

206390

ENTERED
Office of Proceedings

OCT 11 2002

Part of
Public Record

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Ex Parte No. 638

*Procedures to Expedite Resolution of Rail Rate Challenges to be
Considered Under the Stand-Alone Cost Methodology*



OPENING COMMENTS

Submitted by

THE MEMBERSHIP OF THE

NATIONAL COAL TRANSPORTATION ASSOCIATION

INTEREST OF THE NATIONAL COAL TRANSPORTATION ASSOCIATION

The National Coal Transportation Association ("NCTA"), formerly the Western Coal Transportation Association, is a non-profit corporation that maintains and promotes, through lawful cooperation and the exchange of ideas, the orderly and effective development of the transportation of coal. NCTA endeavors to serve the needs of the general public, industry, and all modes of coal transportation. NCTA members are vitally interested in reliable, efficient, and economic rail service in the United States. The organization was formed in 1973 as coal from the Powder River Basin was beginning to be delivered over long distances by rail. Educating the members regarding current and future coal transportation issues and facilitating the resolution of coal transportation problems are the primary goals of NCTA. Accordingly, the membership of NCTA would be directly affected by the Board's adoption of the proposals it has requested comment on in this proceeding.

There are approximately one hundred members in NCTA, with the field of membership being coal producers, coal consumers, and rail product and rail service providers. Our electric utility members are organizationally and geographically diverse. They consist of municipalities, cooperatives, investor-owned utilities, and government entities, and they are located from Florida to Oregon. The coal producers provide coal for domestic electric utilities and manufacturing industries as well as for export

via coastal terminals, the Great Lakes, the Mississippi River, and by direct rail to Mexico. The rail product and service suppliers provide virtually all of the running and electronic components, and the manufacture and repair of coal railcars used by the members that own, lease, and manage coal railcar fleets. NCTA members own or lease about 50,000 railcars and produce or consume over 500 million tons of coal annually.

Although NCTA is a shipper-based organization, we assiduously endeavor to cooperate with coal transportation providers whenever possible. Rail carriers are active participants in our working committees that facilitate solutions to issues and challenges of vital interest to the NCTA membership and the railroads. Several NCTA initiatives arising from NCTA activities have been notably successful in improving the level of cooperation and operating efficiency in North America. The coal transportation infrastructure benefits significantly from these endeavors.

COMMENTS

NCTA applauds the Board's recognition that the often extraordinary delay in processing large formal rail rate reasonableness proceedings, the majority of which have involved challenges to coal transportation rates, continues to be a problem and must be addressed and eliminated. It was lengthy delays in the processing of coal rate reasonableness cases and other formal rate proceedings prior to 1995 that led Congress in the Interstate Commerce Commission Termination Act to specifically direct the Board to "establish procedures to ensure the expeditious handling of challenges to the reasonableness of railroad rates." 49 U.S.C. § 10704. This statutory provision specifically required that such procedures were to include procedures to avoid delay in discovery and to ensure prompt disposition of motions. *Id.* Although the Board responded to the directives of section 10704 by adopting in 1996 the procedural regulations now found at 49 C.F.R. Part 1111, and by amending its discovery rules in Part 1114, lengthy delays in the processing of coal rate reasonableness cases still occur. The resulting complaints by coal shipper complainants and others is, the Board notes, "a significant topic of discussion before both the Board and Congress."

The Board has responded to the continued problem of delay with a proposal that suggests, in order, three measures to expedite the processing of formal rail rate cases: (1) mandatory mediation before a complaint could be filed at the STB; (2) more restrictive discovery standards for both complainants and defendants; and (3) expedited processing of motions to compel discovery. In NCTA's view, the last of these proposals, although it could be improved upon, is the most important aspect of the proposed rule. Expedited action on discovery motions would solve much of the present problems with the current system. On the other hand, as set forth in more detail below, NCTA does not believe mandatory mediation will appreciably help to resolve the delay problem, but that it could be useful if carefully implemented. Finally, NCTA suggests that discovery standards be enforced by the STB on a timely basis.

1. Expedited Review of Motions to Compel

NCTA supports the Board's general policy decision to seek to expedite the processing of rate complaint cases by speeding up the time period for processing motions to compel discovery. In recent coal rate cases such motions have sometimes taken six months or more to be decided, resulting in the suspension of case procedural schedules and the lengthy extension of the discovery period well beyond the 75 days allotted by the Board's procedural rules. 49 C.F.R. § 1111.8. Under those rules, which contemplate a minimum of 135 additional days for preparation and submission of evidence after the close of discovery,¹ delays in completing discovery translate into an overall lengthy delay in reaching a final decision in the case.² This delay acts to the detriment of the complainant by significantly extending the time period over which it must pay the challenged rates. On the other hand, discovery of relevant and probative evidence from the railroad defendant is essential to meeting the burden of proof under the

¹ The time frames for submitting evidence are often extended by the Board or the parties, and in recent cases it has become common for the parties to file briefs, which is an additional procedural step not included in section 1111.8.

² NCTA notes that in two current cases, the complaints were filed in December 2000 and January 2001, respectively, and in neither case has discovery been completed due to delays in receiving decisions on motions to compel discovery. Docket No 42057, *Public Service Company of Colorado d/b/a Xcel Energy v. The Burlington Northern and Santa Fe Railway Company ("PSCO")*; and Docket No. 42058, *Arizona Electric Power Cooperative v. The Burlington Northern and Santa Fe Railway Company and Union Pacific Railroad Company*.

Board's standards set forth in the Coal Rate Guidelines and agency precedent. Thus, complainants are presently placed in the unfair position of asking the Board to order the discovery of materials needed to prove their case, but at the heavy cost of substantially delaying the overall resolution of the complaint. As the Board alluded to in its proposal, this current state of affairs provides an incentive to railroad defendants who wish to delay their proceeding to force complainants to file motions to compel discovery.

Adopting a policy and regulations that more quickly resolve motions to compel will not only speed up the pace at which these cases are processed, it will also level the playing field in the discovery phase of the case, which NCTA believes will result in the Board achieving its goal of having more discovery disputes being resolved by the parties. NCTA therefore supports shortening the time for filing a reply to a motion to compel to 10 days, and the concept of a discovery conference with Board staff. NCTA also supports giving the Secretary the authority to make initial summary rulings on discovery motions. That being said, NCTA respectfully suggests the following modifications to the Board's proposal that NCTA believes strengthens it and helps achieve the Board's objectives:

- A. Permit a party to obtain a discovery conference with Board staff by requesting one when it files its motion. In the alternative, make the proposed discovery conferences mandatory in all cases. The prospect of upon-request or mandatory discovery conferences should serve as a deterrent to abusive and bad faith discovery tactics.
- B. Recognize the special category of discovery of rail transportation contracts. The relevance and discoverability of rail transportation contracts is undisputed, and motions to compel such contracts are therefore filed primarily to assuage the confidentiality concerns of the railroad defendants. An example of how this category of materials could be recognized is for the Board to state that the proposed \$2,300 filing fee for motions to compel either does not apply to motions to compel concerning coal transportation contracts, or that it may be waived upon a showing that the motion is non-controversial.
- C. Clarify the procedures and standards that would govern appeals of summary decisions of the Secretary. For example, the Board should clarify whether such appeals would be governed by (1) 49 C.F.R. § 1115.1(c) governing appeals of "decisions of employees acting under authority delegated to them by the Chairman;" (2) 49 C.F.R. § 1115.2, governing appeals of "initial decisions" by administrative law judges; or (3) some other provision or standard. The two referenced provisions contain very different procedures and standards for review. In any case, the Board should establish that parties would have 5 business days to appeal a summary decision by the Secretary, not the 10 days or 20 days set forth in § 1115.1(c) and § 1115.2, respectively. Consistent with the proposal above, replies to appeals should be due in 10 days.

- D. While the proposal places a time limit on the Secretary to act, there is no comparable requirement for the Board to act on appeals of Secretary decisions in a set time frame. This lack of a deadline for decision could be an invitation for mischief on the part of defendants by providing an incentive for them to appeal all summary decisions by the Secretary with the hopes that such an appeal will result in indefinite delays in obtaining a final decision from the Board. NCTA suggests that the Board either (1) place a 30-day time limit on itself to issue a written decision in response to an appeal of a summary decision by the Secretary, or, (2) adopt a rule that summary decisions of the Secretary are deemed a final decision by the Board if the Board does not act on an appeal within the 30-day period following the filing of the reply to the appeal. The latter approach, by allowing the Board to rule on an appeal without having to produce a written decision, would seem to help address the complaints of the Board on page 5 of the proposal that motions to compel consume substantial staff effort.

2. Mandatory Mediation

NCTA does not believe that implementing a process of a mandatory 60-day mediation period before an administrative law judge will solve the current problems of delay. There are several reasons why a 60-day mediation in this context is unlikely to be effective. As an initial matter, coal rate complaint cases are usually preceded by months of negotiations and detailed legal and economic analysis by the shipper customer and the railroad. Thus, by the time the complaint is filed, it is likely that the parties have engaged in extensive discussions in an attempt to settle their dispute, but those discussions have reached impasse. Similarly, because rate complaints are preceded by such extensive discussion between the parties as well as individual analysis of the merits of their respective cases, it is also unlikely that the parties have peripheral issues that could be narrowed through discussions with a mediator. This is not to say that there may be cases where mediation could result in the case being settled prior to the parties and the Board engaging in the substantial time and effort these cases require. It is also possible that in some cases a mediator could streamline the issues to be considered by the Board in a complaint proceeding by having the parties stipulate to certain key items, such as the lack of market dominance at a specific location or jurisdictional threshold questions. For these reasons, NCTA does not object to the concept of mediation, but nevertheless cautions the Board that, if it pursues adoption of a mediation requirement, that the Board carefully craft this new component to not have the undesirable result of further delay.

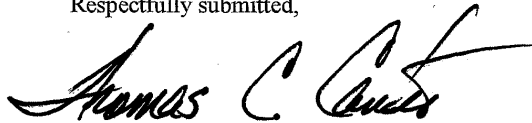
3. Tightened Discovery Standards

NCTA agrees with the Board that discovery in coal rate reasonableness cases should not be without limits. For example, NCTA believes the Board should closely scrutinize the efforts of complainants and defendants to obtain "third party" discovery, which can be extremely burdensome for entities that have no connection to the case. However, the Board's specific proposal in this proceeding to restrict its discovery standard is unnecessary. Instead, NCTA recommends that the Board continue to apply the discovery standards it has adopted in these cases, but just apply them in a more timely manner. NCTA maintains that the Board's existing test for whether it should order a party to respond to discovery requests over its objection is workable and has resulted in ample precedent for complainants and defendants to follow. Accordingly, what is needed instead of a new, restrictive standard based on yet-to-be-defined "clear, demonstrable need," and determinations of what data is "readily available" by "means other than discovery," is for the Board to apply its existing standards for ordering discovery, but on a more timely basis.

4. Conclusion

In conclusion, NCTA generally supports the Board's efforts to reduce or eliminate the current lengthy delays in the processing of coal rate reasonableness cases, and submits these Opening Comments on the Board's proposed procedures to accomplish this result for the Board's consideration.

Respectfully submitted,



Thomas C. Canter
Executive Director
The National Coal Transportation Association
4 Meadow Lark Lane, Suite 100
Littleton, Colorado 80127-5718
(303) 979-2798

October 11, 2002