn.

MS. RINN: Good morning, Chairman Elliott, Vice Chairman Mulvey, and Commissioner Begeman. I'm Louise Rinn, Associate General Counsel for Union Pacific Railroad. I appreciate this opportunity to discuss ways to improve ADR before the STB.

Union Pacific welcomes well designed and properly administered ADR programs as yet another useful tool for the fair, cost effective and expeditious resolution of disputes. We agree with NGFA that fairness and transparency are essential to the successful functioning of an unbiased arbitration system. Only if individual parties have confidence that STB-sponsored arbitration is fair will they be willing to participate.

Unfortunately, we believe that the

proposals in the March 28th NPR are unclear and unfair, unfair in the sense because they engender distrust rather than encouraging trust. And therefore, they will fail to encourage greater use of STB-sponsored arbitration if adopted without change.

There have been several suggestions by many parties that we think, if adopted, could increase the willingness of parties to use STB arbitration, but we think that there are other suggestions on the record that if adopted would discourage the use of arbitration.

Our written comments address those in further detail so for the purpose of my prepared remarks, I'm going to focus on two keys to improving the proposed rules from our perspective that we think may, in fact, encourage greater use. And that is selection of arbitrators and clarification of the matters that can be arbitrated.

Nothing is more important than

parties' confidence that the procedures will assure the selection of qualified, neutral arbitrators, especially if there is a single arbitrator. Parties will be reluctant to participate in arbitration unless they have confidence that the arbitrators will listen to both sides, weigh all relevant facts, consider applicable legal principles with an open mind and an impartial temperament.

Comments made by virtually every party in this proceeding confirm that selection of qualified neutrals is of concern. When this proceeding began, if I had had one guess as to why the current STB arbitration procedures weren't being used, my guess would have been the available list of arbitrators.

Now I can speak with personal experience. UP and another railroad are involved in an arbitration under STB procedures right now. And out of all of the arbitrations I have been involved with, I have never had a more frustrating experience in

attempting to come up with an appropriate arbitrator. Part of that is it is a single arbitrator, so that gets you outside of a comfort zone if you have three. But we have had the ability in other proceedings, not under the STB procedures, to assess relatively quickly whether the arbitrator is neutral and qualified because we either selected our arbitrator, the other party selected an arbitrator and then they agreed on a third or somebody else selected the third or a neutral organization such as the AAA or JAM supplies a list of potential arbitrators with extensive information about their background and experience as arbitrators.

In contrast, the STB roster of arbitrators provides no information beyond the name and contact information. And in working through that list we found several have been paid to testify as experts against railroads and do not appear to have any experience whatsoever as arbitrators. We have been able

to find little or no information on many of the people who are on that roster and the limited information we have found is often dated. And most of the others where we can find information have either represented or worked only for shippers, only for large railroads or only for small railroads. And again, there is little indication they have had either training or experience as arbitrators.

And those concerns get heightened, as I said, if you have a single arbitrator. So given the quality of what's going on there, I mean this has been a real issue for us. So there are numerous suggestions in the record to improve the section process for arbitrators. These include post current information on STB website on arbitrators' qualifications and arbitration experience. Recognize that even well-qualified arbitrators may not be neutral for all disputes for all parties. This isn't a one size fits all type

of a test.

Accordingly, if an individual is being considered for a particular dispute, the Board's rules should require an arbitrator to disclose any possible conflict of interest or bias or past feelings with the parties and grant the parties the opportunity to strike for cause, and ensure transparency by requiring arbitrators to submit either their decisions or summary of decisions to the STB, and for the STB to post those decisions on their website.

We believe that these improvements should be applied to any STB-sponsored arbitration whether solely case by case, voluntary arbitration, or if you were to adopt some type of a pre-dispute subscription model.

We also think that it would be helpful if you would clarify the matters that are eligible for arbitration. We think it is particularly important that if you're doing a pre-dispute method that it be reciprocal.

That's critical because if potential participants are to perceive the pre-dispute program as fair, it's unreasonable to expect larger railroads to participate in a system where any other party can require them to arbitrate, but the other party must specifically agree to an arbitration. For example, I believe WCTL gets it wrong when they elevate form over substance by saying, well the difference is that shippers can complain that railroads have violated the law and railroads can't complain that shippers violate the law. This is not about violating the law, as other parties pointed out. This is about resolving disputes.

So if arbitration affords the opportunity for less expenses and more expeditious resolution of a demurrage dispute does it make sense to require Class 1 or Class 2 carrier to sue the shipper in court and then ask to refer the matter to the STB if the point is to save money? We don't think so.

We believe that otherwise the Board should be wary about expanding the scope of disputes that would be subject to an automatic type of arbitration because of just the practical difficulty in coming up with rules and a list of arbitrators that can do that, bearing in mind that voluntary arbitration would always be available to the parties if they wanted to pursue that route.

Thank you, and I'd be willing to answer any questions later if you want to pursue the discussion. Thank you.

CHAIRMAN ELLIOTT: Next we'll hear from Mr. MacDougall.

MR. MacDOUGALL: If it please the Board, my name is Gordon MacDougall. I'm hear on behalf of Sam Nasca who is --

CHAIRMAN ELLIOTT: Is your mic on, Mr. MacDougall?

MR. MacDOUGALL: Now it is. Sam Nasca is the senior UTU legislative director in the UT organization and he participates in

many STB cases as do other state directors for the UTU. And we're opposed to any change in the current regulations for mediation and arbitration. We're particularly concerned about arbitration. Arbitration has not been used for 15 years. That was back in 1997. And arbitration was used back in the 1880s. It was the cause, a major cause for the Interstate Commerce Commission in the first place. The basic reason why arbitration does not work is that a lot of the key people affected by arbitration are not before the arbitration panel.

For example, if you want to change the rates from Coos Bay, Oregon on lumber to Chicago, you can arbitrate that and get a decision, but those rates have to be lined up with the rates from Hattiesburg, Mississippi. Similarly, if I sell batteries from by Madison, Wisconsin have to be tuned into Dubuque, Iowa. And those of us that have been familiar with the ex parte rate increases

since World War II, that's ex parte 148 through ex parte 310 know that rates have to be in line. If they're not something happens. Other carriers in other regions are going to have to make adjustments because United States is a common market. And it didn't work and it hasn't been worked for 15 years.

In fact, it was the UTU that opposed the arbitration rules if you look back at ex parte 560 to STB 564 it was the Illinois UTU, Joe Szabo, who is now the Federal Railroad Administrator, oppose arbitration. The main reason was the rules would not allow intervention. And we've said that. There have been three decisions since that decision in 1997 involving the Burlington Northern and the General Chairman for the UTU on the BNSF decided in 2003, Docket 42076 and three times he said you can't intervene in an arbitration. An arbitration never got under way. And there's never been any arbitration because the UTU is not necessarily interested in being a

direct party in an arbitration, but we are affected by what happens in the arbitration and we have the right to intervene. You said no. You're trying to modify that now by saying well, those parts of the statute that require us to look beyond the immediate folks which have public immediate necessity, you're not going to let them go to arbitration. You should also do the same thing if you do it for public interest which means that your railroad consolidations can't go to arbitration, through routes and joint rates can't go to arbitration, terminal access can't be. Reciprocal switching can't be because all of those statutes require you to look at the public interest. And if you have arbitration, you only look at the interest of the arbitrators. You have held that and nobody has used it for 15 years.

I didn't go into this in my prepared statement. It was when two of you Board members mentioned, you wanted to know

why arbitration hasn't been tried in 15 years. Well, one of the reasons, the main reason is is because there are interests at stake beyond the two parties in the arbitration and by your intervention rules on top of that you're not going to get a complete record. You're going to be like the situation was before the Interstate Commerce Act was passed in 1887. All the parties aren't before the Commission -- the Board.

We had the Cooley Award arbitration, 1984, in the North Atlantic Port differentials. Cooley later became head of the ICC. We have the Volger board, arbitration boards. We had all sorts of arbitration boards. And had you put in your proposed comments tell me why arbitration doesn't work, some of us could have given you a brief on that score, gone to the library and giving the history of arbitration and why it does not and will not work. Thank you. I'll answer any questions.

CHAIRMAN ELLIOTT: Thank you, Mr. MacDougall. Now we'll have some questions.

Commissioner?

MEMBER BEGEMAN: Thank you. Ms. Rinn, are you able to tell us any more about the current arbitration process that you're going through -- did you say it was through the Board's process?

MS. RINN: Yes.

MEMBER BEGEMAN: Has it just recently started?

MS. RINN: It was, I believe it is Docket NOR 42135, Denver and Rock Island v. Union Pacific, and of course, because the procedures are confidential. I can't get into detail. But clearly, it's a small railroad invoking our agreement under the Railroad Industry Agreement to arbitrate using the STB procedures. So it is subject to that and let us just say that we are still trying to see if we can reach agreement on an arbitrator.

MEMBER BEGEMAN: Could I hear your

comments, whomever would like to offer them, on the concept of opting-in versus opting-out? Now I recognize you all, at least the three of you, have certainly touched on it in some aspect, but I'm sensing you need fairness, which I believe we definitely want to provide and it needs to be voluntary for all parties, on both sides.

Would an opt-in provision, sort of just switching the opt-out, such as an annual opting-in, be sufficient or does it have to be on a case-by-case basis?

MR. SCHEIB: Well, of course, the current system is on a case-by-case basis. If the Board wanted to modify that, Norfolk Southern's position would be that an opt-in process would at least meet the requirements of the ADRA. It would be an agreement in writing, sets the scope of what's arbitrable and sets limits on what's arbitrable. That is very different from an opt-out process where in the absence of arriving, we're deemed to be

in the arbitration program. So from a legal standpoint I think that would, at least, be legal.

I think it would be very -- it would be a different situation for us to evaluate if that were the proposed rule. We would see what shipper interest there was based on which shippers decided to opt in. We'd look at the other things that we have an issue with with regard to balance and fairness and we'd make a decision then whether we would opt in.

MEMBER BEGEMAN: So the shippers would have to show their cards first? Is that what you're suggesting?

MR. SCHEIB: I would suggest that we both would have to show our cards at some point.

MS. RINN: Needless to say, I can only speak for Union Pacific, but I would say that there were two points that were made on the Shipper Panel that struck me. And one was

that trust is the friend of arbitration and the other one was that uncertainty is the enemy of arbitration. We believe that the current approach which basically drafts only certain carriers and forces them to opt out is the opposite of facilitating trust between shippers and carriers. And it creates uncertainty because you've got seven Class 1 railroads. I'm not sure how many Class 2 railroads who are in there, but we have no idea out of all the tens of thousands of customers we have who is then going to decide basically the one-sided mechanism to get us to arbitrate.

And this is in distinct contrast to the NGFA which people are describing as an opt out and I would say no, in a material sense, it is not an opt out because now we would have to opt out, but we opted in to begin with.

We weren't drafted into the NGFA. They provided extensive testimony of how the

railroads worked with NGFA members to design a system that was going to be fair and balanced for both. We opted in and now we have the option to opt out and that is the exact opposite of what you're proposing to do. And the uncertainty is made worse because we have tens of thousands of customers and we don't know how many of them would tend to use it and what we would be exposing ourselves to. Under those circumstances, it becomes almost intolerable pressure to choose to opt out and not participate because you don't know what's going on.

Now this is hypothetical. I have not had a chance to vet it with my client yet, but if what you're looking for is to develop some certainty, if you're trying to develop some experience so people can do it, if you have an opt-in approach with other appropriate measures, it may be that only a few parties on each side will choose to opt in, but then you may get the experience. And if you have that

happen, either you may have other parties more willing to do the voluntary case by case, or you may get other parties who decide to opt in. In other words, it may break the impasse. But something that basically says one party or one side is going to get drafted and the other one gets to choose if and when they're going to play, that's not -- that's not consistent with trust. That's not bilateral. That's not reciprocal.

MR. WARCHOT: I'd just like to add that it seems that while it's a valid question as to whether the opt out or opt in approach is more desirable or more acceptable, it really turns on what the rest of the elements of the arbitration program are. If there is an acceptable way of determining who the arbitrator is, if there's a clearly-defined list of the type of issues that are covered, if there is agreement or comfort on the review process, that will lead parties or encourage parties to try the system out. Whether or not

they would want to opt in or opt out -- opt in is what we're really talking about here -- at the early stage, is not as important as encouraging somebody to try the system. If people try the system and get more comfort that it is transparent, it is fair, it has the integrity like the NGFA system has of over 100 years, then you'll have potentially more opportunity to use it and whether someone opts in or not may not be as critical.

MEMBER BEGEMAN: And my last question is the issue of the cap. I don't know that your testimony has really touched on that, at least your oral testimony. Would any of you like to comment on the currently proposed $200,000 cap?

MS. RINN: We consider it relevant in a decision as to whether we're going to be participating. But we believe that it's the shippers should indicate what they're willing, then we would have to evaluate given what the cap is, consistent as Mr. Warchot indicated

with all the other elements because there are a lot of moving pieces here, about whether the cap is too high for us to do it on anything other than say a case-by-case basis because if it's an individual case, you're going to have an idea of what the value is. But he would not rule out participating in STB arbitration if the cap were lifted from $200,000 to say $500,000, but we would have to evaluate it in the context of all the other circumstances.

I would suggest that you may want to get clarity that there may need to be a limit on the overall cap because, for example, the distinction between event versus dispute, if you have a demurrage dispute that involves a lot of cars, the individual events may not be much, but if you've got enough cars, it may get to be enough. And therefore, it may need to be some type of a hybrid of occurrence or event or dispute approach.

MR. WARCHOT: Well, the parties can certainly agree on a higher limit if they

would want to, but the AAR's position would be to start slowly, as you heard in the first panel, and see and get experience, assuming there was as Ms. Rinn said, a general comfort with the rest of the terms that that number would be where we think the process should start.

MR. SCHEIB: Certainly there would be a number of factors in deciding whether or not to participate and the cap is one of them. The higher the cap, the more important a factor it becomes. In my view, starting at a lower level, letting people develop trust in the process is the right approach.

VICE CHAIRMAN MULVEY: Thank you. I think both panels had some excellent ideas. I think this really shows the value of these kinds of hearings. We've gotten a lot of input on our proposed suggestions of how to improve it.

It does strike me that to some extent "opt-out-opt-in" is really a default

model and I was wondering if the Board sort of went to an opt-in approach instead of an opt-out approach, we could see whether or not if none of the railroads chose to opt in, effectively they would all be opting out. So I think a test case of going to an opt-in approach and then seeing what happens. This might be a way of proceeding so that you could see whether or not the railroads are interested in this arbitration program -- a changed STB arbitration program.

It is true as Mr. MacDougall pointed out, we've had this arbitration program in place now since 1997, 15 years, and I believe now we have the first time it's actually being tried with a lot of difficulty in finding an arbitrator.

My first question is to Ms. Rinn. I appreciate your comments on the current list of arbitrators, but how can we develop a bigger pool given the concerns about neutrality? I mean, after all, people get

their expertise on these issues either working with railroads or working with shippers.

It strikes me that we're really limiting ourselves to former government people, say former FRA people or even former Board people or for that matter, academics who have never been asked to testify and that's probably a small number if you're also looking for expertise.

So how would you go about it? Where do you think we could look for arbitrators with knowledge because one of the problems, as they said in Canada, is you have people who are knowledgeable about arbitrating, but don't necessarily have a background in railroading?

Do you have any suggestions as to where we might look?

MS. RINN: I do recognize that is a tension to my mind, that tends to be a factor that mitigates towards perhaps considering three member arbitration panels.

Now I will say that my experience in arbitration has always been with three-member panels, that I think that if you have three members with each of the parties selecting somebody who they believe is knowledgeable and can explain it, you're willing to accept less familiarity with the particular context of that dispute because you figure that both sides will have an opportunity to educate the neutral member beyond what you can do in the pleadings. I think that, for example, this very hearing, hearing what shipper panel members had to say and now hearing what railroad members, there has been a growth of learning, I think, on both sides and I suspect the same thing happens with the three-member panel.

Now I also recognize that three members raises the costs and that is a concern, particularly to the shipper side.

I believe that perhaps that you would want to approach either programs that

teach arbitration or conversely go to programs of academics or others who may have a background in transportation and encourage them, perhaps, to get arbitration training as a way of developing a pool. Again, you have a chicken and egg problem here because why are they going to go to the time and perhaps the trouble unless they're sure there's a demand. And how is there going to be a demand, unless you're sure you've got qualified arbitrators. This is not an easy nut to crack.

VICE CHAIRMAN MULVEY: Gordon, in your testimony, you propose that the Board return to ALJs, Administrative Law Judges, and abandon its arbitration program altogether. But wouldn't using qualified subject matter expert arbitrators on an as-needed basis serve the same purpose as having ALJs and be more cost effective?

MR. MacDOUGALL: I don't think so. ALJs are independent. They work for the government. They have 20 or more years'

experience. What you're saying is is it better to substitute your staff people that retire and appoint them as the arbitrators. I think it's better not to have former staff people and named arbitrators as opposed to active ALJs.

And while I have the floor momentarily, I am saying that I have looked into that Colorado -- the first one using the arbitration program. It's actually the second. The first one was out in Oregon which I described didn't get anywhere and they're asking for trackage rights, terminal rights. Those things have mandatory employee-protective conditions. You can't send that out to arbitration. You can't -- I mean whatever is going to happen, if it does get resolved, it's going to affect employee opportunities and mandatory employee-protected conditions.

In fact, my understanding is the Union Pacific has raised that as one of the

possible relief trackage rights because trackage rights has employee-protective conditions. And so you're into something which has a history of not working and I think the ALJ approach is the best thing.

Now the reason the staff doesn't like the ALJs is because you, members, approach somebody with 20 or 40 years' experience, ask little questions, not part of what they're working on. You ask them because they're experts rather than kids just out of law school coming down here to be your staff people. And the staff doesn't like that. They resent that. But you're going to have to be strong and realize that some of these ALJs which are under your control are far better than your staff people to answer your question.

VICE CHAIRMAN MULVEY: Thank you. Although I must say that an awful lot of our staff people are not people fresh out of law school. As Mr. Buttrey used to say that two

thirds of our staff are MRTs, May Retire Tomorrow, so we do have a lot of people with a long history of expertise.

Mr. Warchot, I have a question for you. I wish that BN were here because they may have more experience with this, but perhaps you know that based upon the experience with arbitrating cases in Montana, do you have any idea or can the AAR working with the BN provide some estimate as to the cost differential of arbitrating a dispute versus defending a formal action at the Board or in the courts?

MR. WARCHOT: I'll take this back to BN. I do not have that information.

VICE CHAIRMAN MULVEY: I just wondered if maybe they would have it available, just so we can get a sense as to what kinds of savings would be available to us here.

One of the issues that's been raised by the AAR and by the railroads is the

fact that there's sort of an open-ended list of the number of disputes that could be brought under arbitration, that it wasn't a finite number. Would making the list more definite and more limited specifically saying what could be arbitrated versus a more general statement about some of the issues that could be arbitrated as it is right now, would that combined with strengthening our processes for selecting arbitrators and perhaps even looking at opt in versus opt-out, would all of that be important in determining whether or not the railroads as a group would, in fact, opt in to this program?

John or Lou or Louise?

MR. SCHEIB: Thank you, Vice Chairman. As I was saying when I answered Commissioner Begeman's questions, there are a host of factors that would go into a decision whether to participate in an arbitration program. She specifically asked about the cap. Certainly, the uncertainty of what

issues are covered by this language that uses the word "including", clarity there would help, but also we still have the issues related to the arbitrators. We still have the issues related to whether the arbitrator is bound by the statute and agency precedent and those other factors that I listed.

VICE CHAIRMAN MULVEY: Louise.

MS. RINN: Again, subject to the caveat, there are a lot of moving pieces. Yes, we believe clarity, in reducing the range and the type of disputes, we think, could help encourage participation.

VICE CHAIRMAN MULVEY: It's also the issue, of course, of whether countersuits or whether the railroads could bring issues to arbitration where they were the initiator, they were the complainant, for example, demurrage. If the railroads felt that they were not being paid demurrage by a shipper, they could bring a case to arbitration?

MS. RINN: It seems to me to be a

false economy to deal with part of a dispute and still leave some of it unresolved and the possibility of bringing counter claims so that you've got the full ball of wax, as it were, makes a great deal of sense, whether it is the railroad who initiates the arbitration or the shipper who initiates the arbitration.

VICE CHAIRMAN MULVEY: I suppose the question eventually centers around whether or not then if you made the changes that the railroads are suggesting whether or not the shipping community would be supportive of these changes or not. Thank you.

Lou, did you have a response to that?

MR. WARCHOT: I would just on that last point, thank you, Vice Chairman. In terms of narrowing the scope, that is obviously critical, but I think that as Ms. Rinn had said before that this is a learning experience or an opportunity for sharing ideas. Union Pacific in their comments

suggests that a narrowing of scope and the League in their comments picked up on some of those suggestions. So that type of narrowing of scope, I think, would go a long way toward addressing that issue.

VICE CHAIRMAN MULVEY: I must say I did hear an awful lot of give on these issues and there was recognition of the other side's position and so it does look as though it is possible to do something, so I was very pleased with the results of this hearing. Thank you.

CHAIRMAN ELLIOTT: Just to follow up on Vice Chairman's question, I recall, and I think I mentioned it in my questions before in Panel I, that NITL was okay and it seemed like the whole entire panel was okay when you're picking the specific issues to take out that last catch-all phrase "service matters." So would that narrow world of issues be satisfactory for the railroads in order to opt in to an arbitration program?

MR. SCHEIB: Sorry, Mr. Chairman, just to make sure I understand your question, we're talking specifically about 1108.1(b) and the list of issues that are there --

CHAIRMAN ELLIOTT: Correct.

MR. SCHEIB: Excluding the word "including" and excluding the word -- or the language about other service-related matters.

CHAIRMAN ELLIOTT: Correct.

MR. SCHEIB: Certainly that would provide clarity as to what's covered by the arbitration process. Again, this is only one of the factors that we've raised that would go into a determination of whether we would opt in to a process.

CHAIRMAN ELLIOTT: And would the railroads feel comfortable with the list stated that way as you just mentioned?

MR. WARCHOT: Mr. Chairman, may I address that? I think --

CHAIRMAN ELLIOTT: Sure.

MR. WARCHOT: What I was speaking

to was if we go back to the Union Pacific proposal and a response in the League's comments, in their comments, I believe it was on page 19 of their reply comments, they state that "the arbitration program eligible matters involve" -- so they take out "include" and put in "involve." I'm not reading it verbatim here. But disputes involving demurrage charges as applied by a party, disputes involving assessorial charges as applied to a particular party, disputes involving the misrouting or mishandling of rail cars for a particular party and disputes involving a carrier's misapplication or reasonableness of its published rules or practices as applied in specific circumstances.

I think the AAR is okay with those if that is a League proposal with one important caveat and that is we do not believe that the words "or reasonableness" should be in there because as our comments indicated, we believe that the Board's arbitration procedure

should be factual oriented and not go toward determining the reasonableness or the legality of any particular issue.

And the NGFA rules are the same when you look at those. Those are limited to the application of practices, the application of rules, not anything relating to the reasonableness or legality of the rules themselves.

CHAIRMAN ELLIOTT: I think that's where we were kind of trying to go with the whole process ourselves. We weren't trying to get into new legal issues and have arbitrators decide those. I think that's our job.

The next question, with respect to the roster of arbitrators, Ms. Rinn mentioned her frustration with finding arbitrators and I would think that there are arbitrators out there with this expertise. Do you have experience with arbitrators pursuant to your private contracts? I assume there are arbitration provisions within certain

contracts that you use. And if so, how do you find those arbitrators?

MS. RINN: Our experience has been primarily with transportation service contracts. And in that case, basically, you're looking at contract law principles, so you're looking for a lawyer who you think understands contract law. And if they've got some familiarity with railroads and how they operate or utilities and how they operate or whatever the customer might be, then that provides the context.

So it's kind of like you begin with the nature of the dispute and then you start thinking about well, who do I know who would be qualified to look at that?

Here, you're talking really about a kind of a different set of bodies of disputes and I guess I haven't started looking at it from that perspective, but I think certainly the more you limit the range, the easier it's going to be to try to come up with

people who are qualified rather than if you expand the range of subject matters that are just subject to arbitration.

MR. SCHEIB: As I sit here, I cannot think of an example where we've had to arbitrate an issue. Most of those issues get worked out through the commercial process.

CHAIRMAN ELLIOTT: Thank you.

MR. WARCHOT: I want to add one other point, too, please, is that the AAR standpoint, there is not necessarily any one right way to put together the arbitration -- arbitrator selection process. The single arbitrator approach we've discussed, the association has no objection to three arbitrators if we can work out the budget and the other issues involved. And the final offer arbitration approach that we suggest that again, as an alternative for consideration, was trying to address the fact that there may not be an identifiable pool in pushing it back on the parties to try to reach

agreement on it, just as an option.

CHAIRMAN ELLIOTT: And in your final offer proposal, would that -- would the arbitrators that you suggest come from our list or would they just be from the parties' own knowledge and background?

MR. WARCHOT: They would not necessarily come from the roster.

CHAIRMAN ELLIOTT: Okay.

MR. WARCHOT: The concept would be that the parties would hopefully agree on an individual. If they could not, then both parties would submit their choice to the Board with the reasons that they felt that their arbitrator should be chosen or the others should be disqualified. And the Board would decide, based upon criteria of neutrality, impartiality, qualifications, which one should be chosen and the Board, under our proposal, would also have the option of saying these are both terrible, go back to the drawing board and start over.

CHAIRMAN ELLIOTT: I guess that would eliminate some of the concerns about the overall roster which would be helpful, apparently.

MR. WARCHOT: Let me emphasize this was an alternative to suggest.

CHAIRMAN ELLIOTT: I understand. If we didn't adopt that alternative, and we somehow came up with a good list of arbitrators, would you be comfortable with the strike method that was proposed?

MR. WARCHOT: I think with the right list of arbitrators, we have not -- we don't have an issue with that, I don't believe. I need to take that back to confirm that.

CHAIRMAN ELLIOTT: Okay. With respect to your issues on counter claims and affirmative defenses, I don't really see a huge issue with that. Included in that is your -- if you had -- if you were going to opt in, would you also want the ability to bring

a complaint under these, I guess, four categories or five categories?

MR. SCHEIB: I think if you go back to the core principles I mentioned in my opening about balance and fairness that in order for us to opt in that would have to be a component. It strikes us that otherwise, it's a one-way street where we're wearing the target on our back and that doesn't strike me as a process that's going to get us to yes, as Mr. Whiteside described.

MS. RINN: I would agree with Mr. Scheib. I don't know that we would necessarily use it, but I think that if we're in mediation or if we are in discussions where we are trying to resolve it commercially, the fact that if you're in a situation where one side has that as an alternative, and the other one does not, does not help achieve resolution. If, in fact, it is an opportunity that either side can exercise, I think that can only be conducive to either getting it

resolved by agreement or by allowing the parties to get it into our arbitration as opposed to say a more expensive, longer proceeding.

CHAIRMAN ELLIOTT: Just coming back to one of the questions I asked the prior panel, I think I recall that you're comfortable with published decisions, but I just wanted to make sure that's correct.

MR. WARCHOT: Yes, we are comfortable with publication of a summary of the decision, not the entire decision, but yes, we are.

CHAIRMAN ELLIOTT: Great. And then there was one issue that I think NITL proposed that was apparently in the NGFA issue list. It was disputes arising under receipts or bills of lading. Would you be comfortable with that proposal that NITL made?

MS. RINN: Union Pacific is already on record as opposing that. As we explained, we really don't have many disputes.

Where we do have disputes it involves a matter of law and in that case, basically getting a summary judgment resolution allows us to not only resolve that dispute, but basically avoid a whole future generation of disputes. And therefore forcing those into arbitration would, in fact, we think long term be counter productive.

While we have agreed and the NGFA does include freight claims, I'll point out the last time we, in fact, had an NGFA arbitration involving Union Pacific involving a freight claim was in 2005.

CHAIRMAN ELLIOTT: Thank you. That's very helpful.

MR. SCHEIB: Actually, I'm glad you asked that question, Mr. Chairman, and I'll amend my prior answer. I can't think of one arbitration we're involved in. My understanding is we're involved in one at the NGFA now regarding a freight loss issue. Like Union Pacific, we would oppose adding that to

the list of arbitrable issues and frankly, we'll see how it plays out at the NGFA, but that is a field that is highly specialized and finding folks who are expert in the area and in the law there are, I think would be another hurdle.

CHAIRMAN ELLIOTT: Final question that I have, I've asked a number of questions about some of your concerns. Obviously, the opt out versus opt in is a large concern and we certainly didn't mean to engender any distrust by putting that out there. We were just trying to look for something that was manageable, and so if we went to the opt-in proposal and we cleaned up the roster or used the final best offer and took some of these other major concerns that you had into consideration, at that point would the railroads be willing to opt in?

MS. RINN: We would seriously look at all of the considerations. As I said, there are many, many moving pieces. But we're

not going to rule that out and categorically say we won't. We just have to look at what all of the pieces would be.

And I want to make one other observation. I found it interesting that a reason given for why opt in would not work and it ought to be opt out was the number of shippers. But as I recall, the shipper panel indicated that NGFA has 1,000 members versus 7 Class 1 railroads and yet from our perspective that's an opt-in model. You opt in and then you can opt out.

MR. SCHEIB: Like Union Pacific, we would evaluate the totality of the proposal.

MR. WARCHOT: And I'd like to go back to what I said earlier that as far as the AAR is concerned, while obviously it will depend upon what the final package and each railroad would have to look at individual, our position again is that you may not need to go so far as an opt-in proposal. If the package

works and cases will be brought and handled on an individual basis and the extra layer of work required for an opt-in proposal may not be necessary.

CHAIRMAN ELLIOTT: Thank you. Thank you very much for appearing here today. We really appreciate your testimony. And I think this has been a very successful hearing, just hearing what each side has to say about the pluses and minuses of this process and we really do appreciate it.

So thank you very much and the hearing is now adjourned.

(Whereupon, the above-entitled matter went off the record at 12:09 p.m.)

T

C E R T I F I C A T E

This is to certify that the foregoing transcript

In the matter of: Assessment of Mediation and Arbitration Procedures

Before: Surface Transportation Board

Date: 08-02-12

Place: Washington, DC

was duly recorded and accurately transcribed under my direction; further, that said transcript is a true and accurate record of the proceedings.

Neal R. Gross

Court Reporter

Win-Win Approaches To Mediations

Comments Presented to
The Surface Transportation Board
Ex Parte 699
Assessment of Mediation and Arbitration Procedures

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August 2, 2012

Summary

- We have had positive experience with STB mediations in several Small Shipment Rate Cases as well as in other applications.

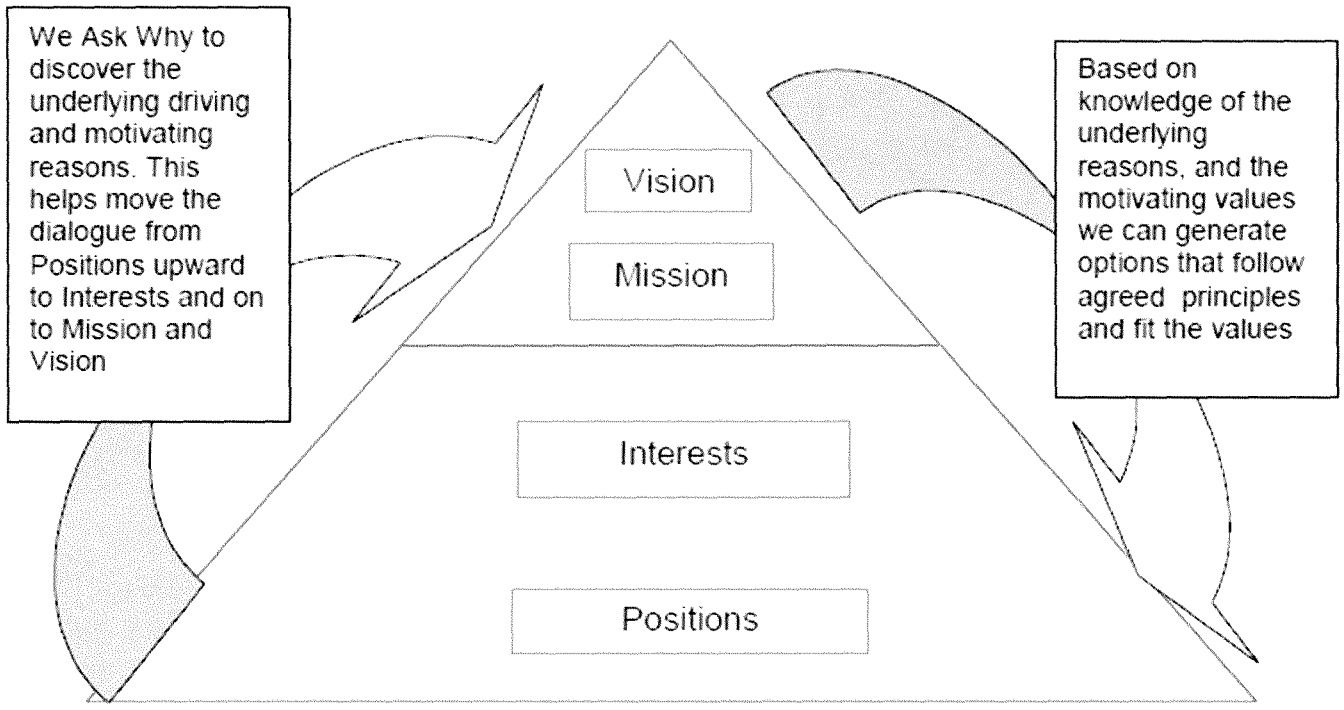
- The mediator has a key role in working with the parties and facilitating solutions. The mediator can help channel and focus the energy

- Decide on strategy:
  - Power-based bargaining with adversaries or
  - Principle and fact- based negotiating with partners

- Approach:
  - Identify Underlying Interests.
  - Agree on Guiding Principles
  - Generate and Evaluate Alternatives.
  - Develop the most promising

- Some of the techniques can appear counter intuitive but they are proven in application. The following charts outline the approach and the accompanying "White Paper" develops it.

Win-Win Mediation Approach



- Maintain a fact based approach
- Maintain a principled approach
- Accept reasonable needs of the other party as legitimate
- Help meet reasonable needs rather than blocking them

Comparison of Position-Based and Interest-Based Approaches

Approach:	Position Based	Interest Based
Goal:	Victory over adversary	Problem-solving solution
Techniques:	Extract Concessions	Attack the problem
	Discard relationship if that appears expedient	Support the people
	Make threats, offers, counter-offers	Explore mutual interests
	Focus only on bottom line	Include all aspects that help build a solution
	Strive for one-sided gains	Develop options for mutual gain
	Search for a single answer	Develop and Choose from multiple options
	Insist on positions	Insist on objective criteria
	Try to win a contest of wills	Apply mutually agreed principles
	Apply sufficient pressure to force a win	Follow principles applied to facts
Level of Trust:	Generally Absent	Unnecessary

Source: Adapted from work by Fisher and Ury; Harvard Negotiation Project

Conclusion

- We have had positive experience with STB mediations in several Small Shipment Rate Cases as well as in other applications.

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The Tom O'Connor Group assists clients by providing regulatory and litigation support and by offering management consulting services. The firm's regulatory and litigation support activities involve the development, preparation and presentation of expert witness testimony before courts and regulatory agencies. Members of the firm have participated in dozens of proceedings before state commissions and Federal commissions that regulate the transportation industries in both the U.S. and Canada. The Members of the firm have provided litigation support in the form of expert witness or economic research services in antitrust, merger, divestiture, rate and other cases before Federal and state courts.

In the area of management consulting, we assist both government and private clients in developing management information systems, evaluating contract performance and conducting management audits.

The Tom O'Connor Group specializes in the analysis of the operations, costs, revenues and services of enterprises, both public and private, involved in all modes of surface transportation. We have developed an array of transportation and logistics related negotiation planning and financial and management tools, including detailed models for negotiations, litigation, cost allocation, accounting, traffic flow, and carrier operations. These tools have been successfully employed on behalf of clients in well over 500 projects, including merger proceedings, contract negotiations, strategic planning and operational analyses. Our transportation practice extends beyond the U.S. borders throughout North America and into Eastern Europe.

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Selected Prior Testimony Related to Issues Addressed in Ex Parte 699

•Testimony on STB Rate Guidelines in Small Shipment Cases. Verified statement was submitted to Surface Transportation Board (STB) on behalf of SK clients in STB Ex Parte 646 in June 2004.

•Oral Testimony on STB Rate Guidelines in Small Shipment Cases. Oral Testimony was presented to the full Surface Transportation Board on behalf of SK clients in STB Ex Parte 646 in July 2004.

•Testimony on STB Stand Alone Costs focusing on alternatives. Comments submitted to Surface Transportation Board (STB) on behalf of SK in STB Ex Parte 657 in April 2005.

•Oral Testimony on STB Stand Alone Costs focusing on alternatives. Presented to Surface Transportation Board (STB) on behalf of SK in STB Ex Parte 657 in April 2005.

•Oral and Written Testimony on the first ever STB Small Shipment Rate Case. Comments submitted to Surface Transportation Board (STB) on behalf of BP Amoco in STB Docket NOR 42093 in May-June 2005. The case was resolved successfully through mediation.

•Oral and Written Testimony on Rail Fuel Surcharges. Comments were submitted to the Surface Transportation Board (STB) in April 2006 and oral testimony was presented the STB in May 2006 on behalf the American Chemistry Council. The testimony was submitted in STB Ex Parte 661. The issue is under adjudication.

•Oral and Written Testimony on a second STB Small Shipment Rate Case. Comments submitted to Surface Transportation Board (STB) on behalf of Williams, Olefins, LLP in STB Docket NOR 42098 in 2006-2007. The case was resolved successfully through mediation.

•Oral and Written Testimony on a third STB Small Shipment Rate Case. Comments submitted to Surface Transportation Board (STB) on behalf of US Magnesium in STB Docket NOR 42014 in 2009. The case was decided by the STB in favor of US Magnesium and subsequently affirmed by the Court. In 2010, two additional medium shipment cases were resolved successfully through mediation prior to filing evidence.