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U.S. Department of
Transportation
Office of the Secretary
of Transportation

GENERAL COUNSEL

400 Seventh St., S.W.
Washington, D.C. 20590

October 11, 2002

Vernon A. Williams, Secretary
Surface Transportation Board
Suite 700
1925 K Street, N.W.
Washington, D.C. 20423-0001



Re: Ex Parte No. 638

Dear Secretary Williams:

Enclosed herewith are the original and ten copies of the Comments of the United States Department of Transportation in the above-referenced proceeding. There is also a computer diskette of this document, convertible into Word Perfect. I have included as well an additional copy of the Department's comments that I request be date-stamped and returned with the messenger.

Respectfully submitted,

Paul Samuel Smith
Senior Trial Attorney

Enclosures

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Public Record

Before the
Surface Transportation Board
Washington, D.C.



Procedures to Expedite Resolution
Of Rail Rate Challenges to be Considered
Under the Stand-Alone Cost Methodology

Ex Parte No. 638

**COMMENTS OF
THE UNITED STATES DEPARTMENT OF TRANSPORTATION**

Introduction

The Surface Transportation Board ("STB" or "Board") in this proceeding has proposed to modify the rules applicable to major cases challenging the reasonableness of railroad rates. Notice of Proposed Rulemaking, served September 4, 2002 (67 Fed. Reg. 57557, September 11, 2002) ("NPRM"). The proposals generally seek to accelerate resolution of these controversies by restricting and expediting discovery disputes and by requiring that the parties engage in non-binding mediation prior to the filing of a formal complaint. The United States Department of Transportation ("DOT" or "Department") supports these proposals.

Background

The Board's proposals would apply to rate cases involving the stand-alone cost methodology. Under this approach, the issue of whether a rail rate is "reasonable" is determined by approximating the rate produced in a competitive environment. 49 U.S.C. §§ 10701, 10704; *See Coal Rate Guidelines, Nationwide*, 1 I.C.C.2d 520, 542-46 (1985).

In brief, the stand-alone cost methodology attempts to replicate intramodal competition in circumstances where no such competition exists, *i.e.*, where in reality only one railroad serves the shipper and that carrier is “market dominant” over the traffic at issue.¹ It does so through the construction of a hypothetical “stand-alone” railroad designed to provide transportation services for the complaining shipper and others. *Id.* This is a data-intensive and analytically complex endeavor that, not surprisingly, tends to be expensive and time-consuming. Consequently, the approach is most often employed in rate disputes involving large amounts of money and traffic.

The Board’s Proposals

The Board has proposed to modify its handling of these cases in two main ways. The first proposal would require that shippers and railroads engage in non-binding mediation as a prerequisite to the filing of a formal complaint. The STB itself would assign and pay for the mediator, the mediation process would be confidential, and it would be completed within sixty days.² NPRM at 3. The second proposal is designed to reduce the number of discovery disputes and to accelerate their resolution. There are two components to the proposal: (1) parties seeking discovery would have to show a “clear, demonstrable need” for information that is “not readily available” through other means; and (2) an informal conference with STB staff. *Id.* at 4-5.³

The mediation proposal aims to encourage the resolution of rate disputes through a more flexible and less confrontational process, and to reduce the number and

^{1/} The STB only has jurisdiction over rate matters where the rail carrier is “market dominant,” *i.e.*, where the carrier faces no intramodal or intermodal competition for the relevant traffic. 49 U.S.C. § 10707(a).

^{2/} This time frame could be extended by the Board in response to a request from the mediator.

^{3/} In a separate proceeding, the Board has also proposed a significant filing fee (\$2,300), payable by the losing party, that would apply to motions to compel discovery. Ex Parte No. 542 (Sub-No. 4).

complexity of cases subject to the traditional regulatory adjudicatory process. Id. at 2.

The discovery proposals acknowledge that at times discovery has been used for delay and harassment. Id. Discovery requests would therefore have to meet a higher standard in order to be granted, and STB staff would provide guidance and clarify issues for the Board and the parties involved. Id. at 5.

Discussion

The Department supports these proposals. Although the federal regulatory process in place to address rail rate controversies does ultimately result in a thorough consideration of relevant issues, it is both time-consuming and costly. Moreover, it can, at times, invite dilatory tactics and abuse. To that extent it is less responsive to the public interest in prompt and fair resolution of the underlying controversy. The instant proposals are the latest in a series of efforts made over the years that seek to remedy these shortcomings.

Mediation is a form of alternative dispute resolution ("ADR"), which the Board has acknowledged to be superior to formal adversarial processes in reconciling disparate interests. Id. at 2-3. DOT also generally favors mediation and other ADR options as a means of settling disagreements in a relatively expedited and efficient manner. The mediation proposal here also offers the potential not only to avoid recourse to more formal adjudicative processes altogether, but -- even when that cannot be accomplished -- to narrow the scope of disputes that ultimately must be resolved formally.

The Department suggests that it would be helpful for the Board to clarify certain aspects of this proposal. For example, does the STB envision the use of a particular model of mediation or would such issues be determined on a case-by-case basis by the

mediator and/or parties? ⁴ The precise extent of the confidentiality afforded this process is also unclear. Would confidentiality be extended to final agreements? ⁵ Would confidentiality protections extend to parties that change their positions during the mediation process? Would mediators be precluded from providing verified statements or otherwise participating in subsequent STB processes should the mediation fail? ⁶

The discovery proposals are a response to past discovery abuses to wear down opponents, impose financial and administrative burdens, and delay the process generally. NPRM at 1-2, 4. The proposals seek to discourage such efforts in the future and thereby to streamline the administrative adjudication of rate disputes. DOT believes that the unfortunate history of discovery in this context warrants the imposition of a higher standard of need for information. Moreover, the Department has long agreed with the Board that railroads generally need less discovery of information held by shippers in rate cases, because carriers already know the bases for their own pricing decisions. *See Id.* at 4; Market Dominance Determinations -- Product and Geographic Competition, Ex Parte No. 627, Comments of the U.S. Department of Transportation (filed May 29, 1998) at 5-6.

⁴/ There are two primary mediation "models" or approaches that seem potentially appropriate here. The facilitative model calls for the mediator to use interest-based negotiating techniques to try and move each party toward a mutually agreeable resolution. In the evaluative model, the mediator assesses each party's prospects of success before the decisionmaking entity (here, the STB), and strives to assist the parties reach an outcome that is reasonable under applicable precedent. This model requires a particularized expertise in the subject matter.

⁵/ Under the Alternative Dispute Resolution Act, final mediation agreements are not confidential. 5 U.S.C. §§ 571(5), 574.

⁶/ Mediators are generally prohibited from giving testimony. 5 U.S.C. § 574(a). Similarly, as the Board knows, positions taken and statements made in the course of settlement negotiations are generally privileged, and not admissible into litigation pleadings should the negotiations fail. *See, e.g., Fed. R. Evid.* 408.

In combination, these proposals properly recognize that informal, flexible, expedited processes outside the federal regulatory machinery offer the prospect of resolving at least some rate disputes in a manner superior to formal adjudication. They also strive to improve upon that formal process when recourse to it proves necessary.

Conclusion

The Department supports the Board's continuing efforts to facilitate the resolution of rail rate disputes. Making mediation a pre-condition to the filing of a formal complaint interposes a relatively flexible and efficient problem-solving alternative that may well resolve significant disagreements without resort to formal adjudicatory processes. When such resort is necessary, restricting discovery and accelerating resolution of related controversies should also improve these processes.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Rosalind Knapp", written over the printed name.

ROSALIND A. KNAPP
Deputy General Counsel

October 11, 2002