

ORIGINAL

Before the
SURFACE TRANSPORTATION BOARD

207249

Ex Parte No. 638

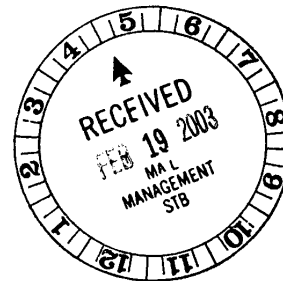
PROCEDURES TO EXPEDITE RESOLUTION
OF RAIL RATE CHALLENGES TO BE CONSIDERED
UNDER THE STAND-ALONE COST METHODOLOGY

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NOTICE OF INTENT



The undersigned intends to present a summary of the attached written testimony at the hearing presently scheduled for February 27, 2003.

A time allotment of 5 minutes is requested. ^{*/}

Gordon P. MacDougal
GORDON P. MacDOUGAL
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Washington DC 20036

February 19, 2003

Attorney for John D. Fitzgerald

^{*/} Circumstances may necessitate counsel's absence; if so, the Board's Secretary will be advised before the close of business on February 21, 2003.

cc: All parties

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Before the
SURFACE TRANSPORTATION BOARD

Ex Parte No. 638

PROCEDURES TO EXPEDITE RESOLUTION
OF RAIL RATE CHALLENGES TO BE CONSIDERED
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RESPONSE FOR WRITTEN TESTIMONY



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Attorney for John D. Fitzgerald

Due Date: February 21, 2003

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

RESPONSE FOR WRITTEN TESTIMONY

This pleading is responsive to the Notice of Public Hearing (Notice) dated February 5, 2003 (served February 6), 68 Fed. Reg. 6794-95 (Feb. 10, 2003), whereby the Surface Transportation Board (Board), invited interested persons to express their views on the subject of expediting resolution of rail rate challenges to be considered under the Board's Stand-Alone-Cost methodology, at a public hearing to be held February 27, 2003.^{1/}

This response by counsel for John D. Fitzgerald,^{2/} is on behalf of United Transportation Union-General Committee of Adjustment (UTU/GO-386).

1. Railroad employee organizations frequently follow their respective carrier management on economic matters in dealing with

^{1/} The Notice was preceded by a Board News Release (No. 03-4), issued January 24, 2003, Surface Transportation Board To Hold February 27 Public Hearing on Proposed Procedures To Expedite Rail Rate Cases, and a further News Release (No. 03-7), identically captioned, issued February 6, 2003.

^{2/} 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.

shippers, just as do employers/employees in other industries. However, the interests of rail carriers and their employees may differ in certain instances, for example, where it may be perceived that a carrier's goal may be unduly directed toward profit maximization (or particular favoritism) by means of high rates with concomitant reduced or lower volume of traffic. The classic example of conflict was during enactment of Reed-Bulwinkle legislation, where certain rail employee groups opposed the industry's position on ratemaking.^{3/} Thus employee organizations desire to retain a free hand in rail rate matters, and to intervene where their interests may be affected.

2. UTU/GO-386 filed comments in this proceeding on October 11, 2002, responsive to the Notice of Proposed Rulemaking (NPR), served September 4 and 11, 2002. 67 Fed. Reg. 57557-58 (Sept. 11, 2002). This commentor ordinarily would have little to add to his comments filed October 11, 2002, which consist of three pages-- directed to mandatory mediation, discovery, and better carrier reporting. Particularly objectionable would be Board staff involvement in the mediation process (through reference to former ICC/Board personnel at FERC, and otherwise), and mandatory staff conferences on discovery matters.

3. However, the Board's Chairman has announced during the past 4-6 weeks (at various transportation industry gatherings) that the Board shortly will revisit the matter of the so-called

^{3/} See: Statement of Martin H. Miller, National Legislative Representative, Brotherhood of Railroad Trainmen, in Regulation of Rate Bureaus, Conferences and Associations, before the U.S. Senate, Committee on Interstate Commerce, Hearings on H.R. 2536, at 1433-53 (1946); Shott, John G., The Railroad Monopoly (Public Affairs Institute, 1950).

"small rail rate" guidelines, with public hearing (in April or early May, 2003) similar to that being conducted here. Guidelines were established in 1996, responsive to ICC Termination Act of 1995.^{4/} The current controversial proposal for resolving matters involving "small railroads" has been put forward as primarily to advance arbitration, as indicated by its caption. Arbitration-- Various Matters Relating to its Use as an Effective Means of Resolving Disputes That are Subject to the Board's Jurisdiction. (Ex Parte No. 586).^{5/} The basic thrust of Ex Parte No. 586 includes features similar to those proposed herein for "stand-alone" (large) rate cases.

A major effort for those opposed to the STB's current handling of "stand-alone" rate cases (almost exclusively major coal rate cases) apparently is not seriously to seek substantive change in the statutory provisions administered by the Board, but instead to inject the Board's staff directly into a settlement process. This would involve Board staff (and their chosen ICC/Board alumni(ae) at FERC) in a compulsory "mediation" or compulsory "arbitration" requirement or compulsory consideration of arbitration, where Board staff would participate in the non-statutory handling

4/ See: 49 U.S.C. §§ 10701(d)(3), 10704(d); H. Rept. 104-422 (Conf.), 169-72 (1995). Expedited Procedures For Processing Rail Rate, 1 S.T.B. 754, 1 S.T.B. 857, and 1 S.T.B. 859 (1996); Rate Guidelines-Non-Coal Proceedings, 1 S.T.B. 1004 (1996), 2 S.T.B. 229 and 2 S.T.B. 619 (1997); Expedited Procedures For Processing Simplified Rail Rate, 3 S.T.B. 1 (1998).

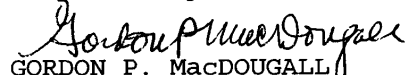
5/ It is mislabeled, and more honestly should have been captioned, "Small Railroad" Rate Disputes, as was the accompanying News Release (No. 01-45), Surface Transportation Board Requests Comment on Whether Congress should Prescribe Mandatory Arbitration For the Settlement of "Small Railroad" Rate Disputes; Focuses on Use of Voluntary Arbitration. (Sept. 20, 2001).

of disputes. It is common knowledge that mediation and arbitration frequently go beyond factors required to be considered by the applicable statute. Such would give staff better "leverage" to affect the resolution of disputes.

4. UTU/GO-386 opposes compulsory mediation or arbitration. The Board's staff should not become involved in either process. Even more important, rail transportation disputes do not merely impact the parties to the dispute, but affect broad areas of the public, including railroad employees.

5. UTU/GO-386 attaches its comments, and reply comments, in Ex Parte No. 586, filed November 23, 2001 and January 3, 2002, as Appendix 1, which attempt to illustrate highlights of the mediation/arbitration process in the railroad industry, its historical failure, and adverse consequences for carrier employees. The Board should defer resolution of the instant proceeding until after it conducts its forthcoming hearing on small rail rate cases.

Respectfully submitted,


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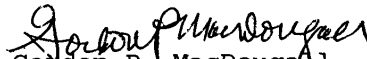
February 19, 2003

Attorney for John D. Fitzgerald

Certificate of Service

I hereby certify I have served a copy of the foregoing upon all parties of record by first class mail postage-prepaid.

Washington DC


Gordon P. MacDougall

Before the
SURFACE TRANSPORTATION BOARD

003940



Ex Parte No. 586

ARBITRATION--VARIOUS MATTERS RELATING TO ITS USE
AS AN EFFECTIVE MEANS OF RESOLVING DISPUTES
THAT ARE SUBJECT TO THE BOARD'S JURISDICTION

COMMENTS

ENTERED
Office of the Secretary
NOV 23 2001
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Public Record

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Attorney for John D. Fitzgerald

Due Date: November 23, 2001

Before the
SURFACE TRANSPORTATION BOARD

Ex Parte No. 586

ARBITRATION--VARIOUS MATTERS RELATING TO ITS USE
AS AN EFFECTIVE MEANS OF RESOLVING DISPUTES
THAT ARE SUBJECT TO THE BOARD'S JURISDICTION

COMMENTS

Preliminary Statement

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 18, 2001 (served Sept. 20, 2001). 66 Fed. Reg. 48853 (Sept. 24, 2001). By subsequent decision dated October 24, 2001 (served Oct. 26, 2001), as corrected the same day, in response to petition by National Industrial Transportation League (NITL) to broaden the inquiry, the NPR was clarified to effectively permit additional areas for comment, although no action was taken on the NITL petition.^{2/}

The Board on September 20, 2001 issued a press release (No.

^{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.

^{2/} NITL sought formal broadening of the NPR to address additional disputes for which Congress might require mandatory binding arbitration. The Board in its October 24, 2001 order ruled that parties could suggest arbitration for other disputes.

01-45), giving emphasis to certain features of the NPR. Surface Transportation Board Requests Comment on Whether Congress Should Prescribe Mandatory Arbitration For the Settlement of "Small Railroad" Rate Disputes; Focuses on Use of Voluntary Arbitration.^{3/}

The NPR (1) would require that all formal complaints, for which voluntary, binding arbitration is available, state that arbitration was considered, but rejected, as a means of resolving the dispute, (2) invites comments concerning proposed legislation to require mandatory arbitration for "small rail rate disputes," and solicits comments for similar arbitration of other disputes, and (3) requires proposed arbitrators, and those already on a roster of arbitrators (if they remain available), to advise the Board by November 8, 2001 if they wish to serve as arbitrators.

Arbitration of certain disputes (other than those involving select features of employee protective conditions), presently is available on a voluntary basis. Where a proceeding has been instituted, the parties voluntarily may defer the procedural schedule so as to explore arbitration. Use of Alternative Dispute Resolution Procedures, 8 I.C.C.2d 657 (1992). In the absence of a proceeding, persons may voluntarily pursue arbitration of certain disputes. Arbitration of Disputes Subject to Stat. Juris. of the STB, 2 S.T.B. 564 (1997).

The instant NPR would require mandatory consideration of arbitration for all complaints, and the NPR seeks comment on

^{3/} The Board on October 22, 2001, through its website (but not in its public releases made available at the agency), reminded persons desiring to serve as arbitrators to submit their name and qualifications by November 8, 2001.

legislation to require mandatory arbitration for small rail rate disputes.

UTU/GO-386 urges the Board should not revise its requirements for bringing a complaint against a rail carrier so as to require a statement that arbitration has been considered; and UTU/GO-386 does not recommend binding mandatory arbitration for small rail rate disputes, or mandatory arbitration for any other formal complaints.

UTU/GO-386 and other rail employee organizations have been active participants in numerous Board (and former ICC) proceedings, involving railroad rates, and other classes of proceedings.

ARGUMENT

I. MANDATORY ARBITRATION OF RATE AND OTHER DISPUTES SUBJECT TO STB JURISDICTION WOULD BE INAPPROPRIATE.

A. Background. Railroad employees are subject to mandatory arbitration for certain disputes in railroad unification proceedings for protection imposed under 49 U.S.C. § 10902(d), § 11326(a), (b). This compulsory arbitration for certain selected features of employee protection in railroad unification stems from the voluntary private agreement known as Washington Job Protection Agreement of 1936, carried forward by statute, and is imposed as part of the conditions known as New York Dock,^{4/} and its proge-

^{4/} New York Dock Ry.-Control-Brooklyn Eastern Dist., 360 I.C.C. 60 (1979).

ny.5/ The Board does not appoint arbitrators or referees; the limited arbitration is not pursuant to STB regulations.

The other substantive provisions of the Interstate Commerce Act do not require arbitration. Indeed, the current arbitration provisions of the Board are purely voluntary, and are not available for arbitration conducted pursuant to labor protective conditions. 49 CFR § 1108.2. See also: NPR at 3 n.7.

B. Experience With Arbitration. Arbitration of freight rate disputes was fairly common prior to 1887. One of the better know arbitrators was Judge Thomas M. Cooley, who subsequently became the first I.C.C. Chairman. The 1884 Cooley Award on live-stock/dressed beef is perhaps the most renown, Eastern Live-Stock Case, 36 I.C.C. 675, 701-2 (1915), but there were others, such as the North Atlantic differentials of July 2, 1882, In the Matter of Differential Rates, 11 I.C.C. 13, 17-18 (1905); New York Produce Exchange v. Baltimore & O. R. Co., 7 I.C.C. 612, 619-20 (1898). See also: Montgomery Freight Bureau v. L. & N. R.R. Co., 17 I.C.C. 521, 529 (1910); McPherson, Logan G., Railroad Freight Rates, 118-19 (1909).

The lumber rate arbitration award of George M. Bogue, issued May 26, 1884, has drawn extensive comment. Eau Claire B. of T. v. Chic., Mil. & St. P. R'y Co. Et Al., 5 I.C.C. 264 (1892); Northern Pine Mfrs. Asso. v. C. & N. W.Ry. Co., 33 I.C.C. 360 (1914) See: Ripley, William Z, Railway Problems (1907); Ibid., Rates and Regulation (1912).

5/ Examples are: Norfolk and Western Ry. Co.-Trackage Rights-BN, 354 I.C.C. 605 (1978); Oregon Short Line R.Co.-Abandonment-Goshen, 360 I.C.C. 91 (1979).

Regulation of railroad rates by arbitration proved unsatisfactory, not due to the competence of arbitrators, but primarily because arbitration is limited to the immediate parties, and does not encompass the "public interest." Simply stated, freight rates impact upon important elements not at the arbitration table. The decisions of the I.C.C. were frequently critical of the arbitration process and results, as indicated from the citations.

The Interstate Commerce Commission was created, in part, to get around the limitations and inadequacies of arbitration.^{6/}

II. FOUR YEARS OF EXPERIENCE UNDER EX PARTE No.
560 INDICATE NO MERIT FOR MANDATORY ARBITRATION.

The Board issued regulations for voluntary arbitration a little over four years ago, in Ex Parte No. 560, Arbitration of Disputes Subject to Stat. Juris. of the STB, 2 S.T.B. 564 (1997). There was considerable disagreement as to how the process would work. Insofar as this commentor is aware, there has been no resort to the Board's process. To be sure, there has been arbitration of transportation disputes, but not under the Board's auspices.

Despite such lack of interest in the Ex Parte No. 560 process, the NPR would now suggest moving from voluntary arbitration to mandatory arbitration, at least for "small rail rate disputes." Moreover, the NPR proposes to require consideration of arbitration as a prerequisite to bringing any complaint against a

^{6/} A post-1887 arbitration, the Todd-Knott Award (1907), was continually contended as unsatisfactory. Peters Mill Co. v. L.V.R.R., 112 I.C.C. 703-4 (1926); Memphis Freight Bureau v. A.G.S.R. Co., 126 I.C.C. 87, 89 (1927); Import Fertilizer Materials, 161 I.C.C. 649, 653n.5 (1930); Export and Import Rates, 169 I.C.C. 13, 19-20 (1930); Export and Import Rates To and From Southern Ports, 205 I.C.C. 511, 521n.6 (1934).

rail carrier. Experience and sound judgment suggest that the Board drop the matter.

III. MANDATORY ARBITRATION OF DISPUTES WOULD
BE PREJUDICIAL TO RAILROAD EMPLOYEES.

Mandatory (compulsory) arbitration of rate and other disputes would be prejudicial to the interest of railroad employees.

A. Intervention. The Board's voluntary arbitration rules make no provision for intervention, yet employees frequently have an interest in railroad ratemaking, and desire to intervene. Thus, under the mandatory arbitration requirement, proposed by the NPR for "small rail rate" disputes,^{7/} the voices of employees would not be heard. Moreover, the Board's arbitration regulations do not call for public hearings--arbitration is secret.

The proposal for mandatory arbitration--even for "small" railroads or for "small rate cases"--is seen as a Star Chamber proceeding, which takes away the ability of railroad employees to participate in proceedings involving statutory rights and obligations.

B. Employee Complaints. The NPR is directed to comments on proposed legislation for small rate cases or for small railroads. Rail employees have an interest in such rail carriers or such disputes, regardless of the size of the carrier or the size of the dispute. It may be that employees would themselves bring a complaint for rate relief--indeed, employees have participated in

^{7/} The Board's Press Release (No. 01-45), terms the rulemaking as directed to "small railroad" rate disputes.

rate surcharge cases as adversely affecting their employment,^{8/} and recently participated in coal rate cases,^{9/} and in market dominance regulations,^{10/} along with service disputes.^{11/} Employees would not feel their statutory interests to be protected by mandatory arbitration, either as intervenors or as original complainants.

III. ARBITRATORS ARE NOT A SUBSTITUTE FOR
THE APPROPRIATE ADMINISTRATIVE PROCESS.

The Board requested that proposed arbitrators submit their names and qualifications prior to the closure date for written comments, rather than have arbitrators file their submissions after the revised rules are promulgated. Presumably, those wishing to become arbitrators are not likely to file comments or, if comments are filed, such may not be too critical of the proposed arbitration rules and suggestion for compulsory arbitration.

It appears from this commentor's examination of the Board's file that only 17 have persons advised the Board of their availability as arbitrators, yet all present and new arbitrators were requested to respond. Such would appear to indicate a lack of interest, and the number is less than the 21 available arbitrators

^{8/} For Example, People of State of Ill. v. ICC, 660 F.2d 289 (7th Cir. 1981).

^{9/} For example, Central Power & Light Co. v. Southern Pacific, Et Al., 1 S.T.B. 1059 (1996).

^{10/} For example, Market Dominance Determination, 3 S.T.B. 937 (1998).

^{11/} For example, Battaglia Distributing Co., Inc. v. Burlington Northern, 2 S.T.B. 323 (1997).

required under the present arbitration regulations. 49 CFR § 1108.6(a).

Examination of the proposed arbitrator candidate roster does not indicate individuals who have expertise in employee concerns.^{12/}

The utilization of an independent and experienced Administrative Law Judge (ALJ), or other STB personnel, is deemed far preferable to the proposal for compulsory arbitration.

CONCLUSION

The Board should discontinue its proceeding, without any recommendations; the Board should not make consideration of voluntary arbitration a prerequisite to complaint of carrier action.^{13/}

Respectfully submitted,

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November 23, 2001

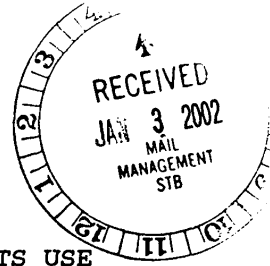
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^{12/} Most of the candidates are experienced practitioners, and many have active on-going commercial practices before the STB, which might subject such individuals to suspicion--particularly by lesser-educated carrier employees.

^{13/} At this time UTU/GO-386 does not comment upon avenues for any redress for small shippers in rate matters, but will await the comments of others. It would seem that some sort of rate comparison methodology, not "simple" rate comparisons, would be helpful. Cf. Rate Guidelines-Non-Coal Proceedings, 1 S.T.B. 1004, 1020 n.48, 1034 n.88 (1996). This was the primary method of the former ICC's informal cases branch, and was employed by the agency in undercharge disputes. Georgia-Pacific Corp. Pet. for Declar. Order, 9 I.C.C.2d 103 (1992), 9 I.C.C.2d 796 (1993), and 9 I.C.C.2d 1052 (1993).

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Before the
SURFACE TRANSPORTATION BOARD



Ex Parte No. 586

ARBITRATION--VARIOUS MATTERS RELATING TO ITS USE
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REPLY COMMENTS

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Due Date: January 3, 2002

Before the
SURFACE TRANSPORTATION BOARD

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REPLY COMMENTS

John D. Fitzgerald,^{1/} for and on behalf of United Transportation Union-General Committee of Adjustment (UTU/GO-386), submits these Reply Comments.^{2/}

Examination of the Comments filed by other parties, fails to disclose a legitimate interest by small shippers, or on their behalf. Accordingly, this commentor does not go beyond his initial comments in this regard. (UTU/GO-386, Comments, 8 n.13).

Unfortunately, the extensive library and its materials, formerly maintained by the Interstate Commerce Commission, which embraced early arbitration awards, are no longer available for the enlightenment of the Board's staff. For example, see: Kolko, Gabriel, Railroads and Regulation 1877-1916, 48 n.13 (Princeton,

^{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.

^{2/} Reply Comments are provided for by the Notice of Proposed Rulemaking (NPR), served September 20, 2001. (NPR 6).

1965); Ripley, William Z., Railroads--Rates and Regulation, ix
(Longmans, Green 1912).

Respectfully submitted,



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January 3, 2002

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