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SERVICE DATE – MAY 12, 2016

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. EP 730

REVISIONS TO ARBITRATION PROCEDURES

Digest:¹ The Surface Transportation Board proposes to modify its arbitration procedures so that the rules conform to the requirements set forth in the Surface Transportation Board Reauthorization Act of 2015.

Decided: May 6, 2016

AGENCY: Surface Transportation Board.

ACTION: Notice of Proposed Rulemaking.

SUMMARY: The Surface Transportation Board (Board or STB) is proposing to amend its arbitration procedures set forth at 49 C.F.R. §§ 1108 and 1115.8 to conform to the requirements of the Surface Transportation Board Reauthorization Act of 2015, P.L. 114-110 (2015) (STB Reauthorization Act).

DATES: Comments are due by June 13, 2016. Replies are due by July 1, 2016.

ADDRESSES: Comments on this proposal may be submitted either via the Board's e-filing format or in the traditional paper format. Any person using e-filing should attach a document and otherwise comply with the instructions at the E-FILING link on the Board's website, at <http://www.stb.dot.gov>. Any person submitting a filing in the traditional paper format should send an original and 10 copies to: Surface Transportation Board, Attn: Docket No. EP 730, 395 E Street, S.W., Washington, DC 20423-0001. Copies of written comments will be available for viewing and self-copying at the Board's Public Docket Room, Room 131, and will be posted to the Board's website. Information or questions regarding this proposed rule should reference Docket No. EP 730 and be in writing addressed to: Chief, Section of Administration, Office of Proceedings, Surface Transportation Board, 395 E Street, S.W., Washington, DC 20423-0001.

FOR FURTHER INFORMATION CONTACT: Amy C. Ziehm at 202-245-0391. [Assistance for the hearing impaired is available through the Federal Information Relay Service (FIRS) at 1-800-877-8339.]

¹ The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. Policy Statement on Plain Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

SUPPLEMENTARY INFORMATION: Under Section 13 of the STB Reauthorization Act (codified at 49 U.S.C. § 11708), the Board must “promulgate regulations to establish a voluntary and binding arbitration process to resolve rail rate and practice complaints” that are subject to the Board’s jurisdiction. Section 11708 sets forth specific requirements and procedures for the Board’s arbitration process. While the Board’s existing arbitration regulations are for the most part consistent with the new statutory provisions, certain changes are needed so that the Board’s regulations conform to the requirements under § 11708.² Accordingly, the Board is proposing to modify its existing arbitration regulations, set forth at 49 C.F.R. §§ 1108 and 1115.8, to conform to the provisions set forth by the statute and to make other minor clarifying changes. The most significant changes in these proposed rules are discussed below.

Eligible Matters. Under § 11708(b), rate disputes (i.e., disputes involving the reasonableness of a rail carrier’s rates) are eligible for arbitration. Accordingly, rate disputes would now be added to the list of matters that are eligible for arbitration under the arbitration program, which currently includes disputes relating to demurrage; accessorial charges; misrouting or mishandling of rail cars; and disputes involving a carrier’s published rules and practices as applied to particular rail transportation. The rules would continue to allow parties to agree to arbitrate most other matters on a case-by-case basis, subject to some exceptions. See 49 C.F.R. § 1108.4(e). Specifically, the current rules expressly prohibit use of the Board’s arbitration process to enforce labor protective conditions; to obtain the grant, denial, stay, or revocation of any license, authorization (e.g., construction, abandonment, purchase, trackage rights, merger, pooling), or exemption related to such matters; and to arbitrate matters outside the statutory jurisdiction of the Board. 49 C.F.R. § 1108.2(b). In accordance with § 11708(b)(2), two additional matters would be added to the list of matters not eligible for arbitration: disputes to prescribe for the future any conduct, rules, or results of general, industry-wide applicability; and disputes that are solely between two or more rail carriers.

Rate Disputes. For rate disputes, arbitration is available to the relevant parties only if the rail carrier has market dominance (as determined under 49 U.S.C. § 10707). § 11708(c)(1)(C).³ Section 10707 states that “the Board shall determine whether the rail carrier proposing the rate has market dominance over the transportation to which the rate applies,” and it defines market dominance as “an absence of effective competition from other rail carriers or modes of transportation for the transportation to which a rate applies.” § 10707(a), (b). For this reason, as discussed below, the Board proposes a separate timetable for initiating arbitration in rate cases. Nevertheless, the Board recognizes that making arbitration available only after it determines that a rail carrier has market dominance—as required by the statute—may significantly delay the

² In Assessment of Mediation & Arbitration Procedures, EP 699 (STB served May 13, 2013), the Board adopted new rules governing the use of mediation and arbitration to resolve matters before the Board. The rules established a new arbitration program under which shippers and carriers may voluntarily agree in advance to arbitrate certain disputes with clearly defined limits of liability.

³ Additionally, § 11708(c)(3) requires arbitrator(s) handling rate disputes to “consider the Board’s methodologies for setting maximum lawful rates, giving due consideration to the need for differential pricing to permit a rail carrier to collect adequate revenues (as determined under § 10704(a)(2)).”

arbitration process. Given that the arbitration process is voluntarily entered into by parties, the Board seeks comment on whether parties should be given the option to concede market dominance when agreeing to arbitrate a rate dispute (thereby forgoing the need for a determination from the Board) or, alternatively, whether the Board should limit the availability of the arbitration process in rate disputes to cases where market dominance is conceded. In addition, the Board seeks comments on other possible approaches that would help facilitate the commencement of arbitrating a rate dispute, given the need to make a market dominance determination under § 10707.

Arbitration Commencement Procedures. The Board's current regulations are consistent with § 11708(c), which makes the arbitration process available only after the Board receives written consent to arbitrate from all relevant parties and after the filing of a written complaint.⁴ Under the statute, in lieu of a written complaint, the arbitration process also may be made available "through other procedures adopted by the Board in a rulemaking proceeding." § 11708(c)(1)(B)(ii)(II). To encourage greater use of arbitration to resolve disputes, the Board proposes here that, as an alternative to filing a written complaint, parties may submit a joint notice to the Board, indicating the consent of both parties to submit an issue in dispute to the Board's arbitration program.⁵ The joint notice would allow parties to utilize the arbitration process, even if the dispute is not pending before the Board (assuming that the other criteria for arbitration are met). In the joint notice, parties would state the issue(s) that they are willing to submit to arbitration. The notice would contain a statement that would indicate that all relevant parties are participants in the Board's arbitration program pursuant to §1108.3(a), or, if they are not participants, that they are nonetheless willing to voluntarily arbitrate a matter pursuant to the Board's arbitration procedures. The notice would indicate whether parties have agreed to a three-member arbitration panel or a single arbitrator (discussed in more detail below). The notice would also indicate the relief requested and whether the parties have mutually agreed to a lower amount of potential liability in lieu of the monetary award cap that would otherwise be applicable.

Monetary Relief Available. In accordance with § 11708(g), the maximum amount of relief that could be awarded under the arbitration program, which is currently capped at \$200,000, would be raised to \$25,000,000 in rate disputes and \$2,000,000 in practice disputes (i.e., disputes involving demurrage; accessorial charges; misrouting or mishandling of rail cars; and disputes involving a carrier's published rules and practices as applied to particular rail transportation). The \$2,000,000 monetary award cap would also apply to other disputes that parties seek to arbitrate under § 1180.4(e) that are not specifically listed as arbitration-eligible

⁴ Under 49 C.F.R. § 1108.5, arbitration commences with a written complaint that contains a statement that the relevant parties are participants in the Board's arbitration program, or that the complainant is willing to arbitrate the dispute pursuant to the Board's arbitration procedures. The respondent's answer to the written complaint must then indicate the respondent's participation in the Board's arbitration program or its willingness to arbitrate the dispute at hand pursuant to the Board's arbitration procedures.

⁵ These proposed rules seek to expand, not replace, the current rules set forth at 49 C.F.R. § 1180.3 that govern the Board's arbitration program, under which shippers and carriers may voluntarily agree in advance to arbitrate certain disputes.

matters (yet also not expressly prohibited). The proposed rules would allow parties to mutually agree to a lower monetary award cap.

Arbitrator Roster. Section 11708(f) provides that, unless parties otherwise agree, an arbitrator or panel of arbitrators shall be selected from a roster maintained by the Board. Therefore, we propose rules to establish a process for creating and maintaining a roster of arbitrators and selecting arbitrators from the roster in accordance with the statutory requirements.⁶

Creating and Maintaining the Roster. The Board proposes that an initial roster be compiled by the Chairman, who would seek notice from all interested, qualified persons, as described below, who wish to be placed on the Board's arbitration roster. Under the proposed rules, the Chairman could augment the roster at any time to include other eligible arbitrators and remove from the roster any arbitrators who are no longer available or eligible. The roster would be made available on the Board's website. To ensure that the roster remains current, the Chairman would update it every year, seeking public comment on any modifications that should be made to the roster, including updates from arbitrators appearing on the roster to confirm that the biographical information on the file with the Board (as discussed below) remains accurate. Arbitrators who wish to remain on the roster would be required to notify the Board of their continued availability.

Arbitrator Qualifications. Under § 11708(f)(1), arbitrators on the roster must be "persons with rail transportation, economic regulation, professional or business experience, including agriculture, in the private sector." Additionally, under the proposed rules, persons seeking to be included on the roster would be required to have training in dispute resolution and/or experience in arbitration or other forms of dispute resolution. The Chairman shall have discretion as to whether an individual meets the qualifications to be added to the roster. The Board's roster would provide a brief biographical sketch of each arbitrator, including information such as background, experience, and geographical location, as well as general contact information, based on the information supplied by the arbitrator.

The Parties' Selection of Arbitrators. In accordance with § 11708(f)(3)(A), we are proposing revisions to our arbitrator selection process so that, if parties cannot mutually agree on a single arbitrator or lead arbitrator of a panel of arbitrators, the parties would select the single or lead arbitrator from the roster maintained by the Board by alternately striking names from the roster until only one name remains.⁷

To make the strike process more practicable and efficient, we propose that the Board, through the Director of the Office of Proceedings, would provide parties a list of arbitrators culled from the Board's roster. This culled list would include not more than 15 arbitrators to

⁶ Under our current rules, parties select arbitrators from a list of five neutral arbitrators compiled by the Board for a particular arbitration proceeding. These proposed rules replace the selection process with the process set forth at § 11708(f).

⁷ Under the Board's current regulations, a panel of three arbitrators resolves all matters unless parties mutually agree to use a single arbitrator. 49 C.F.R. § 1108.6(a).

limit the number of strikes each party would have to make. In culling the list, the Board would consider a variety of factors, including relevant background and experience, acceptability, geographical location, and any expressed preferences of the parties. The culled list would have an odd number of arbitrators to ensure that parties have the same number of strikes.

To select the other members for a panel of arbitrators, these rules propose that each party to the dispute would select one additional arbitrator from the roster, regardless of whether the selected arbitrator was included in the culled list or struck from the culled list by another party. See § 11708(f)(3)(B).

These proposed rules also provide that parties share the costs incurred by the Board and arbitrators equally, with each party responsible for paying its own legal and other associated arbitration costs, in accordance with § 11708(f)(4).⁸

Arbitration Decisions. These rules propose to modify our current regulations regarding arbitration decisions. In accordance with § 11708(d), an arbitration decision would: (1) be consistent with sound principles of rail regulation economics; (2) be in writing; (3) contain findings of facts and conclusions; (4) be binding upon the parties; and (5) not have any precedential effect in any other or subsequent arbitration disputes.

In accordance with § 11708(h), if a party appeals an arbitral decision, the Board would review the decision to determine if: (1) the decision is consistent with sound principles of rail regulation economics; (2) a clear abuse of arbitral authority or discretion occurred; (3) the decision directly contravenes statutory authority; or (4) the award limitation was violated.⁹

Initiation of the Arbitration Process and Timelines. Under § 11708(e), deadlines for the selection of arbitrators, the close of the evidentiary process, and the arbitration decision are calculated from the date the Board “initiate[s] . . . the arbitration process,” which would occur “not later than 40 days after the date on which a written complaint is filed or through other procedures adopted by the Board in a rulemaking proceeding.” § 11708(c)(1)(D). Specifically, arbitrators must be selected not later than 14 days after the Board decides to initiate the arbitration process. The evidentiary process must be completed not later than 90 days after the date on which the arbitration process is initiated. An arbitration decision must be issued not later than 30 days after the date on which the evidentiary period is closed.

Accordingly, with the exception of rate dispute proceedings, these proposed rules provide that the Board would issue a decision to initiate the arbitration process within 40 days after submission of a written complaint, or the joint notice described above. In rate dispute proceedings, the Board must determine if the rail carrier has market dominance before making

⁸ This rule would replace the current method of cost allotment under 49 C.F.R. §§ 1108.6 and 1108.12.

⁹ As discussed below, in Assessment of Mediation & Arbitration Procedures, the Board amended the standard of review for arbitration decisions set forth at 49 C.F.R. § 1115.8 and inadvertently omitted the standard of review for labor arbitration cases. This decision addresses that omission.

the arbitration process available. 49 U.S.C § 11708(c)(1)(C). Such a determination would likely require substantial additional time in cases where market dominance is contested. Accordingly, these rules propose that, unless the comments offer persuasive reasons to exclude from the arbitration program rate cases where market dominance is contested, the Board would initiate the arbitration process within 10 days after the Board issues a decision determining that the rail carrier in a rate dispute has market dominance.

After the Board initiates the arbitration process, if parties cannot mutually agree on an arbitrator or lead arbitrator of a panel of arbitrators, the Board would then provide parties with a list of arbitrators within seven days of initiating the arbitration process. Parties would then have seven days to select an arbitrator or panel of arbitrators. § 11708(e)(1). In accordance with § 11708(e)(2), parties would have 90 days from the initiation date to conclude the evidentiary process, unless a party requests an extension, and the arbitrator or panel of arbitrators, as applicable, grants the extension request. The lead or single arbitrator would then have 30 days from the close of the evidentiary process to issue the decision. § 11708(e)(3).

In accordance with § 11708(e)(4), these proposed rules provide that the Board may extend any portion of the timetable upon agreement of all parties in the dispute, thus providing more flexibility than our rules currently allow.¹⁰

Other Matters. In adopting final rules in Assessment of Mediation & Arbitration Procedures, the Board inadvertently omitted the standard of review for labor arbitration cases in 49 C.F.R. § 1115.8. It was not the intention of the Board to alter the standard of review for labor arbitration cases. The narrow standard articulated in the final rules, and codified at 49 C.F.R. § 1108.11(b), was intended to apply solely to reviews of arbitral decisions brought under 49 C.F.R. pt. 1108.¹¹ The standard of review articulated in the final rules was not intended to replace the Board's standard of review in labor arbitration cases, which was previously codified at 49 C.F.R. § 1115.8. In adopting the new arbitration program, § 1115.8 should have reflected both the standard of review for arbitrations conducted pursuant to 49 C.F.R. pt. 1108 and the standard of review for labor arbitration cases. This decision corrects that omission.

¹⁰ This replaces the current regulation at 49 C.F.R. § 1108.7(c), which provides that petitions to extend the timetable will only be considered in cases of arbitrator incapacitation.

¹¹ In the final rules, the Board adopted a standard of review of arbitral decisions made under 49 C.F.R. pt. 1108. The Board stated that,

[u]pon petition by one or more parties to the arbitration, the Board reserves the right to review, modify, or vacate any arbitration award. The final rules clarify that the Board will apply a narrow standard of review, but which is somewhat broader than originally proposed, and will grant relief only on grounds that the award reflects a clear abuse of arbitral authority or discretion, or directly contravenes statutory authority.

Assessment of Mediation & Arbitration Procedures, EP 699, slip op. at 17 (STB served May. 13, 2013); see 49 C.F.R. § 1108.11(b).

The proposed rules, which would govern arbitration in Board proceedings, are set forth in the Appendix A.

CONCLUSION

Regulatory Flexibility Act. The Regulatory Flexibility Act of 1980, 5 U.S.C. §§ 601-612, generally requires a description and analysis of rules that would have significant economic impact on a substantial number of small entities. In drafting rules an agency is required to: (1) assess the effect that its regulation would have on small entities; (2) analyze effective alternatives that might minimize a regulation's impact; and (3) make the analysis available for public comment. 5 U.S.C. §§ 601-604. In its notice of proposed rulemaking, the agency must either include an initial regulatory flexibility analysis, 5 U.S.C. § 603(a), or certify that the proposed rules will not have a "significant impact on a substantial number of small entities," 5 U.S.C. § 605(b). The impact must be a direct impact on small entities "whose conduct is circumscribed or mandated" by the proposed rules. White Eagle Coop. Ass'n v. Conner, 553 F.3d 467, 480 (7th Cir. 2009).

The Board certifies under 5 U.S.C. § 605(b) that these proposed rules, if promulgated, will not have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act. The proposed rules, if promulgated, would amend the existing procedures for arbitrating disputes before the Board so that the Board's regulations conform to the statutory requirements under 49 U.S.C. § 11708.

Although some carriers and shippers impacted by the proposed rules may qualify as a "small business" within the meaning of 5 U.S.C. § 601(3), we do not anticipate that our revised arbitration procedures would have a significant economic impact on a large number of small entities. To the extent that the rules have any impact, it would be to provide faster resolution of a controversy at a lower cost. The relief that could be accorded by an arbitrator would presumably be similar to the relief shippers could obtain through use of the Board's existing formal adjudicatory procedures, and at a greater net value considering that the arbitration process is designed to consume less time and likely will be less costly. Therefore, we do not believe that a substantial number of small entities would be significantly impacted.

Paperwork Reduction Act. Pursuant to the Paperwork Reduction Act (PRA), 44 U.S.C. §§ 3501-3549, and Office of Management and Budget (OMB) regulations at 5 C.F.R. § 1320.8(d)(3), the Board seeks comments about each of the proposed collections regarding: (1) whether the collection of information, as modified in the proposed rule and further described in Appendix A, is necessary for the proper performance of the functions of the Board, including whether the collection has practical utility; (2) the accuracy of the Board's burden estimates; (3) ways to enhance the quality, utility, and clarity of the information collected; and (4) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology, when appropriate. Information pertinent to these issues is included in Appendix B. This proposed rule will be submitted to OMB for review as required under 44 U.S.C. § 3507(d) and 5 C.F.R. § 1320.11. Comments received by the Board regarding the information collection will also be forwarded to OMB for its review when the final rule is published.

List of subjects

49 C.F.R. pt. 1108

Arbitration of Certain Disputes Subject to the Statutory Jurisdiction of the Surface Transportation Board.

49 C.F.R. pt. 1115

Appellate Procedures.

It is ordered:

1. The Board proposes to amend its rules as set forth in this decision. Notice of the proposed rules will be published in the Federal Register.
2. Comments regarding the proposed rules are due by June 13, 2016. Replies are due by July 1, 2016.
3. This decision is effective on the day of service.

By the Board, Chairman Elliott, Vice Chairman Miller, and Commissioner Begeman.

Appendix A

Code of Federal Regulations

For the reasons set forth in the preamble, under the authority of 49 U.S.C. § 1321, title 49, chapter X, parts 1108 and 1115 of the Code of Federal Regulations are proposed to be amended as follows:

PART 1108 – ARBITRATION OF CERTAIN DISPUTES SUBJECT TO THE STATUTORY JURISDICTION OF THE SURFACE TRANSPORTATION BOARD

1. Revise the authority citation for part 1108 to read as follows:
Authority: 49 U.S.C. § 11708, 49 U.S.C. § 1321(a) and 5 U.S.C. § 571 *et seq.*
2. Amend §1108.1, as follows:
 - a. In paragraph (b) add the words “from the roster” after the word “selected” and remove the word “neutral” and add in its place “lead”.
 - b. In paragraph (d) add the word “rates,” after “subjects:”.
 - c. In paragraph (g) add the words “and the Surface Transportation Board Reauthorization Act of 2015,” after “1995”.
 - d. Revise paragraphs (h) and (i).
 - e. Redesignate paragraphs (j) and (k) as paragraphs (k) and (l).
 - f. Revise newly redesignated paragraph (k).
 - g. Add paragraph (m).

The revisions and addition read as follows:

§ 1108.1 Definitions.

(h) *Lead arbitrator or single arbitrator* means the arbitrator selected by the strike methodology outlined in § 1108.6(c).

(i) *Monetary award cap* means a limit on awardable damages of \$25,000,000 in rate disputes, including any rate prescription, and \$2,000,000 in practice disputes, unless the parties mutually agree to a lower award cap. If parties bring one or more counterclaims, such counterclaims will be subject to a separate monetary award cap.

(k) *Practice disputes* are disputes involving demurrage; accessorial charges; misrouting or mishandling of rail cars; and disputes involving a carrier’s published rules and practices as applied to particular rail transportation.

(m) *Rate disputes* are disputes involving the reasonableness of a rail carrier’s rates.

3. Amend § 1108.2, as follows:

a. In paragraph (a) introductory text remove “\$200,000” and add in its place “\$25,000,000 in rate disputes, including any rate prescription, and \$2,000,000 in other disputes” and remove the word “different” and add in its place “lower”.

b. In paragraph (a)(1) remove the word “different” and add in its place “lower”.

c. Revise paragraph (b) to read as follows:

§ 1108.2 Statement of purpose, organization, and jurisdiction.

(b) *Limitations to the Board’s Arbitration Program.* These procedures shall not be available:

(1) To resolve disputes involving labor protective conditions;

(2) To obtain the grant, denial, stay or revocation of any license, authorization (e.g., construction, abandonment, purchase, trackage rights, merger, pooling), or exemption related to such matters;

(3) To prescribe for the future any conduct, rules, or results of general, industry-wide applicability;

(4) To resolve disputes that are solely between two or more rail carriers.

Parties may only use these arbitration procedures to arbitrate matters within the statutory jurisdiction of the Board.

4. Amend § 1108.3 as follows:

a. In paragraph (a) introductory text remove the word “either”.

b. In paragraph (a)(1)(ii) remove the words “different monetary award cap” and add in their place “lower monetary award cap than the monetary award caps provided in this part.”

c. Revise paragraph (a)(2).

d. Remove paragraph (a)(2)(i).

e. Add paragraph (a)(3).

f. In paragraph (b), add “itself” after “not” and remove “within that” and add in its place “prior to the end of the”.

g. In paragraph (c), remove “on a case-by-case basis” and add in its place “only for a particular dispute”.

The revision and addition read as follows:

§ 1108.3 Participation in the Board’s arbitration program.

* * * * *

(a) * * *

(2) Participants to a proceeding, where one or both parties have not opted into the arbitration program, may by joint notice agree to submit an issue in dispute to the Board’s arbitration program. The joint notice must clearly state the issue(s) which the parties are willing to submit to arbitration and the corresponding maximum monetary award cap if the parties desire to arbitrate for a lower amount than the monetary award cap that would otherwise be applicable.

(3) Parties to a dispute may jointly notify the Board that they agree to submit an eligible matter in dispute to the Board’s arbitration program, where no formal proceeding has begun before the Board. The joint notice must clearly state the issue(s) which the parties are willing to submit to arbitration and the corresponding maximum monetary award cap if the parties desire to arbitrate for a lower amount than the applicable monetary award cap.

* * * * *

5. Amend § 1108.4 as follows:

a. In paragraph (a) add “rates,” before the word “demurrage”.

b. In paragraph (b) introductory text remove “may not exceed” and add in its place “will be subject to” and remove “\$200,000” and add in its place “\$25,000,000, including any rate prescription,” and remove “arbitral proceeding” and add in its place “rate dispute and \$2,000,000 per practice dispute”.

c. In paragraph (b)(1) remove the word “different” and add in its place “lower”.

d. In paragraph (b)(2) remove the word “different” and add in its place “lower”.

e. In paragraph (b)(3) remove “\$200,000” and add in its place “\$25,000,000, including any rate prescription,”; remove “case” and add in its place “rate dispute and \$2,000,000 per practice dispute”; and remove “different” and add in its place “lower”.

f. In paragraph (c) remove the words “arising in a docketed proceeding” and add “for a particular dispute” after “consent to arbitration”.

g. Amend paragraph (e) by adding a new sentence after the second sentence and remove “which” and add in its place “that”.

h. Add paragraph (g).

The revision and addition read as follows:

§ 1108.4 Use of arbitration.

* * * * *

(e) * * * Such disputes are subject to a monetary award cap of \$2,000,000 or to a lower cap agreed upon by the parties in accordance with paragraph (b)(2) of this section.

(g) *Rate disputes.* Arbitration of rate disputes will only be available to parties if the rail carrier has market dominance as determined by the Board under 49 U.S.C. § 10707. In rate disputes, the arbitrator or panel of arbitrators, as applicable, shall consider the Board’s methodologies for setting maximum lawful rates, giving due consideration to the need for differential pricing to permit a rail carrier to collect adequate revenues (as determined under 49 U.S.C. § 11704(a)(2)).

6. Amend § 1108.5 as follows:

a. In paragraph (a) introductory text, add “Except as provided in paragraph (e) of this section,” to the beginning of the first sentence, and remove “Arbitration” and add in its place “arbitration”.

b. In paragraph (a)(1) remove the word “single-neutral” and add in its place “single”.

- c. In paragraph (a)(3) remove the word “different” and add in its place “lower” and remove “\$200,000” and add “that would otherwise apply” after “cap”.
- d. In paragraph (b)(1) remove the word “single-neutral” and add in its place “single” wherever it appears.
- e. In paragraph (b)(1) introductory text, remove the words “the request” and add in their place “that request”.
- f. In paragraph (b)(1)(i) remove the word “single-neutral” and add in its place “single”.
- g. In paragraph (b)(1)(ii) remove the word “single-neutral” and add in its place “single” wherever it appears and remove “§1108.6(a)-(c)” and add in its place “§1108.6(a)-(d)” and remove the word “matter” and add in its place “case” and add “by the Board” after “adjudication”.
- h. Revise paragraph (b)(2).
- i. In paragraph (b)(3) remove the word “different” and add in its place “lower” and remove “\$200,000” and add in its place “ otherwise applicable”.
- j. Revise paragraph (e).
- j. Add paragraphs (f) and (g).

The revisions and additions are as follows:

§ 1108.5 Arbitration commencement procedures.

* * * * *

(b) * * *

(2) When the complaint limits the arbitrable issues, the answer must state whether the respondent agrees to those limitations or, if the respondent is already a participant in the Board’s arbitration program, whether those limitations are consistent with the respondent’s opt-in notice filed with the Board pursuant to § 1108.3(a)(1)(i). If the answer contains an agreement to arbitrate some but not all of the arbitration-program-eligible issues in the complaint, the complainant will have 10 days from the date of the answer to advise the respondent and the Board in writing whether the complainant is willing to arbitrate on that basis.

* * * * *

(e) *Jointly-filed notice.* In lieu of a formal complaint proceeding, arbitration under these rules may commence with a jointly-filed notice by parties agreeing to submit an eligible matter in dispute to the Board’s arbitration program under § 1108.3(a)(3). The notice must:

- (1) Contain a statement that all relevant parties are participants in the Board’s arbitration program pursuant to § 1108.3(a), or that the relevant parties are willing to arbitrate voluntarily a matter pursuant to the Board’s arbitration procedures, and the relief requested;
- (2) Indicate whether parties have agreed to a three-member arbitration panel or a single arbitrator;
- (3) Indicate if the parties have agreed to a lower amount of potential liability in lieu of the otherwise applicable monetary award cap.

(f) *Arbitration initiation.* When the parties have agreed upon whether to use a single arbitrator or a panel of arbitrators, the issues(s) to be arbitrated, and the monetary limit to any arbitral decision, the Board shall initiate the arbitration under § 1108.7(a) and provide a list of arbitrators as described in § 1108.6.

(g) *Arbitration agreement.* Shortly after the panel of arbitrators or arbitrator is selected, the parties to arbitration together with the lead or single arbitrator, as applicable, shall create a written arbitration agreement, which at a minimum will

state with specificity the issues to be arbitrated and the corresponding monetary award cap to which the parties have agreed. The agreement may also contain other mutually agreed upon provisions.

(1) Any additional issues selected for arbitration by the parties, that are not outside the scope of these arbitration rules as explained in § 1108.2(b), must be subject to the Board's statutory authority.

(2) These rules shall be incorporated by reference into any arbitration agreement conducted pursuant to an arbitration complaint filed with the Board.

7. Amend § 1108.6 as follows:

- a. In paragraph (a), remove “§ 1108.5(a)(1)” and add in its place “§ 1108.5(a)(1) and agreed to by all parties to the arbitration”.
- b. Revise paragraph (b).
- c. Revise paragraph (c) introductory text.
- d. In paragraph (c)(1) remove the word “neutral” wherever it appears and in the second sentence add “lead” in its place.
- e. Revise paragraph (c)(2).
- f. Remove paragraph (c)(3).
- g. Revise paragraph (d).
- h. Redesignate paragraph (e) as paragraph (f).
- i. Add a new paragraph (e).
- j. In newly redesignated paragraph (f)(1) remove “§ 1108.6(b)” and add in its place “§ 1108.6 (d)”.
- k. Revise newly redesignated paragraph (f)(2).

The revisions read as follows:

§ 1108.6 Arbitrators.

* * * * *

(b) *Roster.* Arbitration shall be conducted by an arbitrator (or panel of arbitrators) selected, as provided herein, from a roster of persons with rail transportation, economic regulation, professional or business experience, including agriculture, in the private sector. Persons seeking to be included on the roster must have training in dispute resolution and/or experience in arbitration or other forms of dispute resolution. The initial roster of arbitrators shall be established and maintained by the Chairman of the STB, who may augment the roster at any time to include other eligible arbitrators and may remove from the roster any arbitrators who are no longer available. The Board’s roster will provide a brief biographical sketch of each arbitrator, including information such as background, experience, and geographical location, as well as general contact information, based on the information supplied by the arbitrator. The roster shall be published on the Board’s website. The Chairman will update the roster every year. The Chairman will seek public comment on any modifications that should be made to the roster, including requesting the names and qualifications of new arbitrators who wish to be placed on the roster, and updates from arbitrators appearing on the roster to confirm that the biographical information on file with the Board remains accurate. Arbitrators who wish to remain on the roster must notify the Board of their continued availability.

(c) *Selecting the lead arbitrator.* If the parties cannot mutually agree on a lead arbitrator

for a panel of arbitrators, the Board, through the Director of the Office of Proceedings, shall provide the parties with a list of not more than 15 arbitrators selected from the Board’s roster within seven days of the Board initiating the arbitration process. When compiling a list of arbitrators for a particular arbitration proceeding, the Board will consider a variety of factors, including relevant background and experience, likely acceptability, geographical location, and any expressed preferences of the parties. The parties will have seven days from the date the Board provides them with this list to select a lead arbitrator using a single strike methodology. The list will have an odd number of arbitrators to ensure that parties have the same number of strikes. The complainant will strike one name from the list first. The respondent will then have the opportunity to strike one name from the list. The process will then repeat until one individual on the list remains, who shall be the lead arbitrator.

(c) * * *

(2) The lead arbitrator appointed through the strike methodology shall serve as the head of the arbitration panel and will be responsible for ensuring that the tasks detailed in §§ 1108.7 and 1108.9 are accomplished.

(d) *Party-appointed arbitrators.* The party or parties on each side of an arbitration dispute shall select one arbitrator from the roster, regardless of whether the arbitrator’s name appears on the list of 15 potential lead arbitrators and regardless of whether the other party struck the arbitrator’s name in selecting a lead arbitrator. The party or parties on each side will have seven days from the date the Board provides them with the list described in paragraph (c) of this section to appoint that side’s own arbitrator. Parties on one side of an arbitration proceeding may not challenge the arbitrator selected by the opposing side.

(e) *Use of a single arbitrator.* Parties to arbitration may request the use of a single arbitrator. Requests for use of a single arbitrator must be included in a complaint or an answer as required in § 1108.5(a)(1), or in the joint notice filed under § 1108.5(e). Parties to both sides of an arbitration dispute must agree to the use of a single arbitrator in writing. If the single-arbitrator option is selected, and if parties cannot mutually agree on a single arbitrator, the arbitrator selection procedures outlined in paragraph (c) of this section shall apply.

* * * * *

(f) * * *

(2) If the incapacitated arbitrator was the lead or single arbitrator, the parties shall promptly inform the Board of the arbitrator’s incapacitation and the selection procedures set forth in paragraph (c) of this section shall apply.

8. Revise § 1108.7 to read as follows:

§ 1108.7 Arbitration procedures.

(a) *Initiation.* With the exception of rate dispute arbitration proceedings, the Board shall initiate the arbitration process within 40 days after submission of a written complaint or joint notice filed under § 1108.5(e). In arbitrations involving rate disputes, the Board shall initiate the arbitration process within 10 days after the Board issues a decision determining that the rail carrier has market dominance.

(b) *Arbitration evidentiary phase timetable.* Whether the parties select a single arbitrator or a panel of three arbitrators, the lead or single arbitrator shall establish all rules deemed necessary for each arbitration proceeding, including with regard to discovery, the submission of evidence, and the treatment of confidential information, subject to the requirement that this evidentiary phase shall be completed within 90 days from the date on which the arbitration process is initiated, unless a party requests an

extension, and the arbitrator or panel of arbitrators, as applicable, grants such extension request.

- (c) *Written decision timetable.* The lead or single arbitrator will be responsible for writing the arbitration decision. The unredacted arbitration decision must be served on the parties within 30 days of completion of the evidentiary phase. A redacted copy of the arbitration decision must be served upon the Board within 60 days of the close of the evidentiary phase for publication on the Board’s website.
- (d) *Extensions to the arbitration timetable.* The Board may extend any deadlines in the arbitration timetable provided in this part upon agreement of all parties to the dispute.
- (e) *Protective orders.* Any party, on either side of an arbitration proceeding, may request that discovery and the submission of evidence be conducted pursuant to a standard protective order agreement.

§ 1108.9 Decisions.

9. Amend § 1108.9 as follows:

- a. Revise paragraph (a).
- b. In paragraph (b) remove the word “neutral” and add in its place “lead or single”.
- c. In paragraph (d) remove the heading “*Neutral arbitrator authority*” and add in its place “*Lead or single arbitrator authority*” and remove the word “neutral” from the first sentence and add in its place “lead or single” and add “, if any,” after “what”.
- d. In paragraph (e) remove the word “neutral” wherever it appears and add in its places “lead or single” and remove “§ 1108.7(b)” and add in its place “§ 1108.7(c)”.
- e. In paragraph (f) remove the word “neutral” and add in its place “lead or single”.

The revision reads as follows:

§ 1108.9 Decisions.

(a) *Decision requirements.* Whether by a panel of arbitrators or a single arbitrator, all arbitration decisions shall be in writing and shall contain findings of fact and conclusions of law. All arbitration decisions must be consistent with sound principles of rail regulation economics. The arbitrator shall provide an unredacted draft of the arbitration decision to the parties to the dispute, in accordance with § 1108.7.

* * * * *

10. Amend § 1108.11 by revising paragraph (b) introductory text to read as follows.

§ 1108.11 Enforcement and appeals.

* * * * *

(b) *Board’s standard of review.* On appeal, the Board’s standard of review of arbitration decisions will be narrow. The Board will review a decision to determine if the decision is consistent with sound principles of rail regulation economics, a clear abuse of arbitral authority or discretion occurred; the decision directly contravenes statutory authority; or the award limitation was violated. Using this standard, the Board may modify or vacate an arbitration award in whole or in part.

* * * * *

11. Amend § 1108.12 as follows:

- a. Revise paragraph (b).
- b. Remove paragraphs (c) and (d).

§ 1108.12 Fees and costs.

* * * * *

(b) *Costs.* The parties shall share the costs incurred by the Board and arbitrators equally,

with each party responsible for paying its own legal and other associated arbitration costs.

PART 1115 – APPELLATE PROCEDURES

12. The authority citation for Part 1115 is revised to read as follows:

Authority: 5 U.S.C. § 559; 49 U.S.C. § 1321, 49 U.S.C. § 11708.

13. Revise § 1115.8 to read as follows:

§ 1115.8 Petitions to review arbitration decisions.

An appeal of right to the Board is permitted. The appeal must be filed within 20 days of a final arbitration decision, unless a later date is authorized by the Board, and is subject to the page limitations of § 1115.2(d). For arbitrations authorized under part 1108 of this chapter, the Board’s standard of review of arbitration decisions will be narrow, and relief will only be granted on grounds that the decision is inconsistent with sound principles of rail regulation economics, a clear abuse of arbitral authority or discretion occurred, the decision directly contravenes statutory authority, or the award limitation was violated. For labor arbitration decisions, the Board’s standard of review is set forth in Chicago and North Western Transportation Company—Abandonment—near Dubuque & Oelwein, Iowa, 3 I.C.C.2d 729 (1987), aff’d sub nom. International Brotherhood of Electrical Workers v. Interstate Commerce Commission, 862 F.2d 330 (D.C. Cir. 1988). The timely filing of a petition will not automatically stay the effect of the arbitration decision. A stay may be requested under § 1115.3(f).

Appendix B

INFORMATION COLLECTION 1

Title: Joint Notice for Request of Arbitration.

OMB Control Number: 2140-XXXX

Form Number: None.

Type of Review: New collection.

Respondents: Parties seeking to submit to arbitration certain matters before the Board.

Number of Respondents: 5.

Estimated Time Per Response: No more than 1 hour.

Frequency of Response: On occasion.

Total Annual Hour Burden: 5 hours.

Total Annual “Non-Hour Burden” Cost: No “non-cost” burdens associated with this collection have been identified.

Needs and Uses: Under 49 C.F.R. § 1108.5, arbitration commences with a written complaint that contains a statement that the relevant parties are participants in the Board’s arbitration program, or that the complainant is willing to arbitrate the dispute pursuant to the Board’s arbitration procedures. The respondent’s answer to the written complaint must then indicate the respondent’s participation in the Board’s arbitration program or its willingness to arbitrate the dispute at hand pursuant to the Board’s arbitration procedures.

The Board proposes here, as an alternative to filing a written complaint, that parties may submit a joint notice to the Board, indicating the consent of both parties to submit an issue in

dispute to the Board's arbitration program. In the joint notice, parties would state the issue(s) that the parties are willing to submit to arbitration. The notice would also contain a statement that would indicate that all relevant parties are participants in the Board's arbitration program pursuant to § 1108.3(a), or that the relevant parties are willing to arbitrate voluntarily a matter pursuant to the Board's arbitration procedures, and the relief requested. The notice would indicate whether parties have agreed to a three-member arbitration panel or a single arbitrator. And, the notice would indicate whether the parties have mutually agreed to a lower amount of potential liability in lieu of the monetary award cap that would otherwise be applicable. This alternative filing method would encourage greater use of arbitration to resolve disputes at the Board.

INFORMATION COLLECTION 2

Title: Arbitrator Roster.

OMB Control Number: 2140-XXXX

Form Number: None.

Type of Review: New collection.

Respondents: Potential arbitrators.

Number of Respondents: 40.

Estimated Time Per Response: No more than 1 hour.

Frequency of Response: Annually.

Total Annual Hour Burden: 40 hours.

Total Annual "Non-Hour Burden" Cost: No "non-cost" burdens associated with this collection have been identified.

Needs and Uses: Under § 11708, the Board must "promulgate regulations to establish a voluntary and binding arbitration process to resolve rail rate and practice complaints" that are subject to the Board's jurisdiction. To facilitate this process, the Board's proposed rules would establish a process for creating and maintaining a roster of arbitrators and selecting arbitrators from the roster in accordance with the statutory requirements.

Pursuant to § 11708(f), unless parties otherwise agree, an arbitrator or panel of arbitrators would be selected from a roster maintained by the Board. The Board's roster would provide a brief biographical sketch of each arbitrator, including information such as background, experience, and geographical location, as well as general contact information, based on the information supplied by the arbitrator. Under the proposed rules, an initial roster would be compiled by the Chairman, who would seek notice from all interested, qualified persons who wish to be placed on the Board's arbitration roster. The Chairman could augment the roster at any time to include other eligible arbitrators and remove from the roster any arbitrators who are no longer available or eligible. The roster would be made available to the public on the Board's website.