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BEFORE THE
SURFACE TRANSPORTATION BOARD

Ex Parte No. 586

***ARBITRATION — VARIOUS MATTERS RELATING TO ITS USE AS AN
EFFECTIVE MEANS OF RESOLVING DISPUTES THAT ARE SUBJECT
TO THE BOARD'S JURISDICTION***

COMMENTS

SUMMITTED BY

THE FERTILIZER INSTITUTE

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The Fertilizer Institute ("TFI") respectfully submits these comments, which express its strong support for legislation that would create procedures for the arbitration of small rate disputes, at a shipper's option. TFI commends the Board for recognizing concerns voiced by many shippers that "[the Board's] formal procedures are still impractical" for smaller rail customers and that such shippers "are effectively precluded from obtaining relief from . . . unreasonably high rail rates." See Ex Parte No. 586, *Arbitration—Various Matters Relating to Its Use as an Effective Means of Resolving Disputes that are Subject to the Board's Jurisdiction*, slip. op. at 3 (served September 20, 2001). TFI believes that legislation mandating binding arbitration of small rail rate disputes would significantly aid smaller shippers and advance the rail transportation policy by fostering reasonable rates, encouraging private-sector resolution of disputes, and minimizing regulatory oversight. 49 U.S.C. § 10101. Additionally, TFI believes that binding arbitration can also be used effectively to resolve a wide range of matters that arise between shippers and carriers and that are subject to the Board's jurisdiction. Therefore, TFI

also supports legislation that would permit binding arbitration, at a shipper's option, to resolve a variety of other disputes between shippers and rail carriers.

I. IDENTITY AND INTEREST OF THE FERTILIZER INSTITUTE

The Fertilizer Institute is the national trade association of the fertilizer industry. The Institute, which traces its roots back to 1883, represents more than 250 member companies, including virtually every primary plant food producer, as well as secondary and micronutrient manufacturers, fertilizer distributors and retail dealerships, equipment suppliers and engineering construction firms, brokers and traders, and a wide variety of other companies and individuals involved in agriculture. Many members of TFI use rail transportation, and are in a position to utilize binding arbitration to resolve small rate disputes, as well as other disputes, with rail carriers.

II. TFI STRONGLY SUPPORTS LEGISLATION THAT WOULD PERMIT ARBITRATION OF SMALL RATE DISPUTES AT THE SHIPPER'S OPTION

TFI strongly supports legislation that would utilize binding arbitration, at a shipper's option, to permit a shipper to challenge a rail carrier's common carrier rate as exceeding a maximum reasonable rate. In establishing this proceeding, the Board has correctly identified a significant problem in its oversight of rail rates: despite the Board's attempt to promulgate simplified procedures for so-called "small" rate cases, the fact is that smaller shippers cannot feasibly contest a carrier's rate because of the substantial costs and burdens associated with such a challenge, and because of the time it takes to resolve such a dispute before the Board. TFI affirms that many of its small shipper members simply do not have the resources to invest in a rate challenge under the Board's existing procedures. Moreover, even large shippers with small-volume movements find it impractical to challenge a carrier's rail rates applicable to those

movements, because the Board's procedures demand an investment of time and money that frequently are greater than the amount in issue. The Board has noted that no shipper has ever availed itself of the small rate case guidelines that are currently in place. Ex Parte No. 586, *Arbitration—Various Matters Relating to Its Use as an Effective Means of Resolving Disputes that are Subject to the Board's Jurisdiction*, slip. op. at n.1 (served October 26, 2001). TFI believes that this is convincing evidence of the need for legislation that would fill a void in the Board's regulatory oversight of rail rates. If shippers are to have realistic access to the statutory protections, a much quicker and less expensive process to adjudicate disputes must be developed. A legislatively-created arbitration process would promote the original objective of the small rate case guidelines to "ensure that no shipper is foreclosed its statutory right to challenge the reasonableness of rates charged on its captive traffic." *Rail Guidelines—Non-Coal Proceedings*, 1 S.T.B. 1004, 1008 (1996).

The Board's September 20 decision in this proceeding sets forth a variety of issues that would need to be addressed by any legislation that would establish a binding arbitration process for small rate cases. TFI sets forth below its position on issues that are presented by the Board in its decision, as well as other issues that TFI believes are important to resolve in developing legislation that would permit the use of such arbitration.

A. Existing Market Dominance Standards Should be Applied in Arbitration Proceedings.

TFI believes that existing market dominance standards should be applied in arbitration proceedings. In light of statutory policies that would limit direct regulation of rail rates to only those cases in which the competitive market does not provide an effective check upon railroad market power, TFI believes that it is appropriate for a shipper to demonstrate that there is an

absence of effective intermodal and intramodal competition, and that the complained-of common carrier rate exceeds 180% of the variable cost of providing the service. TFI believes that, for the purposes of developing an arbitration remedy for small rate cases, these statutory standards properly identify the circumstances and conditions under which a rate should be subject to challenge. Thus, TFI is not suggesting any change in the existing market dominance standards in legislation that would permit the use of binding arbitration.¹

B. Rates to Which Arbitration Should Apply.

TFI believes that arbitration should be available for all common carrier rates charged by rail carriers. In the case of non-exempt commodities, the jurisdiction of the arbitrator would be on the same basis that administrative rate proceedings are litigated today before the Board.

In the case of exempt commodities, a shipper may not currently challenge a rate as unreasonable unless the shipper first applies to the Board for revocation of the exemption, at least with respect to the particular movement at issue. TFI believes that an arbitrator should have the power to revoke an exemption as to the particular movement at issue, if the shipper can show that it meets the standards for revocation of an exemption with respect to that movement. *See* 49 U.S.C. § 10502(d); *Mr. Sprout, Inc. v. U.S.*, 8 F.3d 118 (2nd Cir. 1993) and *G. & T. Terminal Packaging v. Consolidated Rail Corp.*, 646 F. Supp. 511 (D.N.J. 1986). TFI believes that it would make little sense for a shipper with a small-volume movement to first have to apply to the Board for revocation of any exemption with respect to that movement, and then separately

¹ In this connection, however, TFI strongly believes that the Board was correct in its December 21, 1998 decision in which it ruled that product and geographic competition should not be considered in the determination of market dominance. *Market Dominance Determinations – Product and Geographic Competition*, decision served December 21, 1998, *petition for reconsideration denied*, decision served July 2, 1999, *affirmed in part and remanded in part*, *Association of American Railroads v. Surface Transportation Board*, 237 F.3d 676 (D.C. Cir. 2001), *further decision upon remand*, served April 6, 2001, *appeal pending*, *Association of American Railroads v. Surface Transportation Board*, No. 01-1213 (D.C. Circuit). The use of such factors would be particularly inappropriate in the determination of market dominance in small rate cases.

initiate arbitration to resolve the substance of the dispute. Moreover, while the standards for revocation of the exemption are not identical to those for determining market dominance or reasonable rates, the evidence that may be submitted on those questions may well be highly relevant to the issue of revocation of an exemption for a particular movement.² Thus, TFI believes that an arbitrator should have the authority to revoke an exemption with respect to a specific movement at issue whose rate is being challenged by the shipper.

Finally, TFI believes that rates established through private contract should not be subject to arbitration, unless the contract otherwise provides for it. The legislation should not engraft upon a rail transportation contract an "external" provision to which neither party agreed.

C. The Definition of a Small Rate Dispute.

The Board requested comments as to how to determine which shippers should be eligible for arbitration. In order to "launch a dialogue on this issue," the Board proposed in its September 20 decision that this determination should not be derived from the shipper's own business, but rather from the shipper's "limited amount of rail traffic" on a particular railroad. *See Ex Parte No. 586, Arbitration—Various Matters Relating to Its Use as an Effective Means of Resolving Disputes that are Subject to the Board's Jurisdiction*, slip. op. at 4 (served Sept. 20, 2001). As a ballpark figure, the Board suggested that binding arbitration should be available to shippers whose traffic falls in a range of 200 to 500 carloads per year on a single rail carrier.

² Under 49 U.S.C. §10502(d), the Board may revoke an exemption "when it finds that application in whole or in part of a provision [of the statute] is necessary to carry out the transportation policy of section 10101" Under Section 10101 of the statute, it is the policy of the U.S. Government "to maintain reasonable rates where there is an absence of effective competition." Thus, the issues of market dominance (*i.e.*, the lack of effective competition, see 49 U.S.C. § 10707(a)) and rate reasonableness intersect, at least in part, with the issue of whether the application of the statute is necessary to carry out the rail transportation policy of the act with respect to a particular movement. Particularly in view of the intersection of the two matters, it would be administratively efficient and economical for a small shipper for these questions to be resolved at the same time, before the same decider of fact.

TFI believes that the Board was correct to approach the eligibility question from the standpoint of traffic levels, and strongly agrees that eligibility for arbitration should not be derived from the size of the shipper's business. Shippers with substantial businesses may have just one segment of their business that is captive to a rail carrier, and it would be unfair to deny to such shippers the advantages that would be afforded by arbitration.

However, TFI does not believe that eligibility for arbitration should be determined on a shipper's *total* number of cars on a *single* railroad, as proposed by the Board. The Board's proposal appears to rest on a number of misconceptions. For example, it is very common for a shipper to have a large manufacturing facility that is served by a single rail carrier, and whose shipments from that facility are then dispersed to a wide variety of destinations across the country, either in single-line rail service on the lines of the origin carrier or in interchange service with other carriers. All of the movements from that origin facility could well be subject to the originating railroad's market power, and even in the case of interline service, many of the movements may also be subject to the market power of the terminating railroad. Yet, a rate reasonableness challenge in those circumstances is almost always not practical, given the dispersed nature of the movements and the relatively low amount at issue in any one movement. However, in such a case, swift, economical arbitration of particular movements between certain origin/destination pairs might provide a substantial remedy. But the Board's proposal, in which eligibility for arbitration would be determined by the shipper's total shipments over a single carrier, would make such a shipper ineligible for arbitration, even as to any one of its movements.

Moreover, even if some of the traffic tendered to a single rail carrier is "competitive," the Board's proposal rests on the assumption that the shipper can "leverage" his competitive traffic

to obtain lower rates for his non-competitive traffic. But this is simply not what occurs in the real world. When a rail carrier is faced with a shipper with partly competitive and partly non-competitive traffic, the carrier simply segments the total traffic, bidding the "competitive" traffic at the levels dictated by the market, and the "non-competitive" traffic at monopoly levels. It would have no reason to do otherwise. Thus, one assumption underlying the Board's proposal to limit arbitration to shippers transporting less than 200-500 carloads over a single railroad -- that a shipper can leverage his competitive traffic to obtain favorable rates for his non-competitive traffic -- is simply not correct.

TFI believes that a shipper's eligibility for arbitration should be based on shipments between *a single origin/destination pair*. This proposal would follow the current statutory framework, which focuses on the reasonableness of the rate for a discrete movement. *See* 49 U.S.C. § 10707(c) ("When the Board finds in any proceeding that a rail carrier proposing or defending a rate for transportation has market dominance over the transportation *to which the rate applies*, it may then determine that rate to be unreasonable. . .) It would also be consistent with the statutory definition of market dominance, which is defined as "an absence of effective competition from other rail carriers or modes of transportation for the transportation to which a rate applies." 49 U.S.C. § 10707(a). TFI's proposal, which focuses on shipments between an origin/destination pair, would permit arbitration for small-volume movements, for which the time and cost of a rate challenge before the Board would be prohibitive.

If the Board would focus on origin-to-destination pairs as defining eligibility for arbitration, the question remains as to what is the proper measure for determining a "small" rate case. TFI believes that a movement over a specified origin to destination pair should be eligible for arbitration if the movement would meet either a carload test or a freight revenue test over a

specified time, such as an annual period. Use of a carload test alone would eliminate from arbitration movements in which there were a relatively high number of cars transported, but at a relatively low per-carload rate (such as in the case of small movements of heavy-loading, low-value commodities). Use of a revenue test alone would eliminate from arbitration movements in which there were a relatively low volume of cars, but moving at high revenue per car (such as certain high-value chemicals or similar products).

TFI believes that the Board unwisely rejected a test based on the dollar amount at stake for a given movement. As suggested above, if the Board employs only a traffic-based test, this would arbitrarily exclude customers who ship higher volumes at lower rates. For shippers, carloads are synonymous with freight bills, which are measured in dollar amounts. Hence, the Board's distinction between "carloads" and "revenues" is artificial. TFI would note that the amount of money at stake often determines court jurisdiction: the Board need look no further than the amount-in-controversy requirements at 28 U.S.C. §§ 1332 and 1337 to see use of monetary figures as jurisdictional thresholds. Most states employ similar standards to distinguish between claims eligible for litigation in small claims courts versus courts of general jurisdiction. In fact, the Board recognized the feasibility of a revenue test in its request for comments: "[i]f special treatment was limited to a particular commodity group (such as agricultural commodities), then freight revenues could be a useful measure as well." See Ex Parte No. 586, *Arbitration—Various Matters Relating to Its Use as an Effective Means of Resolving Disputes that are Subject to the Board's Jurisdiction*, slip. op. at n.9 (served Sept. 20, 2001).

Thus, TFI believes that legislation should incorporate an arbitration-availability test of a set dollar amount, based on the shipper's annual payment for a particular origin-to-destination

movement, and in addition, a test based on traffic levels in carloads over an origin/destination pair, with eligibility for arbitration determined if either test is met.

TFI is not wedded to and has no final proposal with respect to either a proper carload figure or an appropriate dollar amount, and it will be carefully evaluating the comments in this proceeding. As a point of departure for purposes of discussion, TFI believes that a carload test in the 200 carloads per year range between a given origin/destination pair and a revenue cutoff of approximately \$250,000 per year over a specific origin/destination pair might be considered.

D. Procedures for Arbitration.

TFI believes that certain procedures should govern arbitration that might be created through legislation. First, TFI believes that for every proceeding, there should be a single arbitrator (unless otherwise agreed by the parties), selected by the STB within fifteen days of the demand, from a roster maintained by the agency. The Board should implement safeguards to ensure that the arbitrator is impartial, and should insure that arbitrators qualified by the Board have sufficient training and expertise in the process of arbitration. The procedures governing arbitration should require a decision to be reached within 90 days after the demand, unless the parties otherwise agree. The decision of the arbitrator should be retroactive to the date of the demand.

TFI believes that discovery should be permitted under the supervision of the arbitrator. However, regulations implementing arbitration should mandate an initial exchange of certain information. This would include information on inter- and intramodal competition and variable costs. Additionally, the regulations should encourage the arbitrator to confine discovery to the central issues of the dispute, or even limit the number of interrogatories and document requests,

unless the parties otherwise agree. And, in order to ensure that the 90 day decision deadline remains firm, the arbitrator should have the last word on discovery disputes.

Finally, the parties should split the expense of the arbitrator.

E. The Authority of the Arbitrator.

TFI believes that the Board has properly identified "baseball-style" arbitration as appropriate for use in small rail rate disputes. TFI concurs in the Board's judgment that this form of arbitration would bring the positions of the parties together as "[they] work to narrow their differences at the outset of the process and each strives to present the figure that would be more likely to be the one selected by the arbitrator." *Id.* at 6. After the arbitrator finds that the carrier has market dominance and after the exchange of information through discovery, each party would be required to submit its "final offer," supported with arguments and evidence. The arbitrator would select the more reasonable rate, based on his or her analysis of the evidence. TFI does not believe that the legislation should establish rigid standards for what a "reasonable" rail rate might be, except of course, that a "reasonable" rate would need to exceed the statutory jurisdictional threshold. Rather, the parties should have the ability to present facts and circumstances appropriate to the circumstances. While parties may wish to present evidence consistent with the Board's very general guidelines in Ex Parte 347 (Sub-No. 2), they should not be required to do so, and could present other evidence that they believe is relevant to the issue of reasonableness. However, parties should be precluded from presenting evidence on "Stand Alone Cost," since such evidence would be inconsistent with the entire purpose of arbitration as a cost-effective, timely method of resolving smaller rate disputes.

TFI believes that the arbitrator should have the authority to prescribe rail rates for up to two years, unless the parties agree otherwise. This would be an appropriate horizon given that the traffic patterns may change over a longer time period, and a longer period may unduly impinge upon a carrier's ability to respond to changed economic conditions. Moreover, since the arbitrator would be dismissed at the conclusion of the proceeding, there would be no ongoing authority to whom either party could appeal to modify the order. TFI believes that the arbitrator should have the ability to award damages reaching back one year, in the event that the challenged rate exceeds the prescribed rate. The amount of damages should be determined using the difference between the prescribed rate and the rate paid during the challenge period.

Finally, appeals to the Board for review of the arbitrator's decision should be limited to the circumstances permitted by the Federal Arbitration Act. *See* 9 U.S.C. § 10 (award procured by corruption, fraud, undue means; evident partiality; misconduct; etc.). A party that seeks to contest the arbitrator's decision should have 10 days to file an appeal with the Board and any such appeals should be decided by the Board within 30 days of the filing of an appeal.

III. THE BOARD SHOULD BROADEN ITS PROPOSED INQUIRY TO INVITE COMMENTS ON OTHER TYPES OF DISPUTES THAT MIGHT BE RESOLVED THROUGH ARBITRATION

TFI strongly supports the Board's decision to inquire into the feasibility of arbitrating small rate cases. However, TFI believes that the Board should also recognize the applicability of arbitration beyond this one subject and should discuss the desirability of arbitration to resolve other types of disputes. Thus, TFI would like to suggest a number of other matters which could be effectively resolved via arbitration.

Rail carriers and shippers have already adopted arbitration in a number of different settings. For example, the National Grain and Feed Association and the Association of

American Railroads have negotiated an agreement to utilize arbitration for certain commodities in a variety of disputes. Such disputes include: application of a demurrage rule or term; misrouting of loaded rail cars or locomotives; disputes arising under receipts and bills of lading; application of a railroad's special car or equipment program rules; application of a railroad's general car distribution rules; mishandling of private cars; and others. See, Rail Arbitration Rules of the National Grain and Feed Association, adopted August 24, 1998.³ The Board's own recently-published rules regarding rail mergers include a provision urging the offer of arbitration by merger applicants as part of their mandated service assurance plans. *Major Rail Consolidation Procedures*, decision served July 11, 2001, at 40-42, 66 Fed Reg. 32582 (June 145, 2001). The Canadian National Railway Company ("CN") has agreed that it would arbitrate service disputes arising as a result of CN's assumption of control of the Wisconsin Central Transportation Company. See, *Canadian National Railway Company, et al. - Control - Wisconsin Central Transportation Corporation, et al.*, served September 7, 2001, slip op. at 12. Thus, there is precedent for the use of arbitration in disputes other than those involving rates.

TFI firmly believes that arbitration presents a practical, informal, and cost-effective means of resolving matters that otherwise would come before the Board. Arbitration proceedings, which move forward under strict time constraints (decided 90 days from the date of the demand), would provide for expedited resolution of disputes. And, to the extent that arbitration would lighten the load on the administrative docket, the Board might shorten its own time-frame for reaching decisions.

TFI submits that the following additional disputes are susceptible to arbitration:

³ <http://www.ngfa.org/traderules/2001%20Rail%20Arbitration%20Rules.pdf>

1. Disputes involving the application of demurrage/storage rules and charges to a particular shipper.
2. Disputes involving the application of rail classifications, rules and practices to a particular shipper.
3. Disputes involving liability limits on goods shipped by a particular shipper
4. Disputes arising under receipts and bills of lading (e.g., loss and damage claims).
5. Damage claims for failure to provide service on reasonable request.
6. Disputes involving application of a railroad's car or equipment program rules, and application of a railroad's general car distribution rules.
7. Specific railroad/rail user disputes involving the reasonableness of railroad's published rules and practices applied in specific circumstances, except for the reasonableness of car allocation/distribution practices.
8. Disputes involving misrouting.
9. Disputes involving a sidetrack agreement.
10. Disputes involving the reasonableness of terminal switching charges, weighing and overloading charges, car diversion charges, car cleaning charges, stop-off-in-transit charges, and other accessorial charges contained in published railroad tariffs, as applied to the facts of a particular movement.

TFI believes that these disputes should be decided under standard arbitration procedures, as opposed to "baseball-style" arbitration, which is appropriate for small rate disputes, in order to give the arbitrator maximum flexibility to craft a resolution appropriate to the facts of the case. Other than the absence of the "final offer" component, TFI believes that arbitration procedures for the above-listed disputes should be the same with respect to the selection of the arbitrator, discovery, appeals, etc., as discussed above with respect to small rate cases.

IV. CONCLUSION

TFI commends the Board for initiating this inquiry. TFI strongly supports the creation of arbitration procedures that will resolve small rail rate disputes and other areas of conflict

between rail shippers and carriers. Fundamentally, TFI concurs with the Board that there is a regulatory void in its oversight of rail rates for small shippers. This void should be filled in a manner that will extend the opportunity for rate relief to all shippers who are subject to unreasonable rates. These are not always small shippers; larger shippers also face unreasonable rates on routes where they ship smaller volumes of traffic. Thus, TFI believes that access to arbitration must be decided on a volume between an origin/destination pair. Additionally, TFI believes that binding arbitration represents an effective, less-expensive, and practical means of resolving a broad range of shipper-carrier disputes. TFI strongly advocates legislation which will provide arbitration as a means to solve these areas of contention.

Respectfully submitted

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