THE
NATIONAL
INDUSTRIAL
TRANSPORTATION
LEAGUE

June 13, 2016

The Honorable Daniel R. Elliott III
Chairman
Surface Transportation Board
395 E St. S.W.
Washington, DC 20423

Re: Ex Parte No. 730—*Revisions to Arbitration Procedures*

Dear Chairman Elliott,

The National Industrial Transportation League (NITL or League) respectfully submits these comments in response to the Notice of Proposed Rulemaking (NPRM) issued by the Surface Transportation Board (STB or Board) in a decision served on May 12, 2016 in Ex Parte No. 730-- *Revisions to Arbitration Procedures.* The League was founded in 1907 and represents companies engaged in the transportation of goods in both domestic and international commerce. The majority of the League's members include shippers and receivers of goods; however, third party intermediaries, logistics companies, and other entities engaged in the transportation of goods are also members of the League. Rail transportation is vitally important to League members and their customers, and many League members depend highly upon efficient and effective rail service for the transportation of their goods.

The League has been broadly supportive of this Board's efforts to promote the availability and use of arbitration as an alternative dispute resolution tool. The League submitted opening and reply comments and testified before the Board in Ex Parte 699, *Assessment of Mediation and Arbitration Procedures*. In those comments and in our testimony, the League voiced a strong preference for private resolution of disputes on the basis of its inherent efficiency and cost effectiveness. While offering specific proposals for the Board's consideration in reforming its arbitration rules, the League was generally supportive of the Board's proposals, and equally supportive of the Board's proposal to broaden its authority to order mediation. Then as now, we noted that while mediation of disputes was an accepted and frequently used successful tool to resolve disputes between rail carriers and shippers, the Board's arbitration procedures have never been used.

The failure of rail carriers and rail shippers to use arbitration as a dispute resolution process was a matter of interest to the Congress in its work leading up to the enactment of the Surface Transportation Board Reauthorization Act of 2015 (Act). (The League was very supportive of the legislation which ultimately was enacted in December 2015.) As explained clearly in the Board's decision to open this proceeding, in section 13 of the Act Congress gave very explicit direction to the Board to "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.

We agree with the Board's observation that its existing arbitration regulations are for the most part consistent with the requirements in the Act but that some modification of existing regulations is necessary. We offer the following constructive comments on the Board's proposed revisions. We note

as an overall comment that the Board has a somewhat limited ability to rewrite its regulations on arbitration given the statutory mandates in the Act.

With regard to matters proposed to be eligible, and not eligible, for arbitration the Board has certainly followed the dictates of the Act. In our comments in Ex Parte 699 the League urged the Board to add a number of matters to the list of disputes eligible for arbitration. We are pleased that rate disputes will now be eligible for arbitration. However, the statutory requirement that the rail carrier must be found to have market dominance still governs. Board determinations of market dominance have in the past been complex, expensive and time consuming exercises, although the Board has attempted to streamline the market dominance determination. See, STB Docket No. 42121, *Total Petrochemical and Refining USA, Inc. v. CSX Transportation Inc.,* decision served Mary 31, 2014. We appreciate and support the Board's clear-minded proposal to allow the parties seeking to use arbitration in a rate dispute to concede market dominance in lieu of a Board finding of market dominance as a means to speed the process along. However, we do not agree with the Board's proposal to limit the use of arbitration only to cases where market dominance has been conceded; such a limitation would have an overall chilling effect on the selection of arbitration, an outcome which would be at odds with the Board's own stated desires to see its greater use and the clear intentions of the Congress to promote its use.

With regard to the Board's proposal to allow parties to use the agency's arbitration process after submitting a joint notice which meets specified criteria in lieu of filing a complaint at the agency, the League fully endorses this approach. The proposal very clearly and correctly applies the new statutory guidance given to the Board to explore additional ways to encourage the use of arbitration.

We note in passing that the new statutory relief caps are certainly welcome and appropriate, and may encourage the greater use of arbitration to resolve both rate and practice disputes.

The Board's proposed process for compiling a roster of qualified arbitrators is well reasoned, fair and based on a framework that stresses professional competency and experience. The League fully supports that approach. Likewise, the Board has proposed an exceptionally fair method of selecting either a single arbitrator or a panel of arbitrators via a "strike" process. In our comments on the Ex Parte 699 proceeding we proposed a similar strike process to ensure a transparently fair arbitrator selection result for both parties in a dispute and we are pleased to endorse its inclusion in the subject rulemaking.

The League appreciates the opportunity to comment on this proposed rulemaking. Furthermore, the League will continue to promote the use of mediation and arbitration to resolve disputes which will inevitably arise between rail carriers and their customers.

Sincerely yours,

Jennifer Hedrick
Executive Director
National Industrial Transportation League