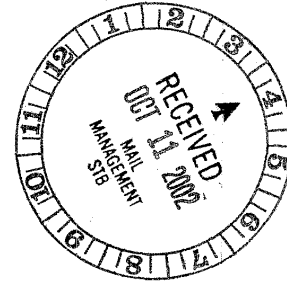


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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB Ex Parte No. 542 (Sub-No. 4)

**REGULATIONS GOVERNING FEES FOR SERVICES PERFORMED
IN CONNECTION WITH LICENSING AND RELATED SERVICES --
2002 NEW FEES**

COMMENTS

submitted by

THE NATIONAL INDUSTRIAL TRANSPORTATION LEAGUE

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Dated: October 11, 2002

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THE NATIONAL INDUSTRIAL TRANSPORTATION LEAGUE

The National Industrial Transportation League ("League" or "NITL"), by and through its attorneys, hereby submits its comments in STB Ex Parte No. 542 (Sub-No. 4), *Regulations Governing Fees for Services Performed in Connection with Licensing and Related Services—2002 New Fees*. NITL recognizes that the Board must comply with the requirements of the Independent Offices Appropriations Act, 31 U.S.C. § 9701 ("IOAA"), which mandate that the Board ensure that services and things of value provided by it are self-sustaining to the extent possible. Accordingly, NITL does not object in principle to Board's decision to assess and/or modify certain of the fees at 49 C.F.R. § 1002. However, NITL believes that the Board has too broadly interpreted the concept of a "special benefit," and thereby assessed fees in instances where they are not appropriate. The League would note that, in all but one case cited in these Comments, the fees now proposed by the Board are modest in amount. However, the League is concerned that the Board apply a sound analysis, to insure that future decisions in the area of fees are based on correct principles.

I. IDENTITY AND INTEREST OF NITL

The National Industrial Transportation League is an association of companies that conduct industrial and/or commercial enterprises throughout the United States and internationally, and that are concerned with the transportation of goods in domestic and international commerce. The League has approximately 700 separate company members who are involved with all modes and aspects of transportation, including rail transportation. The League's members conduct industrial and commercial enterprises throughout the country and internationally and ship all types of goods. NITL's members ship substantial volumes of freight via rail and motor and virtually all of them make use, or might in the future make use, of the services provided by the Board. Accordingly, NITL has a direct and immediate interest in this proceeding, which affects the fees that its members will be required to pay for services provided by the Board.

II. NITL'S GENERAL COMMENT ON THE BOARD'S APPLICATION OF "SPECIAL BENEFIT"

The Board predicates its assessment of certain new fees on its identification of "a number of services that confer special benefits. . . that the Board has been providing to identifiable recipients without charge." Citing Office of Management and Budget ("OMB") Circular No. A-25, User Fees, revised July 8, 1993 (Circular A-25), the Board states that a special benefit exists when a federal activity confers a benefit on an identifiable recipient that is beyond that received by the general public.

Although the Board has properly articulated the standard, as defined by Circular A-25, NITL believes that it has misapplied it in assessing certain fees. The Board seems to believe that the standard warrants a fee in any instance where a person seeking certain relief (a benefit or service) may obtain such relief by application to the Board. Assuming the petitioner meets the relevant legal standard, he or she qualifies as a "recipient" under the Board's interpretation by obtaining the sought-after relief. The League believes that the Board has performed only part of

the required analysis. The question is not simply whether the applicant will gain from the service, but rather whether the applicant stands to gain something over and above the general public. Where the relief confers a benefit upon the petitioner and the general public (or a relevant subsection thereof), the Board has not provided a special benefit that would justify the imposition of a fee.

The examples contained in Circular A-25 bear out the foregoing distinction and instruct the Board as to how it should properly conceive of a "special benefit." For instance, the circular states that a special benefit exists when a government service "enables the beneficiary to obtain more immediate or substantial gains (which may or may not be measurable in monetary terms) than those that accrue to the general public," such as "receiving a patent, insurance, or guarantee provision, or a license to carry on a specific activity or business." The circular also advises that a special benefit exists when the service "is performed at the request of or for the convenience of the recipient, and is beyond the services regularly received by other members of the same industry or group," such as "receiving a passport, visa, airman's certificate, or a Custom's inspection after regular duty hours." Thus, a petition for exemption pursuant to 49 U.S.C. § 10502 from the prior approval requirements of 49 U.S.C. § 10901 to abandon a rail line quintessentially seeks a special benefit. The railroad desires authorization to abandon an unprofitable and/or unused line that is a drain on its own operations. On the other hand, a directed service order sought by an individual shipper, pursuant to 49 U.S.C. § 11123, for emergency service over a rail line that serves other shippers or provides a connection to other carriers would confer a broader benefit. NITL believes that the former warrants a fee. The latter does not, despite the fact that the applicant is one of the beneficiaries.

III. NITL'S COMMENTS ON SPECIFIC FEE ITEMS

Bearing in mind the foregoing general comment, NITL offers the following comments on the Board's proposals for individual fee items:

A. Fee Item (12)(iv) – A request for determination of a dispute involving a rail construction that crosses the line of another carrier under 49 U.S.C. § 10901(d).

NITL contends that the \$10,100 fee assessed in this item is very excessive. First, NITL believes that this is a case where the Board has misapplied the special benefit standard. While it is true that one party may sponsor a track construction or a line extension, and therefore so files a crossing petition, the benefits of operations over that construction or extension are by no means limited to the applicant. On the contrary, a number of shippers or rail carriers may receive benefits from the line (and the service provided by the Board), which may create new transportation services and foster intermodal and/or intramodal competition.

Second, because such projects have pro-competitive effects, NITL strongly believes that it would be appropriate for the Board to reduce the amount of the fee in recognition of this feature, even if the Board would determine that this item would properly confer a “special benefit.” Otherwise, the fee may very well cause a “chilling effect” on construction and/or extension of track, in direct contravention of the rail transportation policy at 49 U.S.C. § 10101(4), (5), and (7).

B. Fee Item (56)(ii) – A formal complaint involving rail maximum rates filed by a small shipper.

NITL accepts the Board’s decision to adopt a filing fee of \$150 for formal complaints involving rail maximum rates filed by small shippers. In fact, NITL warmly commends the Board for again recognizing and purposefully avoiding the “chilling effect” that a larger fee would otherwise have.

C. Fee Item (56)(v) – A request for an order compelling a carrier to file a common carrier rate.

NITL commends the Board for its decision to set the fee for this item at \$200, pending further review of the costs involved, especially given that the “full cost” of \$35,500 reflected

complexities that the Board faced in confronting recent requests as “matters of first impression.” However, NITL questions whether assessment of a fee is appropriate at all, under the standard established by Circular A-25. (This is an instance where, although the fee proposed by the Board now is modest, there is a concern that a future Board, acting on unsound precedent, might decide to increase the fee substantially). NITL believes that in seeking a common carrier rate through the Board, the petitioner is simply asking the Board to require the railroad to do what the carrier is obligated to do by law, under 49 U.S.C. §§ 11101 and 10742. A petitioner does not seek a “special benefit,” but rather to avail itself of the same benefits enjoyed by other members of the shipping public, which benefits are open to the public by statute. Because the requested relief will merely put the applicant on equal footing with other members of the public, the Board cannot rationally assess a fee under the framework enunciated in the circular.

D. Fee Item (61)(ii) – An appeal of a Surface Transportation Board decision on procedural matters except discovery rulings.

The \$200 fee assigned to this filing is clearly modest. However, NITL believes that this is another occasion where the Board has improperly applied the principle stated in Circular A-25. In this case, whether a “special benefit” exists depends entirely upon the context: the nature of the underlying proceeding and the issue at stake. Where there are two parties to a proceeding and one of them appeals a procedural ruling by an ALJ, then it is more than likely that appellant would gain a special benefit. In a larger proceeding with multiple parties, the case is not clearcut. One party’s appeal of a procedural ruling might benefit a number of other parties, or the public generally. Accordingly, NITL recommends that the Board suspend its assessment of this fee until it can rationally distinguish between the two cases.

E. Fee Item (63)(i) and (ii) – Expedited relief under 49 U.S.C. § 11123 and 49 CFR part 1146 for service emergency; Temporary relief under 49 U.S.C. § 10705 and 49 CFR part 1147 for service inadequacy.

NITL objects to the Board's assessment of a fee in each of these instances, which arise, respectively, where a party seeks "temporary alternative rail service when there has been a substantial, measurable deterioration or other demonstrated inadequacy in rail service by the incumbent carrier" or "localized temporary alternative rail service when there has been a substantial, measurable deterioration or other demonstrated inadequacy in rail service by the incumbent carrier." Clearly, restoration of reliable rail service in both of these cases has the potential to confer benefits not simply upon the applicant, but upon all other members of the shipping public who suffer the effects of a service failure. As such, the benefit received by the applicant is not "beyond those received by the general public," so as to warrant a fee. And, in so far as the requested relief restores rail service that the law otherwise requires, the benefit is not "special" at all. It restores the "status quo" and places the applicant back on equal footing with other common carrier-served shippers. Under Circular A-25, a fee is not warranted for either of the Board's services.

F. Fee Item (64)(i) – A motion to compel discovery in formal complaint proceedings under 49 U.S.C. § 10704(c)(1).

In this item, the Board proposes a fee of \$2,300 for the filing of a motion to compel, and a "fee-shifting" arrangement whereby the party moving to compel discovery, if it is successful, would be reimbursed for its filing fee by the party against which discovery is sought. The Board suggests that the establishment of a fee for a motion to compel discovery could discourage parties from working out discovery issues amicably, as one party might conclude that it might avoid complying with discovery if its opponent was unwilling to pay the filing fee. Thus, the Board has arrived at the "fee-shifting" approach to ameliorate that effect.

The League does not oppose the proposed "fee-shifting" arrangement with respect to motions to compel, but believes that the Board is setting up a procedure that will not achieve the proposed goal (at least in SAC cases) and may be more trouble than it is worth. Particularly in SAC cases, where the stakes are often high, the fee-shifting arrangement is not likely to deter the filing of unwarranted discovery responses and/or motions to compel. Moreover, an examination of recent decisions in SAC cases indicates that a single motion to compel frequently encompasses a variety of discovery issues, and that decisions on such motions will frequently be decided in favor of the complainant shipper on some issues, and the defendant railroad on others. The Board's proposed arrangement will require the Board not only to decide the substantive issues in such cases, but also decide how to "split" the fee, thus complicating and perhaps delaying the decision itself.

G. Fee Item (64)(iii) – An appeal of a discovery ruling.

NITL refers to its comments in section III.D. NITL believes that whether a "special benefit" exists depends upon the nature of the underlying proceeding and the issues presented.

H. Fee Item (88) – A basic fee for STB adjudicative services not otherwise covered.

The League refers to its comments in section III.D. NITL believes that whether a "special benefit" exists depends upon the nature of the underlying proceeding, the issues presented, and the relief requested.

I. Other Matters

Finally, NITL commends the Board for revising its manner of handling requests for waiver of a filing fee. NITL believes that it is appropriate for the Board to consider the waiver request in advance of the filing to which the fee applies. This will ameliorate the hardship placed

upon parties who are genuinely unable to afford the fee at issue. The League believes that the alternative proposal, to accept the filing and the waiver request, simultaneously, and to defer collection of the fee until ruling on the request, is also appropriate.

IV. CONCLUSION

NITL recognizes that the Board must comply with the requirements of the Independent Offices Appropriations Act, 31 U.S.C. § 9701, which mandate that the Board ensure that services and things of value provided by it are self-sustaining to the extent possible. Thus, NITL does not object in principle to Board's decision to assess and/or modify certain of the fees at 49 C.F.R. § 1002. However, NITL believes that the Board has misconceived the concept of a "special benefit," which has led it to assess fees in instances where they are not appropriate. NITL urges the Board to revisit this issue and to revise or withdraw fees, as necessary and proper.

Respectfully submitted,

The National Industrial Transportation League

By its attorneys,

A handwritten signature in dark ink, appearing to read "Nicholas J. DiMichael", is written over a horizontal line.

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