



Public Service Commission
State of North Dakota

206374

COMMISSIONERS

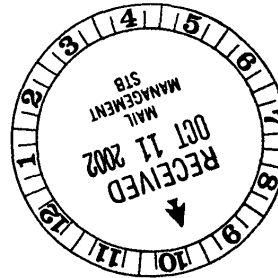
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October 10, 2002

Office of the Secretary
Case Control Unit
Surface Transportation Board
1925 K Street, N.W.
Washington, DC 20423-0001



Attention: Ex Parte No. 638

Gentlemen:

Enclosed for filing in this case are the original and 10 copies of written testimony submitted by the North Dakota Public Service Commission in this proceeding.

Sincerely,

Jon H. Mielke
Executive Secretary

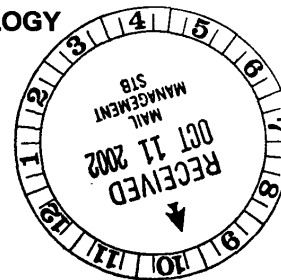
Enclosures (10)

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Office of Proceedings
OCT 11 2002
Part of
Public Record

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Ex Parte No. 638

**PROCEDURES TO EXPEDITE
RESOLUTION OF RATE CHALLENGES
TO BE CONSIDERED UNDER THE
STAND-ALONE COST METHODOLOGY**



**COMMENTS OF THE
NORTH DAKOTA PUBLIC SERVICE COMMISSION**

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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Ex Parte No. 638

**COMMENTS OF THE
NORTH DAKOTA PUBLIC SERVICE COMMISSION**

Identification

The North Dakota Public Service Commission (NDPSC) is a three-member elected constitutional body that is charged with representing North Dakota's shipping interests in proceedings such as this. NDPSC and its predecessor, the North Dakota Board of Railroad Commissioners, have been active in Interstate Commerce Commission and Surface Transportation Board cases for well over one hundred years. This level of involvement is indicative of the state's ongoing need for reliable, reasonably priced transportation services and of its lack of transportation alternatives.

North Dakota has 640,000 residents and over 70,000 square miles of land. Agriculture is the number one component of the state's economy. The state has 30,000 farmers and typically leads the nation in the production of spring wheat, durum wheat, barley, sunflower, dry edible beans, and canola. Other major grain crops include corn, soybeans, potatoes, and sugar beets.

Farmers typically use their own trucks to haul the grain from farms to a nearby grain elevators / warehouses. Typical haul distances are 15 to 20 miles. Farm truck capacities range from 350 to about 850 bushels – between 1/10th and 1/4th of a single rail car.

Grain elevators serve as the primary market for farmers' grain. The state's 424 grain elevators purchase between 500 and 550 million bushels of grain per year. Elevators clean the grain and blend it with different qualities of grain to meet the exact specifications of domestic users and export markets. Many of the state's grain elevators are "cooperative" businesses that are owned by the farmers that they serve.

Over 80 percent of the grain that is sold by North Dakota's grain elevators each year is destined for out-of-state markets. North Dakota does not have direct access to any

navigable waterways and almost all of its out-of-state markets are too distant to be effectively served by truck. Trucks typically are not an effective way to move low value bulk commodities like grain over distances of more than 250 miles.

The average distance to North Dakota's nearest major out-of-state market (Minneapolis) is over 300 miles. Many markets, including the Pacific Northwest export market, are over 1,000 miles away. This level of captivity explains why 84 percent of the grain that was shipped to out-of-state destinations during the last crop year was shipped by rail. North Dakota shippers simply have no other good options. This also explains why many of the rates charged to move grain out of North Dakota generate revenue-to-variable cost ratios of between 220 and 400.

The grain elevator industry's dependence on rail service is enormous. Without rail, the industry would have no feasible means of transporting North Dakota grain to market. This near total reliance has a direct impact on farmers since local grain elevators are the only major market for the grain that farmers produce and grain is, in fact, the only commodity grown by the majority of North Dakota farmers. North Dakota is clearly dependent on railroads.

North Dakota is served by two Class I railroads and three affiliated short lines. The Burlington Northern Santa Fe (BNSF) operates about 2,050 miles of track in the state. Its short line affiliate, the Red River Valley & Western (RRVW) operates another 475 miles of track. Collectively, these two carriers serve about 73 percent of the North Dakota grain elevators that have direct access to rail service.

The Canadian Pacific (CP) is North Dakota's other Class I carrier. CP operates about 475 miles of track in the state. Its two affiliated short lines, the Dakota, Missouri Valley & Western (DMVW) and the Northern Plains (NP) operate about 375 and 360 miles of track, respectively. Collectively, these three carriers serve about 27 percent of the North Dakota grain elevators that have direct access to rail service.

Only about three percent of the state's grain elevators are directly served by more than one rail carrier.

Prescribed Mediation

The STB continues to look for private sector solutions to complex and costly rate complaint proceedings. Unfortunately, the processes that are being developed work primarily for the benefit of one of the parties to such proceedings – the railroads.

When the Board sought comments on proposed arbitration rules in Ex Parte No. 586, the Association of American Railroads characterized large shipper and shipper association comments as “thinly-veiled” attempts to reduce or eliminate the role of the Board in related adjudications. Unfortunately, it appears that it is the rail industry’s actions that are “thinly veiled,” both in Ex Parte No. 586 and in the present proceeding.

Arbitration and mediation are, most certainly, attempts to reduce or eliminated the role of regulators and judges. That is what private sector solutions are all about.

The fact of the matter is, the railroad industry does not want someone other than the Board to have the ability to issue decisions in rate complaint cases. It prefers to put additional hoops in place that shippers must jump through – more time and money requirements that might dissuade captive shippers from pursuing relief from exorbitant rates. And if the outcome is something other than what the railroad wants, it still wants the ability to take the matter before the Board. In rate complaint cases, it seems that time and money and Board rules and procedures are always on the side of the railroad.

The concept of mediation is not distasteful to NDPSC, per se. Unfortunately, however, there is a very strong and justified fear that the railroad industry may disingenuously use the process to it keep aggrieved shippers from obtaining justified relief.

Since the passage of the Staggers Act in 1980, the rail industry has done a masterful job of convincing regulators of what the rules should say. With tangled rules and deep pockets on their side, the railroads have made it virtually impossible for captive shippers to achieve timely and affordable rate relief. The McCarty Farms case, for example, cost millions of dollars to pursue and took 17 years to complete – all to no avail for the aggrieved captive shippers.

The Board has taken steps to bring some equity to the system by eliminating roadblocks such as product and geographic competition but the rail industry is again frustrating these attempts with a barrage of court appeals. Given this track record, shippers should view this rulemaking proposal with a high degree of skepticism, especially since its genesis seems to be in the rail industry.

The events leading up to this proceeding fuel this skepticism. In the Board's May 22, 2002, decision on binding arbitration in ExParte No. 586, the Board reported that it could find no common ground among interested parties; railroads and their customers simply could not agree. The Board also noted, however, that, "The comments of the Association of American Railroads support private-sector solutions, and take the position that non-binding mediation under the auspices of expert Board staff could be helpful in addressing small shipper concerns."

So now, with decades of one-sided rulemaking and decisions from the ICC and the STB and an ExParte 586 finding that the parties could not agree, the Board has initiated a rulemaking proceeding that appears to be right out of the mouth of the rail industry.

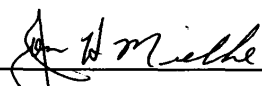
NDPSC supports private-sector dispute resolution. North Dakota did, in fact, endorse a form of final offer arbitration in ExParte 586. North Dakota is, however, concerned that the rules proposed in this proceeding will result in even more protracted and costly rate complaint proceedings; primarily to the detriment of complaining shippers.

The proposed rules provide for mandatory non-binding mediation. Railroads have little to lose and much to gain from this process. They win because they are not bound to take corrective action if the mediator favors the shipper's position and they also win if the process contributes to running the shipper out of time or money. This has been a tactic that has been used repeatedly by railroads; mandated mediation would be just another hurdle that can be placed in the way of captive shippers who are seeking regulatory relief.

NDPSC encourages the Board to put safeguards in place to ensure the resulting rules do not:

- Compel mediation; it should be available strictly on a voluntary basis,
- Force protracted delays,
- Substantially increase costs for either party, or
- Create procedural hurdles.

If any of these unintended occurrences are experienced, prompt, corrective actions should be available to the aggrieved party.



Jon H. Mielke, Executive Secretary