

206394

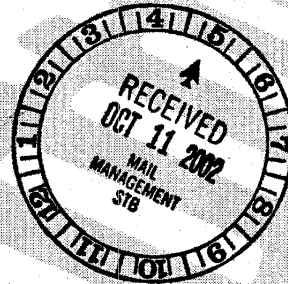


ASSOCIATION OF
AMERICAN RAILROADS

Law Department
Dennis J. Starks
Senior Commerce Counsel

October 11, 2002

Honorable Vernon A. Williams
Secretary
Surface Transportation Board
1925 K. Street, N. W.
Washington, D.C. 20423



Sub No. 4
Re: Ex Parte 542 - - Regulations Governing Fees For Services Performed
In Connection With Licensing And Related Services - 2002 User Fees

Dear Secretary Williams:

Enclosed for filing in the proceeding captioned above, please find an original and ten copies of the Comments of the Association of American Railroads.

Please date-stamp the extra copy provided for that purpose and return it via our messenger.

Sincerely,

Dennis J. Starks
Dennis J. Starks
Senior Commerce Counsel

ENTERED
Office of Proceedings
OCT 11 2002
Part of
Public Record

206394

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 USER FEES

COMMENTS OF THE
ASSOCIATION OF AMERICAN RAILROADS



Of Counsel:

GEORGE A. ASPATORE
Norfolk Southern Railway Corporation

PETER SHUDTZ
PAUL R. HITCHCOCK
CSX Transportation Inc.

J. MICHAEL HEMMER
LOU ANNE RINN
Union Pacific Railroad Co.

RICHARD E. WEICHER
MICHAEL. ROPER
Burlington Northern & Santa Fe Rwy Co.

PAUL GUTHRIE
CP Railway Company

SERGE CANTIN
Canadian National Rwys Co.

WILLIAM J. WOCHNER
Kansas City Southern Railway

LOUIS P. WARCHOT
DENNIS J. STARKS
ASSOCIATION OF AMERICAN
RAILROADS
Street, N.W.
Washington, D.C. 20001
(202) 639-2504

Attorneys for the
Association of American Railroads

ENTERED
Office of Proceedings

OCT 11 2002

Part of
Public Record

Dated: October 11, 2002

BEFORE THE
SURFACE TRANSPORTATION BOARD

STB EX PARTE NO. 542 *Sub No. 4*

REGULATION GOVERNING FEES FOR SERVICES PERFORMED
IN CONNECTION WITH LICENSING AND RELATED
SERVICES – 2002 USER FEES

COMMENTS OF THE
ASSOCIATION OF AMERICAN RAILROADS

The Association of American Railroads ("AAR") hereby submits these comments on behalf of itself and its individual members in response to the Board's Notice of Proposed Rulemaking, served August 29, 2002, (NPR), to establish new fees and amend existing fees.

Specifically, the Board proposes to amend its regulations at 49 CFR part 1001 to (1) establish 22 new fees for services provided by the Board for which no fee currently exists, including a catch –all, "basic fee for STB adjudicatory services not covered by a specific fee item; (2) raise the below-cost fee assessment that currently applies to six fee items; (3) update fees for nine existing fee items; and (4) amend, renumber and delete certain rules to clarify the applicability and scope of certain fee items and to reflect current and proposed fee and billing practices and tariff requirements.

The AAR understands that the Board's proposal is premised on the Independent Offices Appropriation Act, (31 U.S.C. 9701)(IOAA), that prescribes that federal agencies are required to ensure that each service or thing of value provided by an agency to a person be self-sustaining; and premised on OMB Circular No. A-25, User Fees, revised July 8, 1993, that states that the

policy of the federal government is that a user charge will be assessed against each identifiable recipient of special benefits derived from federal activities beyond those received by the general public. To that end, the NPR states that Board staff has identified a number of services that confer special benefits and that the Board has been providing to identifiable recipients without charge.

With respect to user fees in general, it is the AAR's position that the costs associated with most STB activities should be borne by the public through a general appropriation to the STB because the services provided by the STB primarily benefit the public. Also, it should be noted that OMB Circular No. A-25 does not apply to the activities of the judicial branch; and, therefore it would be appropriate to treat adjudicatory matters before the STB in the same manner and limit the imposition of fees to only reasonable filing fees.

With respect to, specifically, proposed new fee item (64)(i) -- *A motion to compel discovery in formal complaint proceedings under U.S.C. 10704(c)(1)* - - the Board proposes to establish a filing fee of \$2300 for a motion to compel discovery. The Board further proposes a *fee-shifting* scheme, under which the party moving to compel discovery, if successful, would be reimbursed for its filing fee by the party against whom discovery is sought. Essentially, the Board proposes that the losing party bear the responsibility for the filing fee, based on the assumption that the risk of paying such a fee may discourage parties making both unreasonable requests or objections, and encourage them to resolve their differences.

The AAR understands the Board's concern (NPR p. 11) that the discovery process has in recent rate cases delayed the timely resolution of such cases. Nevertheless, for the reasons expressed below, the AAR believes that the Board should not prescribe an ironclad rule under which the losing party automatically pays.

Specifically, while the AAR recognizes that such a rule could serve as a bright line in discouraging frivolous requests and objections, we believe that if such a rule were imposed an

exception should be recognized for objections that are legitimately based on an opposing party's good faith concern that a Board Order is necessary before certain types of information can be disclosed, such as in the case of sensitive or confidential third party information.

To be sure, the resolution of a motion to compel in such instances will **technically** create a winner and a loser. But there the underlying objection may have more to do with a preexisting duty to a third party regarding the information sought, rather than with an attempt to delay, harass, or unduly burden the proceeding. Under such circumstances, to automatically obligate the so-called losing party with the moving party's filing fee, amounts to the imposition of a penalty that has more to do with form rather than with substance. That surely cannot stand as the intended consequence of the Board's proposal here. As such, we suggest that proposed Fee Item (64)(i) be amended to reflect that filing fees will not shift in situations where a motion to compel is granted over an underlying objection premised on the assertion of a pre-existing duty to a third party.

The Board also seeks comments on how a fee-shifting approach might apply in situations where motions to compel are partially granted and partially denied. In the AAR's view, assuming such a rule were imposed logic suggests that in such instances a filing fee should be apportioned between the winner and loser. And the only fair and frank basis upon which to apportion fees in such instances, is to reimburse (or relieve) the successful party of an amount of a filing fee equal to a percent that reflects the proportion of the total number of items for which the order is actually granted relative to the total number of items over which an order is sought.

For example, assume that a party seeks to compel disclosure of 13 items, but the Board only grants the request with respect to six of those items. Under the AAR's fee-shifting proposal, granting (or for that matter, denying) six out of the 13 items sought is equal to a success (or denial) rate of 46%; and 46% of \$2,300 is \$1,058.00. Thus, under such a scenario, the moving party will only be reimbursed (by the non-moving party) \$1,058.00 of the total \$2,300 it costs to

file the motion.

CONCLUSION

The AAR urges the Board to modify its proposal in a manner consistent with the views expressed above.

Respectfully submitted

Of Counsel:

George A. Aspatore
Norfolk Southern Railway Corporation

Peter Shudtz
Paul R. Hitchcock
CSX Transportation Inc.

J. Michael Hemmer
Lou Anne Rinn
Union Pacific Railroad Co.

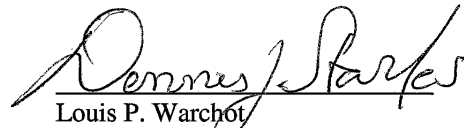
Richard E. Weicher
Michael E. Roper
Burlington Northern & Santa Fe Rwy Co.

Paul Guthrie
CP Railway Company

Serge Cantin
Canadian National Rwy Co.

William J. Wochner
Kansas City Southern Railway

Dated: October 11, 2002



Louis P. Warchot
Dennis J. Starks
ASSOCIATION OF AMERICAN
RAILROADS
50 F Street, N.W.
Washington, D.C. 20001
(202) 639-2504

Attorneys for the
Association of American Railroads