



ARC
*Alliance for
Rail Competition*

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Re: Alliance for Rail Competition Position on Arbitration and Standing

Dear _____:

The Alliance for Rail Competition and its many members have for many years supported legislation to promote more competition among railroads and more effective regulation where competition is inadequate to prevent abuses of market power by railroads. In the 111th Congress, ARC supports many elements of the rail competition bill now being developed.

There are two issues of particular importance to ARC members, including shippers of agricultural commodities, coal, chemicals, and other products. First, captive shippers in the U.S. need a faster, less expensive method of dispute resolution than STB proceedings. In Canada, final offer arbitration has worked well, and has recently been expanded to permit a group of shippers with a common concern to arbitrate their dispute with a railroad. With arbitration as an option, many disputes are resolved through negotiations.

Second, there are shippers of agricultural commodities who have legitimate complaints that they are reluctant to raise because of concerns about railroad retaliation, or

can't raise, because they bear railroad freight charges but do not pay them directly. To help the first group, the Act should clarify that their State Governor or Attorney General may challenge rail rates on their behalf.

The second group consists of agricultural producers who sell to grain elevators and other intermediaries. The elevators pay the railroad freight charges and deduct those amounts from what the producers receive for their grain and other commodities.

Elevators could challenge excessive rail rates, but they may decline to do so, leaving producers without a remedy even if rail rates are clearly excessive. The new legislation should permit agricultural producers to file their own rate challenges in such situations.

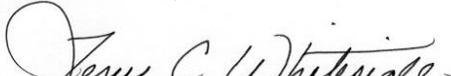
The final offer arbitration option should also be available to a State Governor or Attorney General or to agricultural producers who could file rate challenges at the STB.

ARC has attached suggested legislative language to implement these principles while protecting railroads against duplicative rate challenges. A section by section analysis is also attached.

Please contact us with any questions. We look forward to working with you to enact captive rail shipper legislation.



Mike Snovitch, Executive Director



Terry Whiteside, Chairman

SECTION BY SECTION ANALYSIS

Section ____. **Arbitration of Certain Rail Rate, Service and Other Disputes.**

This section adds a new Section 11708 to the existing ICC Termination Act, creating an alternative to formal and informal STB proceedings that is based on final offer arbitration. This approach has been used successfully in Canada to resolve disputes between shippers and railroads, and final offer arbitration is used in many commercial contexts in the U.S.

The alternative of final offer arbitration is needed because many disputes require resolution at lower cost and in a shorter time period than is possible through formal and informal proceedings before the STB.

STB “small rate case” procedures adopted under current 49 U.S.C. Section 10701(d)(3) are projected to cost between \$250,000 and \$5 million and to take between 9 months and 18 months.

There are many captive shippers, especially smaller shippers or large shippers with smaller disputes, for whom these costs and delays are prohibitive. They need faster decisions that cost less to obtain, and they are willing to accept decisions that are in effect for only one year.

Subsection (a) of Section 11708 provides that the arbitration option can be invoked by any party, and subsection (b)(1)(A) defines broadly the types of disputes subject to arbitration, referring to sections of the existing statute under which such disputes might arise. The cross-referenced sections are 10701(c) and (d), concerning unreasonable rates, 10702 and 10704(a)(1), covering unreasonable practices, 10707, concerning

market dominance, 10741, on discrimination issues, 10744, on continuous coverage of freight and interchange issues, 10746, covering demurrage charges, 11102, terminal facilities, 11121 and 11122, on car supply, and 11706, covering cargo loss and damage.

These categories of issues may be submitted to arbitration, so long as resolution of the dispute does not require promulgation of new rules of general application to the railroad industry. The Board currently has in place only cumbersome and expensive procedures, or no procedures for resolving some of these disputes, and alternative dispute resolution options are clearly needed.

Subsection (c) of Section 11708 calls for the Board to adopt implementing regulations for arbitration, after notice and public comment. Railroads are not permitted to initiate arbitration as to the rates and charges they impose unless the shipper agrees to such arbitration, and the standard of reasonableness cannot be stand-alone cost or a variation thereof. Alternatives to stand-alone cost are acceptable, as are new standards called for under the new Act, and the arbitrator may be an administrative law judge or a person or persons agreed on by both sides to the dispute.

Under subsections (c)(4) and (5), arbitration is “final offer,” i.e., the arbitrator(s) must choose the final offer of one side or the other, without amendment or compromise, so long as that offer is consistent with Section 11708. However, no rate may be prescribed that does not meet the Board jurisdictional threshold of 180% of the variable cost of the transportation service. In addition, market dominance must be found, and the decision of the arbitrators shall remain in effect for no more than 1 year.

Subsection (c)(6) provides for consideration of evidence of comparable rates where damages at or below \$500,000 per year are sought. For many smaller shippers, rate reductions are not sufficient if the shipper remains at a competitive disadvantage.

Subsection (c)(7) provides for court review on a clear error basis unless the parties agree to an appeal to the Board.

Section 11708(d) provides that if a group of shippers could initiate a formal or informal proceeding before the Board, that group of shippers shall have the option of submitting their dispute to final offer arbitration, so long as the group of shippers agrees on a joint final offer. This group arbitration option has recently been adopted as to rail disputes in Canada.

Section 11708(e) clarifies that a dispute involving more than one rail carrier can be submitted to individual or joint final offer arbitration.

Section _____. Standing for State Officials and Certain Producers of Agricultural Commodities.

This section would amend the Act by adding two new subsections to 49 USC Section 11701(b). That section of the ICCTA currently states that a person, including a governmental authority, may file a complaint with the Board and states that the Board cannot dismiss the complaint “because of the absence of direct damage to the complainant.”

New subsection (1) to Section 11701(b) clarifies that the governor or attorney general of a state may file a complaint on behalf of citizens of the state who would have standing to sue on their own behalf. This clarification is needed because there are states in which shippers are reluctant to seek relief because they are small, lack resources or le-

gal expertise, are concerned about retaliation by major railroads, or for all of these reasons.

For such shippers, who may be concentrated in certain states that are major producers of agricultural commodities, an action brought by the governor or attorney general as a representative or “*parens patriae*” action may provide the only realistic chance at relief from abuses as to rates, charges and service by market dominant railroads.

Representative or “*parens patriae*” actions by state officials are well recognized in other legal contexts and should be possible before the STB.

To prevent duplicative relief or litigation against a railroad or representation by a governor or attorney general of shippers who do not desire it, shippers may opt out of representative or “*parens patriae*” actions. Shippers who elect not to opt out may not file on their own as to the same issues and time period as the subject matter of the representative or “*parens patriae*” action.

New Subsection (2) to Section 11701(b) provides for actions to challenge rail rates and charges by producers of agricultural commodities, where the sales prices they receive are directly affected by those rail rates and charges.

Standing for such producers is needed because many such producers are farmers who sell their products to grain elevators or other intermediaries which pay the rail freight rates and charges directly, and deduct those amounts from the payments to the farmers and producers.

The elevator companies may be unwilling to challenge excessive rail rates and charges because they might not keep all the benefits of lower rates, or because they have business relationships with major railroads at many locations in many states. They may

therefore be reluctant to challenge excessive rail rates at one elevator which reduce farmer receipts at that elevator, because of concern about railroad retaliation at other locations or in other states.

To prevent duplicative relief and unfairness to the railroads, producer standing is conditioned on the failure of the grain elevator to challenge unreasonable rates and charges directly affecting the producer's receipts. In addition, relief is available to a producer only to the extent of the impact of the unreasonable rail rates and charges on that producer. An elevator cannot subsequently seek the same relief.

New subsection (3) of Section 11701(b) gives state governors and attorneys general and producers of agricultural commodities with standing to file complaints the option of seeking relief through final offer arbitration.

S:\mcd\SECTION BY SECTION ANALYSIS.DOC

SEC. ____. **ARBITRATION OF CERTAIN RAIL RATE, SERVICE, AND
OTHER DISPUTES.**

(a) In General – Chapter 117 is amended by adding at the end the following:

‘Sec. 11708. Arbitration of certain rail rate, service and other disputes

‘(a) Election of Arbitration – A dispute described in subsection (b) shall be submitted for resolution by arbitration upon the election of any party to the dispute.

‘(b) Covered Disputes – (1) Except as provided in paragraph (2), subsection (a) shall apply to any dispute between a party and a rail carrier that –

‘(A) arises under section 10701(c), 10701(d), 10702, 10704(a)(1), 10707, 10741, 10745, 10746, 11101(a), 11102, 11121, 11122, or 11706;

‘(B) involves the transportation of any product or products; and

‘(C) involves –

‘(i) the payment of money;

‘(ii) a rate or charge imposed by the rail carrier; or

‘(iii) transportation or other service by the rail carrier.

‘(2) Subsection (a) shall not apply to a dispute if the resolution of the dispute would necessarily involve the promulgation of regulations generally applicable to all rail carriers.

‘(c) Arbitration Procedures – Not later than 1 year after the effective date of this section, the Board shall promulgate regulations governing voluntary arbitration that are consistent with the provisions of this section. Such modifications shall include the following:

‘(1) Arbitration shall be mandatory if either party elects arbitration in lieu of filing a formal or informal complaint before the Board. Challenges to the reasonableness of rail rates or charges may not be subjected to arbitration at the sole election of a rail carrier imposing such rates or charges.

‘(2) Arbitration shall be before an administrative law judge of the Board, or arranged for by the Board, unless the parties to the arbitration agree on a single arbitrator or each selects an arbitrator and the two selected arbitrators agree on a third arbitrator from a list of neutral arbitrators maintained by the Board.

‘(3) Disputes concerning rates and charges shall not be considered or decided using any method based on stand-alone cost, the costs of a hypothetical competitor, or in reliance on precedent adopting or applying such methods.

‘(4) Standards for rate reasonableness other than stand-alone cost developed under section 10701(d)(3) or standards provided for in the Rail Competition and Service Improvement Act of 2009 shall apply in arbitration under this section. The arbitrator or arbitrators shall adopt the final offer of the party seeking relief from the rail carrier or the final offer of the rail carrier, without amendment or compromise, if such offer is consistent with this section.

‘(5) A rate may not be prescribed in arbitration if such rate would result in a revenue-variable cost percentage below 180 percent or if market dominance is not found. A rate prescription may not remain in effect for longer than 1 year after the date on which the arbitrator’s decision becomes final.

‘(6) If a party to arbitration under this section seeks damages from a rail carrier that do not exceed \$500,000 per year based on a claim of excessive rates or charges, the arbitrator shall consider evidence of rates or charges on comparable shipments.

‘(7) Decisions issued in arbitration under this section shall not be subject to appeal to the Board unless all parties to the arbitration agree to such appeal. Appeals to a

court, or to the Board if both parties agree to Board review, shall be based on a clear error standard, and consistency with the requirements of this section.

‘(d) In any dispute in which more than one party could initiate a formal or informal proceeding before the Board for resolution of such parties’ dispute concerning the rates, charges or service of a rail carrier, such parties shall have the option of submitting their dispute to joint final offer arbitration under this section, subject to the regulations adopted by the Board, and the parties seeking relief shall make a joint final offer.

‘(e) Any dispute which could be the subject of a formal or informal proceeding against two or more rail carriers may be submitted to single or joint final offer arbitration against such rail carriers.’

(b) Clerical Amendment – The table of sections at the beginning of chapter 117 is amended by adding at the end the following:

‘Sec. 11708. Arbitration of certain rail rate, service, and other disputes.’

SEC. ____. **STANDING FOR STATE OFFICIALS AND CERTAIN PRODUCERS OF AGRICULTURAL COMMODITIES**

(a) In General – Section 11701(b) is amended by adding at the end thereof the following:

‘(1) The governor or attorney general of a State who has the authority to bring representative or *parens patriae* actions on behalf of citizens of the State may initiate a proceeding before the Board challenging the reasonableness of rates, charges or practices of a rail carrier affecting one or more citizens of the State who would have standing to file, on their own behalf, a formal or informal complaint challenging such rates, charges or practices. Any citizen of a state on whose behalf such a representative or *parens patriae* action is brought at the Board shall have the right to be dismissed from such action on request. If no such dismissal is sought, such citizen or citizens shall waive the right to file a separate action seeking the same relief for the same time period as sought by the governor or attorney general.

‘(2) A producer of agricultural commodities whose sales of those products is directly affected by rail transportation costs for those products, including producers selling to grain elevators from which the products are shipped by rail, may challenge the reasonableness of rail rates and charges affecting the sale price of the producer’s agricultural commodities. The right of such producer to challenge rail rates and charges is contingent on the failure the elevator or other party billed for the rail rates and charges on the producer’s agricultural commodities to challenge such rates and charges. Relief shall be available only to the extent of the impact on the complainant producer of unreasonable rail rates and charges, and any relief awarded such producer may not subsequently be

demanded in any proceeding initiated by an elevator or other entity that paid the challenged rates and charges directly.

(3) A State governor or attorney general with *parens patriae* standing or a producer of agricultural commodities with standing shall also have the right to initiate final offer arbitration under Section 11708.