



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

GENERAL COUNSEL

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

206524

October 31, 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 Reply 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

FILED
Office of Proceedings

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Washington

ORIGINAL

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

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

Introduction

The Surface Transportation Board ("STB" or "Board") in this proceeding has sought to accelerate resolution of major rail rate 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. Notice of Proposed Rulemaking, served September 4, 2002 (67 Fed. Reg. 57557, September 11, 2002) ("NPRM"). The United States Department of Transportation ("DOT" or "Department") has already expressed its general support for these proposals. Comments filed October 11, 2002. Following review of the initial comments of other parties, DOT continues to favor the proposals.

Mediation

Virtually all parties supported the proposal to require non-binding mediation as a condition precedent to the initiation of a formal complaint, but there were several reservations. Some expressed concerns about the proposal's implications for statutory

time-frames, others were pessimistic about the prospects for success, and still others urged that carriers be required to establish common carrier rates promptly upon request. *See* Comments of the Association of American Railroads ("AAR") at 4; National Industrial Transportation League ("NITL") at 4-5; Western Coal Traffic League ("WCTL") at 7, 10-12; Edison Electric Institute ("EEI") at 3-4; National Coal Transportation Association ("NCTA") at 3, 5.

DOT continues to support mandatory recourse to mediation as a worthwhile effort to promote agreement without resort to formal regulatory procedures. At the same time, we do not think that this proposal should or need be implemented in a way that undercuts progress in those procedures since they may ultimately be used in any given case. Accordingly, the Department believes that the proposal should not interfere with or affect either statutorily established time-frames for the filing of complaints or jurisdictional provisions. *E.g.*, 49 U.S.C. § 11705(c). Consistent with the need for greater expedition, we would also consider a requirement for prompt responses to shipper requests for common carrier rates.

Parties also addressed particular aspects of the mediation proposal. Commenters overall favored confidentiality protections for all participants and phases of the mediation process. *See* Comments of WCTL at 7, 14; EEI at 5; Burlington Northern and Santa Fe Railway Co. ("BNSF") at 3; AAR at 5. Parties also agreed that mediation should neither be forced to continue beyond impasse nor be extended against the wishes of the participants. *See* Comments of NITL at 6; WCTL at 7, 15-16; EEI at 4. Both railroads and shippers would leave to mediators the choice of processes to be used in each case. *See* Comments of AAR at 6; NITL at 5.

DOT agrees with all of these comments. Enhanced confidentiality should free parties to voice and consider proposals and positions they might shun in public proceedings. Flexibility in ending, extending, and managing mediation, particularly if that flexibility does not postpone or otherwise affect time-frames in place to advance regulatory processes, is also consistent with the Board's basic purpose to encourage more efficient resolution of these disputes.

Discovery

The STB proposed to adopt both a more restrictive standard for discovery and accelerated administrative processing of discovery disputes. NPRM at 4-5. The overarching purpose, again, was to expedite resolution of these disputes that have delayed progress in formal rate adjudications. *Id.* DOT supported these proposals for this reason.

Rail and shipper interests diverge on the question of a stricter standard. Carriers favored it as a means to avoid burdensome requests; shippers opposed it on the grounds that the existing "relevance" standard has not been a source of delay, and that a stricter standard would invite still more objections and disputes. *Compare* Comments of AAR at 6, and BNSF at 2, 4 *with* NITL at 9-10, and WCTL at 7.¹ There was more widespread support for proposals to streamline the handling of discovery disputes through staff conferences, summary rulings, and expedited pleading schedules. *See* Comments of NITL at 7-8; BNSF at 8; WCTL at 8, 23-25; NCTA at 3-5.²

^{1/} Similarly, railroads objected to the use of certain recent STB discovery decisions as precedent under a stricter standard, while shippers urged continued reliance on such decisions (sometimes as consistent with a stricter standard). *See* Comments of BNSF at 5-6; NCTA at 4; EEI at 7, 9, 11; NITL at 18.

^{2/} BNSF did object to shortening the time allowed for responses to motions to compel. *See* Comments of BNSF at 3, 8.

In adopting and implementing final rules the Board should ultimately be guided by its fundamental purpose of expediting resolution of major rail rate cases. The discovery-related proposals implicitly identify both the traditional discovery standard and languid processing of discovery disputes as primary sources of delay. The Department continues to support both proposals. We do so because we believe that as a substantive matter a stricter discovery standard can and should discourage less-than-compelling requests while not hampering access to information that parties are legitimately entitled to secure. But it is imperative not only that the Board announce the type and amount of information that meets such a standard, and that it do so in a consistent manner, but that it also do so through a relatively accelerated process.³ Only in that way can the STB ensure that its final rules do not become instruments of the delay and abuse that they are aimed at ending. Delaying resolution of discovery disputes only stimulates the creation of disputes by those who benefit from delay.

Conclusion

The Department continues to support the Board's current 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

³/ DOT takes no position on the value of recent STB discovery decisions as precedent under either standard.

processes. The recommended modifications should make this avenue still more attractive. When the STB's adversarial procedures must be used, restricting discovery and accelerating resolution of related controversies should also improve these processes.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Kirk K. Van Tine', written in a cursive style.

KIRK K. VAN TINE
General Counsel

October 31, 2002