

---

BEFORE THE SURFACE TRANSPORTATION BOARD

---

STB Ex Parte No. 586

---

**REPLY STATEMENT  
of the  
ALLIANCE FOR RAIL COMPETITION**

---

**Arbitration—Various Matters Relating to its Use  
As an Effective Means of Resolving Disputes  
That are Subject to the Board’s Jurisdiction**

---

January 3, 2002

---

The Alliance for Rail Competition (ARC) herewith submits its reply statement in the above-styled proceeding. The organization and mission of ARC has been defined by rail customers who have continuing and growing concerns about the deterioration in service performance, increases in rail transportation costs, monopolistic railroad behavior in both pricing and service, and the inability of captive rail customers to get either competitive choices among major rail carriers or adequate regulatory protection. ARC further continues to believe, based upon the many initial comments by captive rail customers, that true balanced negotiation rarely takes place in situations where the rail customer is captive or is at a size and resource disadvantage to the large and powerful railroads that exist today. Again, ARC believes that if a rail customer is singly served, has no economically realistic modal alternatives, or is so small that the option of a formal rate relief proceeding is not

realistic, there is little that customer can do to negotiate a fair rate and service contract if the railroad is not interested in providing one. The massive concentration of the rail industry, since the Staggers Rail Act, has created this situation for both small and large captive shippers. It is for this reason that so many rail customers continue urging the Board to set policies that would promote competition among railroads—to provide a balanced playing field that allows for private sector negotiated resolutions. ARC reminds the Board that it has extensive records with regards to the rail customer community's desire for policy changes that would increase the ability of a rail customer to choose among rail carriers. However, in the absence of true freedom of choice, the Board should provide policies that would balance the economic power at the negotiation table.

ARC has read and considered all twenty (20) of the submissions provided to the Board during the period for Initial Statements and this reply statement is responsive to those submissions.

In some perfect commercial world suppliers and customers (Carriers and Shippers) maintain an active dialogue leading to a shared understanding of each other's concerns, needs and issues. This relationship leads to effective joint problem solving and synergistic solutions that help both parties prosper in the competitive world in which they each operate. In this never-never land there are not disputes that need outside intervention to resolve. However, in the real world disputes do occur and sometimes escalate to very counter-productive levels. In the transportation real world, where the nations major Class I railroads are, in some cases, dominant over whole states and very large sections of the country and additionally have total market dominance over entire industries, this type of dialogue and productive relationship building is rare and becoming more so with every merger.

Congress never envisioned in 1980 when it passed the Staggers Rail Act that railroads would become so dominant that they could exercise absolute control over their captive rail customers. Congress instructed that shippers left totally captive should have adequate protections from market abuse.

Private negotiation, followed by mediation, as suggested by The American Association of Railroads (AAR) might make sense if there was a high level of trust between the shipper community and the carriers, and where there was an external factor that would encourage mutually beneficial results through mediation. Today, however, the shipper community views the AAR suggestion as another effort to insert a no-lose step into the process that would take time and financial resources that the shipper can not afford, and would just delay the results. It would also, again, put the railroad in the controlling position where if the step happens to produce a result the railroad likes it can accept it and if they do not like the result they can reject it. Then when that mediation step is completed the shipper is still left with the same options they have today which the shippers continue to tell the Board are unworkable

It can not be any clearer from the initial statements from the shipper companies and organizations that the Board must support a process for resolving disputes between shippers and railroads that creates a more balanced playing field for the parties. That balance must include a reduction in the cost and time necessary to have an equal chance in achieving a successful outcome. There must also be a more equal perceived risk of failure by the parties. If this balance of the factors of cost, time and risk can be achieved the result will not be active utilization of the new process, but the result will be more mutually satisfactory, privately negotiated solutions because the parties will negotiate as equals. The Canadian experience, as discussed in the joint Initial Statement by The Canadian Pacific Railroad and The Canadian National Railway, fully support that outcome although

that was not the intent of their statement. When the Canadian railroads talk about how bad their arbitration process is and how biased towards the shipper and then state that there have only been 23 Final Offer Arbitration (FOA) cases since 1988 they are telling the STB that railroads and shippers are negotiating settlements to the large percentage of ongoing commercial activities before they get so out of hand that they become FOA cases.

Based upon the comments of the many captive rail shippers, ARC believes that a consensus of shipper opinion centers on allowing a shipper the option to choose between a Final Offer Arbitration process and a formal rate case. The options would be mutually exclusive and only the shipper would have the right of election. If a shipper elects arbitration the railroad would have the right to request that the board reject that election on the narrow grounds that the case at hand would have issues of national importance or will create procedures of national applicability. The Board would handle the request on an expedited basis with 30 days allowed for a decision.

ARC suggests that a significant retooling of the Board's existing arbitration process into a FOA process is necessary and appropriate to make it a usable tool. Whether legislation is required or not is a matter of subjective legal opinions, although ARC believes at least some improvements could be accomplished without the intervention of legislation. Nonetheless, ARC believes legislation will be required to more appropriately balance the mandate of the Board as it pertains to all matters of rail policy, including arbitration especially given the massive concentration of the rail industry over the last 20 years accompanied by the equally massive increase in captive rail customers who now only have access to a single railroad.

## Arbitration

Based upon the testimony received by the STB in this proceeding, ARC proposes two arbitration processes based on the size of the case.

1. A **small case process** where a transportation rate is the primary issue and the projected amount of charges over a year is less than \$1,000,000. If service issues are the primary item for resolution, the projected number of car moves over a year should be less than 2,000 to be classified as a small case.
2. A **large case process** for cases that do not fit under the definition of a small case.

The factors of rate charges or car moves would be measured on the same basis on which the railroad proposal is quoted. Generally that will be on an origin-destination pair and car type. It might also contain a commodity component. If, for example, the railroad has one rate for products shipped in boxcars from a plant to a destination and a different rate for products shipped in tank cars or covered hoppers from the same plant to the same destination each of these moves would be evaluated as separate cases.

Note also, that neither the size of the shipping company, nor the total amount of shipments made on a railroad should be factors in determining if the case is a small case or a large case. ARC strongly believes that negotiation leverage is not created for captive shippers by either of these factors.

ARC believes the scope of arbitration disputes should encompass:

- Rates and charges, including demurrage;

- Rail service disputes, including car supply;
- Performance commitments,
- Loss and damage, including delay;
- Competitive access; and
- Unreasonable practices.

The Board should ensure reasonable outcomes through use of Final Offer Arbitration (FOA) sometimes called “baseball” style arbitration. It is clear that the Canadian Transport Authority believes that “baseball” style arbitration has been beneficial to resolving disputes between captive rail customers and the railroads in Canada. It is interesting to note that while the CTA sees merit to the process, the Canadian railroads do not like the process because they have not been successful, through Canadian FOA, in continuing to exert their absolute market dominance over captive rail customers.

The following arbitration procedures should be followed. Differences between small and large cases are noted.

1. There would be a single arbitrator chosen from a master list maintained by the Board. The Board would establish a list of neutral arbitrators who have experience in the rail transportation industry either as a shipper, carrier, or both. The arbitrators would be independent of the Board. Selection would be through an alternating striking methodology. The Board would present the parties with a randomly selected list of eleven names from the master list. The parties would alternate striking names until one remained (or the parties agreed on a selection). The parties would split the fee and expenses of the arbitrator.

2. Arbitration should have a firm time limit from the selection of the arbitrator to completion of the case. For small cases the time limit would be 60 days and for large cases it would be 120 days.
3. All discovery should be controlled by the arbitrator and be under his/her supervision. Depositions would not be allowed. Stand-alone cost evidence would not be allowed. In small cases the amount of allowable discovery would be more limited and the time allowed for testimony in arbitration hearings would also be more limited. Failure to meet discovery deadlines set by the arbitrator can be considered by the arbitrator in his/her decision process.
4. Final Offer Arbitration (FOA) should be used for rate issue cases. In service issue cases the arbitrator should be allowed more leeway in structuring a remedy. Where both rates and service are at issue the arbitrator would first decide on the service issues and then let the parties modify their final offer rates to reflect any impact of the service remedy.
5. The arbitrator would be encouraged to consider the principles of the ICCTA. The arbitrator would not be required to apply those principles in a strict or formal manner. The arbitrator may also consider information provided by the parties on rates charged in other similar moves, market factors, other available transportation options, profit levels, product redistribution options and any other potentially relevant information. The arbitrator shall be allowed to consider the variable cost to the carrier of performing the transportation, as argued by the parties, multiplied by the existing 180% factor. It is the responsibility of the arbitrator to determine what is relevant and the credibility of the information provided.
6. The arbitrator can set rates for up to two years forward. Damages, if appropriate, can cover up to one prior year.

7. The arbitrator's decision would be binding on the parties and could be appealed to a court only on the very limited issues as allowed in the Federal Arbitration Act.

ARC strongly requests that The Surface Transportation Board support an arbitration process of the type we have proposed both within their policies and procedures and in their discussions with members of Congress. ARC believes this system would help fill the gap that currently makes shippers feel the regulatory system is stacked against them. The current atmosphere in the shipping community is not healthy for the national economy, the nation or even the railroads. Quick and balanced opportunities to resolve disputes are absolutely essential for a well functioning, profitable transportation industry.

ARC believes that the time is right for this change. ARC interprets the actions of the Board over the last couple years to show that the Board also believes that more private settlements is the key to better relationships, reduced controversies before the Board and less wasted money fighting when we should be increasing every organization's profits through cooperation. The proposed changes would move the industry in that direction.

Respectfully submitted,

S/\_\_\_\_\_

David J. Putman  
Alliance for Rail Competition  
Interim Executive Director  
2236 Royal Crest Drive  
Birmingham, AL 35216  
205-979-8974  
djputman@aol.com