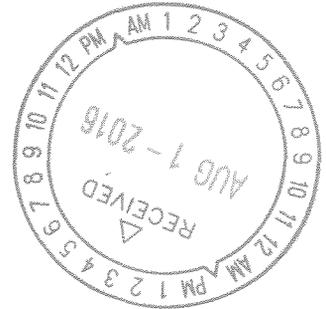


ORIGINAL

Before the
SURFACE TRANSPORTATION BOARD

Ex Parte No. 733
EXPEDITING RATE CASES



COMMENTS

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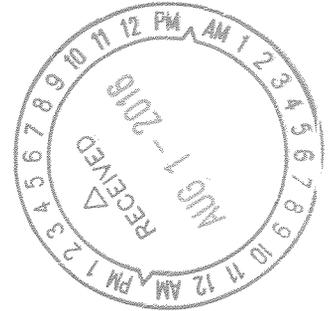
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Attorney for Samuel J. Nasca

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COMMENTS

Preliminary Statement

Samuel J. Nasca,^{1/} for and on behalf of SMART/ Transportation Division, New York State Legislative Board (SMART/TD-NY), submits these comments in response to the Surface Transportation Board (STB or Board), Advance Notice of Proposed Rulemaking (ANPR), dated June 14, 2016 (served June 15). 81 Fed. Reg. 40250-53. (June 21, 2016).

The ANPR is responsive to Section 11(c) of Surface Transportation Board Reauthorization Act of 2015, P.L.

^{1/}New York State Legislative Director for SMART/TD, with offices at 35 Fuller Road, Albany, NY 12205.

114-110, 129 Stat. 2228, 2234 (Dec. 18, 2015). STB Reauthorization Act: 2/

(c) PROCEDURES.-Not later than 180 days after the date of the enactment of this Act, the Surface Transportation Board shall initiate a proceeding to assess procedures that are available to parties in litigation before courts to expedite such litigation and the potential application of any such procedures to rate cases.

The purpose of § 11(c) is set forth in the Senate committee report, S. Rept. 114-52, at 12:

.....the section would require the STB to initiate a proceeding to assess other procedures, including procedures common in other litigation settings, to help expedite rate cases.

Interest of SMART/TD-NY

§11(c) of STB Reorganization Act, is captioned "PROCEDURES FOR RATE CASES." SMART/TD-NY represents the interest of railroad employees and, as such, is concerned with railroad rates. Samuel J. Nasca, has participated in many proceedings at the STB, and its predecessor Interstate Commerce Commission (ICC), as have other rail employee representatives over the years. A number of these proceedings have involved rail rates.

2/We are unable to locate the change in existing law for §11(c). Cf. S. Rept. 114-52 at 14.

I. COMPARISON WITH COURT LITIGATION

A. Staff Meetings in Advance of Proceeding. The Board Staff held informal meetings with selected counsel and persons in advance of instituting this proceeding. See: ANPR at 2. The meetings were unannounced and held ex parte with some named 22 persons or organizations. (ANPR at 2 n.3). The meetings were not open to the public, and invitations not extended to the public.

Although Board Staff may be inexperienced, and seek assistance from private interests regarding court procedures, the limited STB Staff background cautions against failure to provide public notice and opportunity for participation by other than those outsiders who might be favored by Board Staff.

Clearly, the Board's process in carrying out §11(c) is tainted with impropriety, and counter to the due process requirements of the Administrative Procedure Act. Moreover, reference to the U.S. District Court rules in the ANPR at pp. 3,5, for guidance in rail rate litigation, may not prove very fruitful as it has been almost 40 years since judicial review of ICC orders,

other than for the payment of money, was transferred from the U.S. District Court, to the present direct review in the U.S. Court of Appeals where, generally, discovery is not permitted.^{3/}

B. Limited Value of Court Comparisons. There may be limited value in extensive examination of U.S. Court procedures for expediting disposition of rate cases at the STB. As indicated above, judicial review of STB rates decisions currently is in the U.S. Court of Appeals, where the agency record may be supplemented only upon usual circumstances. The Court of Appeals rules for expedition would not appear helpful for ordinary discovery in STB rate cases. Discovery is believed to be the principal cause for delay in rate cases.

II. REDUCTION IN STB INFORMATION

A. Recent Developments. The extensive use of discovery in rail rate litigation at the agency is a recent development. The STB and its ICC predecessor have

^{3/}P.L. 93-584, §4(c), 88 Stat. 1917 (Jan. 2, 1975); P.L.104-88 Title III, §305(c),§305(d)(5), 109 Stat. 944-45 (Dec. 29, 1995).

conducted many rate cases since the ICC's creation in 1887. While there have been discovery disputes in the past, they were infrequent and usually limited. The agency in recent years has reduced the scope of railroad information which previously had been generally available to the public as a matter of course, such that interests complaining of rates today frequently have been required to resort to the discovery process. A reversal of the agency's policy of information secrecy could, by itself, lead to a reduction of discovery disputes.^{4/}

B. Reports. The agency now seriously limits information required by carriers in their annual and other reports. The ICC took this step initially without explanation, but thereafter claimed the information deleted was considered unnecessary for the agency's regulatory duties. Revision to Railroad Annual Report Form R-1, 365 I.C.C. 552 (1982), rem. sub nom. Simmons

^{4/}The former ICC on May 7, 1979, adopted a new data policy which only requires the reporting of information essential to fulfill the ICC's regulatory functions. 44 Fed. Reg. 27537. For application of the new policy to railroad employee information, see: Revisions-Preliminary Report-Class I Railroads, 367 I.C.C. 63, 65 (1982).

v. ICC, 757 F.2d 296 (D.C. Cir. 1985); Ibid., 1 I.C.C.2d 661 (1985), rev. den. Simmons v. ICC, 808 F.2d 137 (D.C. Ci. 1986).

The reduction in the information filed by rail carriers in their annual reports has been followed by the elimination of other information formerly filed by the carriers on a regular basis. Currently, Class II and Class III carriers are not ordinarily required to file annual reports, or to maintain the required accounts.

To reduce discovery disputes, it is suggested the Board should consider restoration of the information formerly reported to the agency, and make such available to the public, preferably by publication.^{5/}

III. ADMINISTRATIVE LAW JUDGE

The discovery process would seem suitable for expedition if the Board would restore its own Administrative Law Judge (ALJ) personnel. The STB since termination of the former ICC has eliminated its ALJ expertise, through termination of all of its ALJ

^{5/}The waybill sample data formerly was published yearly and distributed to the public in pamphlet form. The waybill data is now not available for the public distribution, and such information is highly restricted.

positions. The current STB Staff, generally, is incapable or otherwise not disposed to rendering discovery decisions. Accordingly, many of the discovery disputes in rate cases are referred by STB Staff for handling by ALJs at another agency. This is not satisfactory, for STB operates under different procedures, different statutes, and a different background from the transferee agency.

Moreover, the STB with its own ALJ corps might also be available for consultation by the Board members, in unrelated matters, as was the custom during the former ICC years.

Respectfully submitted,



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August 1, 2016