



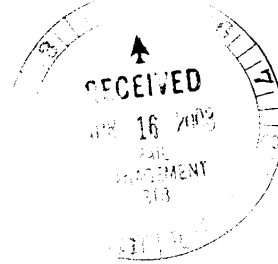
The Fertilizer Institute

Kraig R. Naasz
President

April 15, 2003

Roger Nober
Chairman
Surface Transportation Board
The Mercury Building
1925 K Street, N.W.
Washington, D.C. 20423

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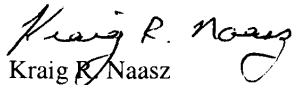
Dear Chairman Nober:

Please find attached written testimony of The Fertilizer Institute (TFI) in response to the Surface Transportation Board's scheduled hearing on Ex Parte No. 646, *Rail Rate Challenges in Small Cases*, April 22, 2003.

TFI's testimony will be orally presented by Jeffrey O. Moreno, on behalf of TFI's attorney Nicholas J. DiMichael, Thompson Hine LLP, 1920 N Street, N.W., Suite 800, Washington, D.C. 20036, telephone (202) 263-4103.

Please contact TFI Director of Government Relations Pam Guffain via telephone at (202) 515-2704 or via e-mail at pguffain@tfi.org if you have any questions or comments regarding this matter.

Sincerely yours,


Kraig R. Naasz
President

Union Center Plaza
820 First Street, NE
Suite 430
Washington, DC 20002

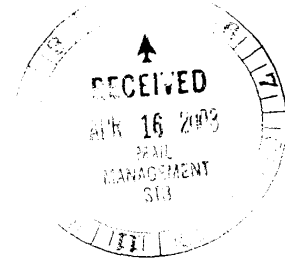
www.tfi.org

202.962.0490
202.962.0577 fax



The Fertilizer Institute

Nourish, Replenish, Grow



Testimony of
The Fertilizer Institute

Before the
Surface Transportation Board

Regarding
Ex Parte No. 646
Rail Rate Challenges in Small Cases

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DESCRIPTION OF TESTIMONY

To provide the fertilizer industry views regarding challenges in small rail rate cases and views on how small rate cases should be defined or identified.

April 22, 2003

Union Center Plaza
820 First Street, NE Suite 430
Washington, DC 20002

202.962.0490
202.962.0577 fax
www.tfi.org

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

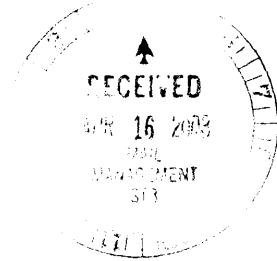
Ex Parte No. 586

Rail Rate Challenges in Small Cases

COMMENTS

SUBMITTED BY

THE FERTILIZER INSTITUTE



The Fertilizer Institute (“TFI”) submits these comments in response to the Notice and Amended Notice of Public Hearing issued by the Board on March 26 and April 1. In those Notices, the Board announced that it was holding a public hearing to provide a forum for the expression of views by rail shippers, railroads, and other interested persons regarding rail rate challenges in small cases to be considered by the Board. The hearing was intended to provide a forum for discussing proposals for handling small cases involving a challenge to the reasonableness of rate charged by a rail carrier, as well as views on how small rate cases should be defined or identified.

TFI highly commends the Board for holding this hearing. It believes that the subject matter is important, and that the venue chosen – a public hearing where views can be discussed and exchanged – will promote constructive debate. TFI is submitting these comments in written form to provide an outline and structure for comments that it will be offering orally at the hearing.

I. IDENTITY AND INTEREST OF THE FERTILIZER INSTITUTE

The Fertilizer Institute is the national trade association of the fertilizer industry. The Institute, which traces its roots back to 1883, represents virtually every primary plant food producer, as well as secondary and micronutrient manufacturers, fertilizer distributors and retail dealerships, equipment suppliers and engineering construction firms, brokers and traders, and a wide variety of other companies and individuals involved in agriculture. Many members of TFI use rail transportation, and are in a position to utilize binding arbitration to resolve small rate disputes, as well as other disputes, with rail carriers.

II. PRINCIPLES THAT SHOULD GUIDE THE BOARD'S ADMINISTRATION OF RAIL RATE CHALLENGES IN SMALL CASES

In its 1996 decision in *Rate Guidelines – Non-Coal Proceedings*, 1 S.T.B. 1004 (1996) [*“Non-Coal Guidelines”*], the Board issued “evidentiary guidelines” to be used in proceedings to determine the reasonableness of challenged rail rates charged on captive traffic where the Board’s “Constrained Market Pricing” (“CMP”) guidelines could not practicably be applied. Despite the fact that these “small case” guidelines have been in effect for more than six years, they have not been invoked a single time. The lack of use does not mean that they have been successful, or that there are no disputes over rail rates charged to small shippers or large shippers with small cases. TFI submits that the small case rate guidelines are deeply flawed: they describe a process that takes far too long, is far too expensive, and far too uncertain. In this section of its comments, TFI describes three principles that it believes should inform the Board’s processing of small cases. Then, in Section IV, TFI presents several specific suggestions that the Board might consider to improve the processing of small cases.

Principle # 1: Small (and Even Medium-Sized) Rate Challenges Should be Adjudicated Far, Far Faster Than the Current Process Contemplates

The Board's current small case guidelines describe a process that takes far too long. Under the current rules, 45 days is consumed in just determining whether a case deserves "small case" treatment. At that point, cost discovery and review of the Board's Waybill Sample is needed, with opening, reply and rebuttal evidence then filed by the parties. Since the Board's discovery rules provide at least twenty days for reply, discovery cannot be completed in less than a month, and is more likely to consume at least twice that amount of time. Even assuming a very brief period for the filing of evidence (e.g., 30 days for opening, 30 for reply and 15 for rebuttal), the "qualification," discovery and evidentiary phases under the Board's current rules will likely consume 6 months, under extremely favorable assumptions. At that point, the Board is permitted a six month period for rendering a decision. Thus, under extremely favorable assumptions, a "small case" will take at least a year, and probably substantially longer.

TFI believes that this is far too long. Few fertilizer shippers have the type of ongoing, year-after-year, repetitive origin-to-destination movements such as exist in large coal cases. Moreover, challenges to rates over "bottlenecks" (which often do have ongoing, repetitive movements over them) are basically not allowed. Product markets change, destinations shift, demand waxes and wanes. There is little advantage in challenging a rate if a "return" on that challenge cannot be seen for over a year, and probably much more. The very uncertainty as to the time a challenge will take kills any attempt.

Principle #2: The Process Should Be Simpler and Less Expensive

The Board's current small case guidelines describe the principles that would be used in adjudicating the evidence, but ignore the process for getting to that point, and the time and cost it

would take to get there, including the need for costing experts. As set forth in Principle #1, TFI submits that the current rules implicitly describe a formalistic discovery and evidentiary process that needs to be simplified, standardized, and above all, quickened. The Board is well aware, for example, of the discovery problems in large cases. See, *Procedures to Expedite Resolution of Rail Rate Challenges To Be Considered Under the Stand-Alone Cost Methodology*, decision served April 3, 2003 [*"Expediting SAC Cases"*]. If even one-tenth of the costs and delays in that process would appear in small cases, the time and cost of pursuing a case would quickly overwhelm any possible advantage in challenging a rate. Yet, the Board's small case rules are basically silent on these discovery and procedural matters.

Principle #3: The Board's Processes and Standards Need to Be More Predictable

TFI submits that shippers will not utilize rules to challenge rates if they cannot at least make some reasonable judgments as to the probable outcome. More importantly, shippers and carriers will not engage in productive negotiations if neither side can reasonably assess its risks if a case is brought. The Board's current rules describes a process that appears to give maximum flexibility to the Board to decide cases as it sees fit at the time. Some flexibility is desirable from a regulatory and even from a litigant's standpoint – all cases are not the same, and the shipper and carrier should have some flexibility to make their case on their own facts. But the Board's rules go much too far. A rational counsel for a rational shipper cannot advise his client: (1) as to whether the shipper will qualify for small case treatment at all; (2) the length of time that a small case challenge will take and the likely cost of such a challenge; and, (3) what is the range of likely outcomes to a small case challenge, given the fact that the agency's "benchmarks" are simply "the starting point of an analysis that should be further developed and tailored to the individual case" 1 S.T.B. 1045. Moreover, it appears that the current small case guidelines

suggest that the rate prescribed in a small case is likely to be a far higher rate than a Stand-Alone Cost proceeding.

III. THE BOARD MIGHT INVESTIGATE A VARIETY OF CHANGES TO IMPROVE ITS PROCESSING OF RATE CHALLENGES IN SMALL CASES

TFI commends the Board for initiating this proceeding, and believes that the Board should follow up on this hearing with another “informal” inquiry that might investigate in more detail some of the ideas to come out of this proceeding. In that spirit, TFI offers the following suggestions for further Board investigation.

1. Develop a Bright-Line Test for Qualifying for Simplified Procedures: The Board should establish some type of “bright line” test for determining when a case is to be adjudicated under its “small case” standards. The current rules require the shipper to submit evidence to demonstrate that the use of CMP is not feasible – an uncertain, unnecessary, and potentially expensive exercise. TFI believes that a tonnage test per origin-destination pair should be used. If there is some dispute as to the tonnage at issue, then the railroad (which already has tonnage data for the movement), should have the burden of showing that the test is not met.

2. Substantially Reduce Discovery, Processing, and Decision Time: The Board needs to examine very carefully how it can reduce the time it takes to adjudicate small cases. TFI believes that the Board should aim for a four-month processing time, from the filing of a complaint to a decision. In its recent decision in *Expediting SAC Cases*, the Board has asked about the feasibility of standard discovery requests. It should do the same here. For example, a complainant might be required to file, with its complaint, certain discovery on use of alternative transportation modes between the origin and destination, and the railroad might be required to file standard cost information within 10 days of the filing of a complaint. Access to the

confidential waybill sample should be provided before the filing of a complaint, upon certification that the request is for a complaint under Section 10701. Legal argument could be filed with the evidence, to avoid post-evidence briefs. The Board might investigate whether the use of ALJ's to manage and decide a case would result in faster processing. The Board needs to commit itself to rendering a decision very promptly after the submission of evidence.

3. Simplify Decision Standards and Make Them More Realistic: If the Board is committed to its current decision standards set forth in *Non-Coal Guidelines*, it needs to give the shipping public some better sense of how they will be applied. The Board should also investigate whether simpler and more realistic standards, rather than complex and expensive rail costing that can only be presented by an expert, might be better. For example, the Board might rely on rate comparisons more directly, rather than the R/VC(comp) "benchmark."

4. Develop Decision Standards for Railroad "Charges": Increasingly, shippers are finding that rail carriers are imposing or increasing "charges" rather than increasing line-haul rates. Yet, the Board's *Non-Coal Guidelines* give no indication as to how complaints against such charges will be handled, and the standards set forth in that decision do not seem to fit cases involving charges and accessorial.

5. Investigate Legislative Change to Utilize Mandatory, Expedited Arbitration: In its Comments in Ex Parte 586, TFI strongly supported the use of mandatory, expedited arbitration to simplify and speed rail rate and service disputes. TFI continues to believe that the use of mandatory, expedited arbitration is the best way to simplify and shorten rate disputes, leaving the Board to set policy and procedures for arbitrators to follow in resolving such

disputes. TFI suggests that the Board "take the lead" in recommending to Congress legislative change that would permit mandatory, expedited arbitration.

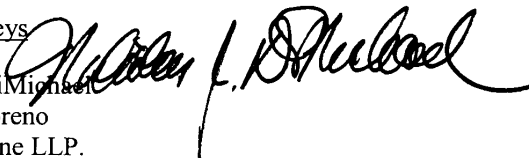
IV. CONCLUSION

TFI commends the Board for initiating this inquiry, and offers its future cooperation in developing more effective rules for small and medium-sized rate challenges.

Respectfully submitted

THE FERTILIZER INSTITUTE
820 First St. N.E.
Suite 430
Washington, D.C. 20002

By Its Attorneys


Nicholas J. DiMichael
Jeffrey O. Moreno
Thompson Hine LLP.
1920 N St. N.W., Suite 800
Washington, DC 20036

Attorneys for The Fertilizer Institute

Dated: April 16, 2003