

ORIGINAL

Before the  
SURFACE TRANSPORTATION BOARD

Finance Docket No. 34487

GREENVILLE COUNTY ECONOMIC DEVELOPMENT CORPORATION  
PETITION FOR A DECLARATORY ORDER



PETITION FOR LEAVE TO FILE REPLY COMMENTS

ENTERED  
Office of Proceedings

APR - 8 2004

Part of  
Public Record

Petitioner, John D. Fitzgerald, petitions for leave to file the attached Reply Comments, dated April 7, 2004. The pleading was to be filed yesterday, but did not timely reach the Board's offices until after the office was closed, due to engagement of counsel in other pressing matters, which were unforeseen.

No party will be prejudiced by filing the Reply Comments one day late, as service was made on April 7, 2004, and the Board's proceedings will not be delayed. Comments in rulemaking are not subject to strict deadlines if timely received. 49 CFR 1110.5.

WHEREFORE, the Board should accept the attached Reply Comments for filing.

Respectfully submitted,

GORDON P. MacDOUGALL  
1025 Connecticut Ave., N.W.  
Washington DC 20036

April 8, 2004

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

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REPLY COMMENTS

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GORDON P. MacDOUGALL  
1025 Connecticut Ave., N.W.  
Washington DC 20036

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Due Date: April 7, 2004

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REPLY COMMENTS

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John D. Fitzgerald,<sup>1/</sup> for and on behalf of United Transportation Union-General Committee of Adjustment (UTU/GO-386), submits these Reply Comments, in response to the submission by Association of American Railroads (AAR), and by Greenville County Economic Development Corporation (GCEDC),<sup>2/</sup> directed to the Surface Transportation Board (STB) Institution of Declaratory Order Proceeding (IDOP), dated March 22, 2004. 58 Fed. Reg. 15433-34 (Mar. 25, 2004).

1. Background. The facsimile letter, dated March 11, 2004, from Greenville County Economic Development Corporation (GCEDC, or carrier), upon which the STB issued its IDOP, indicates that one person in the STB's Office of Public & Congressional Services (OCPS) sides with the delinquent carrier (GCEDC), whereas

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<sup>1/</sup> 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.

<sup>2/</sup> GCEDC's comments, due March 31, were not filed until April 5, 2004, and were unaccompanied by a request to late-file. The comments should not be accepted; in any event, they mainly follow the AAR's lead.

a different section of the STB, its Office of Compliance & Enforcement (OCED), sides with shipper. The OCPS apparently has enlisted the support of the AAR.<sup>3/</sup>

2. Jurisdiction. We disagree with AAR and GCEDC, and believe it inappropriate for the STB to attempt to determine the forum (state court or federal court) for enforcement or determination of liability in connection with common carrier obligations. Of course, the STB does not have exclusive jurisdiction over the subject matter, irrespective of the judicial forum in any particular situation. DeBruce Grain, Inc. v. Union Pacific R. Co., 149 F.3d 787, 789-90 (8th Cir. 1998); Overbrook Farmers Union v. Missouri Pacific R., 21 F.3d 360, 363-64 (10th Cir. 1994); Pejepecot Indus. Park, Inc. v. Maine Cent. R. Co., 215 F.3d 195, 200-6 (1st Cir. 2000); Ethan Allen, Inc. v. Maine Cent. R. Co., 437 F.Supp. 740, 742-45 (D.Vt. 1977). The statute does not mandate a particular tribunal. 49 U.S.C. 11704(b)(c). However, if the STB does rule on the matter, it should uphold state court jurisdiction, as set forth in UTU/GO-386's initial comments.

3. Referral. This matter does not come to the STB as a matter of a referral. Instead, one STB staff member, contrary to the agency's enforcement branch, with the assistance of the AAR, would usurp referral by means of a declaratory order proceeding. Moreover, it is key to effective enforcement of common carrier obligations that the STB be permitted to proceed directly by its OCED personnel into state or federal court, rather than await an adversary proceeding at the STB. The OCED personnel report direct-

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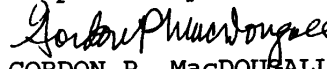
<sup>3/</sup> We note that the AAR pleading is signed by a recent STB staff alumnus.

ly to the STB Chairman. Under a theory that an injured shipper would first institute an adversary proceeding at the STB, engaging the Office of Proceedings, might delay resolution and perhaps prevent effective relief.

The STB's predecessor had a long history of direct court action by its OCED personnel. ICC v. Baltimore and Annapolis Railroad Company, 398 F.Supp. 454 (D.Md. 1975); ICC v. Chesapeake & Ohio Ry. Co., 438 F.Supp. 661 (W.D. Mich. 1977); ICC v. Chicago & N.W. Transp. Co., 533 F.2d 1025 (8th Cir. 1976); Interstate Commerce Com'n v. Maine Central R.R., 505 F.2d 590 (2d Cir. 1974); Interstate Commerce Comm'n v. Chicago, R.I. & Pac. R.R., 501 F.2d 908 (8th Cir. 1974).

There should be no bar to OCED participation in a court proceeding--state or federal--whether the action involves damages or injunctive relief in connection with carrier service obligations.

Respectfully submitted,

  
GORDON P. MacDOUGALL  
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Washington DC 20036

April 7, 2004

Attorney for John D. Fitzgerald

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Gordon P. MacDougall