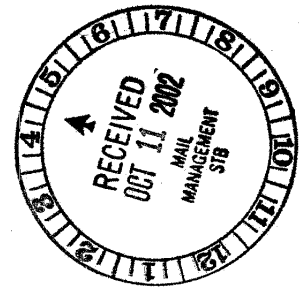


ORIGINAL

Before the

SURFACE TRANSPORTATION BOARD

206401



Ex Parte No. 638

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

COMMENTS

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Attorney for John D. Fitzgerald

Due Date: October 11, 2002

Before the
SURFACE TRANSPORTATION BOARD

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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 September 3 as revised September 11, 2002 (served September 4 and September 11). 67 Fed. Reg. 57557-58 (Sept. 11, 2002).

The NPR is concerned with rate challenges to be considered under the stand-alone cost methodology, and is directed to two subjects--mandatory mediation and discovery. The NPR would direct mandatory mediation prior to filing complaints alleging a violation of the rate reasonableness requirements contained in 49 U.S.C. 10701 and 10704. The mediator would be assigned by the Board using an Administrative Law Judge (ALJ) from the Federal Energy Regulatory Commission (FERC); the NPR would make discovery

^{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.

more difficult, including motions to compel, and would mandate conferences with Board staff.

1. Mandatory Mediation. Railroad employees and their organizations have an interest in the fairness of railroad rates, as do communities, ports, and other elements of the transportation industry. The Board has followed liberal rules of intervention and participation in agency proceedings.

This commentor filed objections to mandatory arbitration in Ex Parte No. 586, Arbitration--Various Matters Relating to It Use as An Effective Means of Resolving Disputes That Are subject to the Board's Jurisdiction (Compulsory Arbitration). Likewise, compulsory mediation should not be adopted. The shipper and the carrier are not the only parties in interest. Indeed, the failure of arbitration to deal effectively with multiple interests was a major factor in the creation of the Interstate Commerce Commission, as highlighted in comments filed in Compulsory Arbitration.^{2/}

This commentor suggests that what really may be at work here is Board staff effort to play a greater role in railroad matters than pure application of statutory provisions otherwise would dictate. Such would be emphasized by appointing ALJs from FERC. Why not utilize Federal Communications Commission personnel? There is a closer historical connection between the former ICC and the FCC, than between the ICC and FERC. Further, why would an ALJ be a better mediator than a non-judge or non-lawyer? One answer may be

^{2/} The NPR states the Board's preference for private sector solutions are the most effective way of resolving disputes. (NPR 2). However, The Interstate Commerce Act is basically directed to disputes affecting the broad public, rather than private matters.

that many former ICC staff members have become ALJs at FERC at recent years, such that there may be a community of background between FERC ALJs and current Board staff.

2. Discovery. Railroad employees and their organizations have an interest in maintaining fair hearings at the Board. The NPR would make discovery more difficult, and discourage motions to compel, contrary to the best interests of the public as well as railroad employees. Further, the NPR notes that the Board is proposing substantial fees to discourage discovery motions and appeals in the pending Ex Parte No. 542 (Sub-No. 4), Regulations Governing Fees For Services Performed in Connection with Licensing and Related Services--2000 New Fees. (NPR 5)

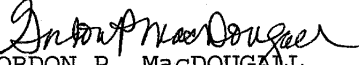
The Board should not adopt the proposed requirement of a Board staff conference with the parties on motions to compel. This gives Board staff undue power, and would be a "closed door" approach that would bar the public, including railroad employees in many instances. The dealings of Board staff with the public should be public.

3. A Suggestion. This commentor suggests that a major method for expediting the development of a record in completed cases would be to increase the availability of public information. The carrier annual reports do not contain the wealth of information today as in prior years, and the Board does not issue information as it did in former times. The withholding of information is in this commentor's view a major factor in the extent and need for discovery today.

CONCLUSION

The Board should not adopt the NPR.

Respectfully submitted,


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October 11, 2002

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