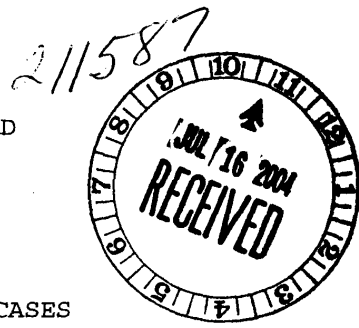


ORIGINAL

Before the
SURFACE TRANSPORTATION BOARD



Ex Parte No. 646
RAIL RATE CHALLENGES IN SMALL CASES

STATEMENT ON BEHALF OF
JOHN D. FITZGERALD, GENERAL CHAIRMAN
UNITED TRANSPORTATION UNION (GO-386)

Gordon P. MacDougall

July 21, 2004

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This statement is on behalf of John D. Fitzgerald, who was represented at the hearing held a year ago on April 22, 2003. Mr. Fitzgerald continues to serve as General Chairman for United Transportation Union (UTU), on lines of The Burlington Northern and Santa Fe Railway Company (BNSF), with offices at Vancouver, WA.

The Board has yet to institute a rulemaking proceeding with a concrete proposal, along with a request for comments, addressed to challenges in small rate cases. Thus, the status is unchanged from a year ago; likewise, the position of Mr. Fitzgerald is unchanged from a year ago. For ready reference, attached is the statement, consisting of four pages, presented at the April 22, 2003 hearing.

In reviewing the transcript of last year's hearing, I wish to emphasize the need for transparency for any conferences held with

agency staff. Such conferences should be open to the public. Moreover, when it comes to evidentiary hearings, an Administrative Law Judge (ALJ) should preside, followed by the usual recommended decision. I do not consider a hearing conducted by agency staff to be adequate or proper, particularly in the absence of a separated staff. The Board may wish to have one of its members preside at a rail rate hearing. The former Interstate Commerce Commission (ICC) employed the single-Commissioner technique in an investigation of rail rates. See: Investigation of Railroad Freight Rate Structure, 345 I.C.C. 1 (1973).


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July 16, 2004

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Before the
SURFACE TRANSPORTATION BOARD

Ex Parte No. 646
RATE CHALLENGES IN SMALL CASES

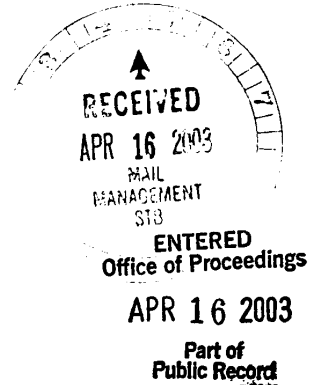
STATEMENT ON BEHALF OF
JOHN D. FITZGERALD, GENERAL CHAIRMAN-
UNITED TRANSPORTATION UNION (GO-386)

Gordon P. MacDougall

April 22, 2003

This statement is submitted on behalf of John D. Fitzgerald, who is necessarily absent and could not be here today. Mr. Fitzgerald serves as General Chairman for United Transportation Union (UTU), on lines of The Burlington Northern and Santa Fe Railway Company (BNSF), with offices at Vancouver, WA.

BNSF operating employees come in contact with shippers and receivers of freight in the course of their railroad duties; frequently BNSF train personnel are the primary contact between the shipper and the carrier. This is particularly true for small shippers. Although small shippers sometimes may not pay the freight charges, they usually are vitally affected when freight rates injure their ability to competitively purchase certain products, or to competitively sell certain products.



1. Inadequate Procedure. Unlike virtually every other rule-making, this oral hearing suffers from the absence of advance written comments addressed to a particular proposal noticed by the Board. Such advance comment was the procedure recently adopted for "large" rate cases, Ex Parte No. 638, Procedures to Expedite Resolution of Rail Rate Challenges to be Considered Under the Stand-Alone Cost Methodology (served April 3, 2003).

2. Mandatory Arbitration. Congressional concern for the smaller rate case led to the institution of Ex Parte No. 586, Arbitration--Various Matters Relating to its Use as an Effective Means of Resolving Disputes in Railroad Matters. The Board concluded that mandatory arbitration of small rate disputes would require legislation, and there were basic differences of opinion whether mandatory arbitration would be appropriate or desirable, and significant differences of opinion regarding standards, scope of review, and other matters. Lack of consensus precluded a recommendation to the Congress. (*ibid.*, 3) (served May 22, 2002).

3. Mandatory Mediation-Secrecy/STB Staff. Today's hearing for small rate cases follows the February 27, 2003 hearing, and the Board's decision served April 3, 2003, in Ex Parte No. 638, for large rate cases (Stand-Alone Cost). Mr. Fitzgerald submitted written testimony for the February 27 hearing in opposition to mandatory mediation/arbitration, which from reading the April 3 decision, appears not to have been considered by the Board. It is offered now in dealing with small rate cases. Of critical importance is the closed-door secret agency dealings between shippers and carriers which has been mandated for large rate cases, along with the injection of Board staff into the mediation process,

either directly or, more likely, by utilizing ICC/STB alumni or friends at other agencies.^{1/}

4. Employee Participation. Rail employees in the past have provided assistance to shippers where freight rates were considered contrary to the sound development of freight business. Rail employees are often very knowledgeable in present and past operations, which can be helpful in determining proper allocation of costs, and traffic patterns.

The Staggers Act gave rise to considerable employee involvement in rate cases. Freight rate increases for various lines were authorized by §217 of Staggers Act, captioned "Compensatory joint rate relief." Examples of shipper-employee joint activity involved rate increases of \$395, \$275, and \$1,000 per car, which were challenged in court after the former ICC declined to suspend or to investigate. See: People of State of Ill. v. ICC, 660 F.2d 289 (7th Cir. 1981); Mississippi Public Service Commission v. ICC, 662 F.2d 314 (5th Cir. 1981); City of Cherokee v. ICC, 671 F.2d 1080 (8th Cir. 1982), cert. den. 459 U.S. 863. Two surcharges were challenged in a reported opinion. Illinois Commerce Com'n v. ICC, 789 F.2d 951 (D.C. Cir. 1986).

The rate increase and rate cancellation provisions of 49 U.S.C. §10705a were not carried forward to the STB in ICC Termination Act of 1995. The self-destructive nature of the light-

^{1/} No attempt is made to disparage Board Staff with regard to rate cases since 1996. One historian found the former ICC to have been regulated by its Staff, said to be "entrenched." Hoogenboom, Ari & Olive, A History of the ICC, 189 (W.W. Norton, 1976). Current concern after the April 3, 2003 decision in Ex Parte No. 638 is in regard to increased Staff involvement. See: Gallagher, John. Traffic World, Staff Involvement, 12 (April 14, 2003).

density line surcharge had by then become readily apparent as primarily aimed at discouraging utilization of a line preparatory to abandonment. Indeed, the last-remembered surcharge (\$300/car) dispute taken to the former ICC by a shipper-employee coalition may have been Suspension Case No. 71609, Light Density Line Surcharge at Skokie, IL, C&NW (served March 12, 1993).

5. Rate Reasonableness. Disputes with small shippers should be resolved with a minimum of time and expense. The Board is urged to consider the time-honored test for rate reasonableness by primary reference to rate comparisons. A well known ICC attorney-examiner wrote books and articles on the subject. See: Shinn, Glenn L., Reasonable Freight Rates (Traffic Service Corp., 1952).

The rate comparison test was extensively used in determining motor carrier undercharge/overcharge proceedings. See: 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). The rate comparison methodology was urged for small shippers by Chicago Board of Trade in Ex Parte No. 347 (Sub-No. 2). (CBOT/UTU-IL Comments, 8-9, filed 5/2/94). Unfortunately, among other things, the Board's decision failed to appreciate the distinction between "rate comparison" and "simple rate comparison." Rate Guidelines-Non-Coal Proceedings, 1 S.T.B. 1004, 1020 n.48, 1034 n.88 (1996).


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April 16, 2003

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