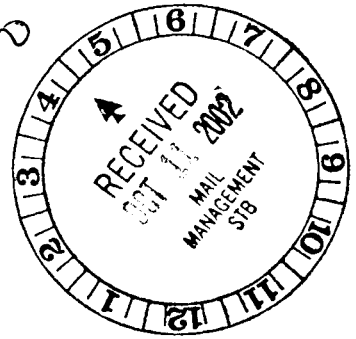


Before the
SURFACE TRANSPORTATION BOARD



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

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

COMMENTS

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Due Date: October 11, 2002

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COMMENTS

John D. Fitzgerald,^{1/} for and on behalf of United Transportation Union-General Committee of Adjustment (UTU/GO-386), submits these comments in response to Notice of Proposed Rulemaking (NPR), dated August 28 as revised September 11, 2002 (served August 29 and September 12, 2002). 67 Fed.Reg. 57554-57 (Sept. 11, 2002).

The NPR proposes many new fees, and raises several fees, for participation by employees or their organizations in proceedings at the Surface Transportation Board (Board). These fees in many cases are prohibitive and of a vindictive character, and should not be adopted. The proposed and increased fees are set forth below in the order appearing in the NPR.

1. Item 56(ii). Complaint-Maximum Rail Rates. The NPR proposes a new \$500 (actually reduced) fee for complaints involving rail maximum rates filed by a small shipper. The fee should not be tied to complaints filed by a given entity, but should be

^{1/} General Chairman for United Transportation Union on lines of The Burlington Northern and Santa Fe Railway Company, with offices at 400 E. Evergreen Boulevard, Vancouver, WA 98660.

identified as involving certain commerce. It may be that other interests would file a complaint regarding rates paid by small entities, such as trade associations, employee organizations, etc.

2. Item 61(ii). Procedural Matters-Appeal. The NPR would assess a \$250 fee to take an intra-agency appeal from a procedural determination, usually having been rendered by a Board staff member. This fee would be new, punitive and would serve to isolate staff procedural decisions from effective Board supervision.^{2/} There is no reason at this time to increase the power of the Staff vis-a-vis the public. This type of fee is not in keeping with the intent of legislation imposing fees for agencies. The staff creates an error, and the apparent theory is that the public receives a "benefit" in correcting that error. This would be unconscionable.

3. Item 61(i). Merits-Appeal. The NPR would redefine the \$200 fee for an intra-agency appeal, by adding the phrase, "on the merits." The present fee item does not have "on the merits." Moreover, as with proposed Item 61(ii), the NPR would define "Board" decision to include virtually any Staff member. (NPR 8).^{3/}

4. Item 64. Discovery. The NPR, for the first time, would impose fees for seeking discovery. The fee would be \$2,300

^{2/} Strangely, the NPR would impose a lesser \$200 fee for challenging a substantive staff decision. See: Item 61(i). The difference between procedure and substance often is a fine line, arbitrary, and is undefined here.

^{3/} "The ruling may be one rendered by the entire Board, an individual Board member, an Administrative Law Judge, or any other decisional body acting under authority delegated by the Chairman or the Board."

in a formal complaint case under 49 U.S.C. 10704(c)(1), and \$950 in the ordinary proceeding. Added to these sums would be a \$2,100 fee for taking an intra-agency appeal from whatever discovery decision was rendered by agency staff.

The proposed discovery fees are outrageous.^{4/} This outrage is compounded by imposing a fee-shifting, where the losing party would bear the cost of the agency fees. (NPR 11).

Much of the need for discovery, at least in the conventional cases, comes from the secrecy permitted by the Board for carrier applications and exemption requests, along with the drastically reduced information appearing in Class 1 carrier reports, and the absence of any reports for Class II or Class III carriers. The Board, having excepted carriers from submitting traditional material, would now require fees to obtain the very information which formerly was required to be available to all.

The discovery fee of \$950, and the discovery appeal fee of \$2,100, are not legitimate fees under the enabling statute. They would preclude rail employee and employee organization participation in discovery.

5. Item 88. Adjudicatory Services. The NPR would impose a new fee, in the amount of \$200, for "Adjudicatory Services Not Otherwise Covered." This would be a "catch all" fee for anything Staff determines appropriate. (NPR 14). This is so vague as to be incompetent, and is not worthy of further discussion. For all that appears, this would be another example of agency staff seeking to

^{4/} The "outrageous" comes from the former ICC's top counsel. See: "STB Proposes 22 new user fees, rises 6 others; attorney calls move 'outrageous.'" Traffic World, p. 15 (Sept. 9, 2002).

bolster its role in the regulatory process, counter to the public,
and to the Members appointed by the President and confirmed by the
U.S. Senate.

Respectfully submitted,


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