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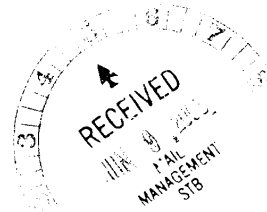
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Before the
SURFACE TRANSPORTATION BOARD

Ex Parte No. 638

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

COMMENTS ON ISSUES



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Due Date: June 9, 2003

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COMMENTS ON ISSUES

Background

John D. Fitzgerald,^{1/} for and on behalf of United Transportation Union-General Committee of Adjustment (UTU/GO-386), submits these comment pursuant to direction by the Board in its April 3, 2003 decision in this rulemaking proceeding. 68 Fed. Reg. 17312-14 (Apr. 9, 2003).

UTU/GO-386 on October 11, 2002 filed comments concerning the Board's September 4 and 11, 2002 proposal (NPR)^{2/} which would require mandatory mediation as a precondition for a shipper to file a complaint alleging a violation of the rate reasonableness requirements contained in 49 U.S.C. §§ 10701, 10704, with the mediator to come from the Federal Energy Regulatory Commission (FERC). In addition, the NPR would make discovery more difficult,

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^{2/} 67 Fed. Reg. 57557-58 (Sept. 11, 2002).

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

The Board established a February 27, 2003 public hearing, inviting written testimony prior thereto.^{3/} UTU/GO-386 submitted written testimony on February 19, 2003.

1. The April 3, 2003 Decision. The Board on April 3, 2003 (Decision), substantially modified its NPR, with indications that the discussion at the February 27, 2003 hearing was accorded considerable weight.^{4/} The Board in its decision required mandatory and confidential mediation after filing a complaint, for shippers seeking rate relief. 49 CFR §1109.4. The Board also amended its regulations to require a technical conference with Board staff and the parties prior to filing any evidence in a stand-alone cost rate case; in addition, the Board may convene a conference of the parties with Board staff, after discovery requests are served, but before any motions to compel are filed to discuss discovery matters in stand-alone cost rate cases. 49 CFR §1111.8. Further, the Board in its decision authorized agency staff to convene a conference with the parties after the filing of a reply to a motion to compel, to discuss the dispute, attempt to narrow the issues, and gather any further information needed to render a ruling. 49 CFR §1114.31. (Decision, 13-15).

^{3/} Notice served February 6, 2003. 68 Fed. Reg. 6794-95 (Feb. 10, 2003).

^{4/} The hearing transcript indicates that shipper counsel generally prefer mediation after the complaint has been filed, whereas in-house counsel for carriers would prefer mediation prior to the filing of a complaint.

The Board in its decision directed the parties to submit views on (1) standard discovery requests, (2) additional discovery, (3), time periods, and (4) costs. (Decision, 5-6).

2. Secrecy in Government. UTU/GO-386 has expressed its opposition to compulsory arbitration or compulsory mediation of rate disputes, and believes public agency business should be open. See: Comments, 11/11/02; Written Testimony, 2/19/03. This opposition has been brought forward by UTU/GO-386 in related rulemaking proceedings. 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;^{5/} Ex Parte No. 646, Rail Rate Challenges In Small Cases.^{6/}

UTU/GO-386, in responding to the Board's April 3, 2003 directive, nevertheless continues to urge that the establishment of compulsory mediation is improper, particularly in the absence of statutory authority.^{7/} Moreover, the active participation by agency staff in various technical and discovery conferences--in secrecy--is most unwise. Railroad employees have an interest in rail rate proceedings, and do not favor closed-door agency discussions with shippers and carriers, particularly when employee interests may be affected--directly or indirectly.

^{5/} See: Comments, 11/13/01; Reply Comments, 1/3/02.

^{6/} See: Statement, 4/22/03.

^{7/} The compulsory mediation is only required where a shipper seeks rate relief in a §1111 complaint. 49 CFR §1109.4. Of course, a person need not be a shipper to file a rate complaint, 49 U.S.C. 11701(b), and over the years many of the major rate complaint proceedings have been brought by parties other than shippers--such as states, ports, communities, trade associations, etc.

The establishment of compulsory mediation, with increased participation by staff in direct negotiations with the parties, stems from efforts by certain large shippers (primarily coal interests) to secure more favorable treatment by the Board through efforts directed to the U.S. Congress. Unsuccessful in persuading Congress, apparently these shipper interests now believe they may improve their situation somewhat by dealing directly with agency Staff and staff-connected mediators in closed-door sessions with Washington representatives of rail carriers.^{8/}

RESPONSES TO SPECIFIC REQUESTS

UTU/GO-386 makes these responses to the specific information requests made to the parties by the Board in its April 3, 2003 decision:

1. Standard Discovery Requests. UTU/GO-386 has no initial list to present. However, any final list adopted by the Board containing general carrier system-wide data, should be considered for inclusion in the carrier's annual R-1 report. UTU/GO-386 takes no position, at this time, concerning the timing of initial disclosures.

2. Additional Discovery. UTU/GO-386 takes no position, at this time, on the number or scope of interrogatories.

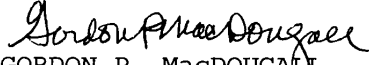
3. Time Periods. UTU/GO-386 takes no position, at this time, on the number of years for which data would be produced for a SAC case, or whether to establish a cut-off date for discovery.

^{8/} The regulation of rail rates is such an arcane subject, now divorced from the real world of actual ratemaking, that both carriers and shippers tend to enlist Washington resources, rather than expend maximum efforts in-house.

To the extent such data is system-wide, inclusion in the R-1 report, as suggested in (1), supra, would seem sufficient.

4. Costs. UTU/GO-386 takes no position, at this time, concerning cost-sharing between the parties, except that rail employees or their organizations should not bear costs in addition to those costs, if any, assessed rail carriers.

Respectfully submitted,


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June 9, 2003

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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


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