

***ALTERNATIVE DISPUTE RESOLUTION AT THE
SURFACE TRANSPORTATION BOARD***

**2015 COAL HANDLING & STORAGE
CONFERENCE & EXHIBITION**

**St. Louis, Missouri
October 6, 2015**

Good morning. I'm Dan Elliott, Chairman of the Surface Transportation Board. I'm happy to be here this morning, and I would like to thank Mining Media International for extending this invitation.

Today, I plan to discuss alternative dispute resolution procedures (also known as ADR) at the Surface Transportation Board, as well as some other ADR procedures used by railroads and their customers.

One focus for me is improving accessibility to the Board's processes for all stakeholders. And an important part of that effort is turning the Board into more of a problem solver and not just an adjudicator, through the use of ADR and other informal measures.

Two years ago, the Board adopted revised arbitration and mediation rules. For arbitration, we created an “opt in” program in which shippers and railroads may agree in advance to arbitrate certain classes of disputes. We chose matters that are often inconvenient to litigate: demurrage, accessorial charges, misrouting or mishandling of rail cars, and tariff rules and practices. Parties can also voluntarily agree to arbitrate other disputes on a case-by-case basis. A three-person panel or a single arbitrator will preside, and damage awards are capped at \$200,000. Cases are designed to move quickly, reaching a decision in six months or less—faster, typically, than a formal proceeding before the Board.

For mediation, we made similar changes. The rules establish procedures under which the Board may order parties to mediate certain types of disputes, even if both parties haven’t agreed to mediation. The Board will be able to order mediation, or grant a mutual request for mediation, at any time in an eligible proceeding. Unless the parties want to use a non-Board mediator, we will appoint Board staff as mediators. Our staff is

especially well-suited because they understand both sides of the issues and have specific expertise, which should make each side comfortable with the process. The parties would be required to pay the expenses of outside mediators.

I have also continued to bolster the Rail Customer and Public Assistance program, which informally assists many smaller shippers that may not be in a position to bring a formal case at the Board. Staffed by industry analysts and attorneys, the office has resolved hundreds of transportation matters since the beginning of my term, and is cited by rail shippers and rail carriers alike as a tremendous success at the agency.

Another informal tool that the Board has recently started to use more frequently is the technical conference. Beginning with our most complex cases—rate reasonableness cases—the Board has been holding additional technical conferences with the parties in each rate proceeding.

A technical conference allows Board staff to meet with the parties informally to talk about expectations for submission of

evidence, address issues relating to discovery, discuss technical deficiencies, and raise new evidentiary matters that may have come up for the first time in that case. The Board plans to take into account the technical conference input received from parties when it issues instructions for the submission of evidence. I hope that the Board's increased use of technical conferences, starting with rate cases, will help parties as well as the Board. These meetings provide an opportunity for improved clarity and efficiency with respect to the submission of evidence, especially when it comes to issues that vary from case to case.

In addition to the procedures offered by the Board, railroads and their customers also use other forms of ADR. For example, the National Grain and Feed Association, or NGFA, has a Rail Arbitration System that is available to its members. Many railroads and most NGFA members, which include grain, feed, and processing companies, have signed an agreement to participate in the arbitration system. Like the Board's arbitration procedures, NGFA's system is voluntary with respect to whether a rail customer or railroad decides to participate in the program. Once you decide to participate, you have agreed in

advance to resolve certain types of disputes through arbitration. This includes, for example, demurrage, misrouting or mishandling of rail cars, loss and damage claims, and tariff rules and practices. Again, as with the Board's arbitration procedures, parties can also voluntarily agree to arbitrate other disputes on a case-by-case basis. Cases are assigned to a panel of three arbitrators, and appeals are assigned to a panel of five arbitrators. Damage awards are capped at \$400,000.

Another ADR program used by rail customers and railroads is the Montana-BNSF mediation and arbitration system. This system is based on an agreement between the Montana Grain Growers Association, Montana Farm Bureau Federation, and BNSF. Like the Board's and NGFA's procedures, participation in the Montana system is voluntary. One of the topics covered by the Montana arbitration procedure, for those who choose to participate, is rail rates. There are limits on which customers can challenge rates under the Montana system and what relief they can receive, including minimum revenue-to-variable cost ratios and comparisons to available truck rates.

Recently, the Transportation Research Board of the National Academy of Sciences, or TRB, released a report with recommendations to Congress regarding improvement of freight rail regulation. Among the important topics addressed in TRB's report is a recommendation that Congress provide for resolution of railroad rate disputes through final-offer arbitration, like the system used in Canada. Under Canadian law, a shipper seeking rate relief can initiate mandatory arbitration procedures through the Canadian Transportation Agency. The parties submit their final offers for resolution to an independent arbitrator, together with their arguments and evidence.

The arbitration must be completed within 60 days, or within 30 days if the dispute involves freight charges less than \$750,000 (Canadian), unless the parties agree to a different time frame. The arbitrator cannot change the offers; he or she must select one of the two offers as it was submitted. Confidentiality applies to the offers and the decision made by the arbitrator, which is non-precedential. The decision is effective for one year unless the parties agree to a shorter period, and its effect is retroactive to the date on which the shipper first filed its

arbitration request. The parties share the cost of arbitration equally. TRB cites research showing that final-offer arbitration leads to settlements at a higher rate than conventional arbitration, apparently because the final-offer format encourages parties not to take extreme positions.

The use of mandatory, final-offer arbitration in Canada, where this process was instituted nearly 30 years ago, highlights the variety of ADR procedures that are out there in addition to the ones used by the Board, NGFA, and Montana agricultural organizations.

In closing, I want to emphasize that the Board is always here to resolve disputes that parties can't. However, when ADR can help parties reach a mutually acceptable solution, I strongly encourage parties to give it a try in lieu of formal proceedings. We've launched a new "Litigation Alternatives" webpage on the Board's website for information on our activities in this area, and I encourage you to take a look.

END