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SURFACE TRANSPORTATION BOARD

DECISION

STB Ex Parte No. 693

ORAL ARGUMENT

STB Docket No. 42114

US MAGNESIUM, L.L.C.
v.
UNION PACIFIC RAILROAD COMPANY

STB Finance Docket No. 35225

SAN BENITO RAILROAD LLC–ACQUISITION EXEMPTION–
CERTAIN ASSETS OF UNION PACIFIC RAILROAD COMPANY

Decided: November 16, 2009

This decision denies US Magnesium, L.L.C.'s (USM) petition for reconsideration of the Board's decision to hold oral argument in STB Docket No. 42114, US Magnesium, L.L.C. v. Union Pacific Railroad Company (USM v. UP), and grants the Brotherhood of Maintenance of Way Employes Division/IBT's and the Brotherhood of Railroad Signalmen's (collectively, the Unions) joint motion to postpone oral argument in STB Finance Docket No. 35225, San Benito Railroad LLC–Acquisition Exemption–Certain Assets of Union Pacific Railroad Company (San Benito).

On November 3, 2009, the Board issued a decision announcing oral arguments for Monday, November 23, 2009, in the aforementioned proceedings. On November 6, 2009, USM filed with the Board a petition to reconsider the Board's decision to hold an oral argument in USM v. UP. Union Pacific Railroad Company (UP) filed a reply opposing USM's petition. On November 9, 2009, in San Benito, the Unions filed with the Board a motion to postpone oral argument.

USM v. UP. In STB Docket No. 42114, USM has filed a complaint challenging the reasonableness of rates charged by UP for the movement of chlorine by tank car from: (1) Rowley, UT, to Eloy, AZ; and (2) Rowley to Sahuarita, AZ. USM seeks relief pursuant to the simplified procedures set forth in Simplified Standards for Rail Rate Cases, STB Ex Parte No. 646 (Sub-No. 1) (STB served Sept. 5, 2007) (Simplified Standards), aff'd sub nom., CSX Transp., Inc. v. STB, 568 F.3d 236 (D.C. Cir. 2009), and vacated in part on reh'g, CSX Transp., Inc. v. STB, No. 07-1369 et al. (D.C. Cir. Oct 23, 2009). USM has elected to utilize the Three-

Benchmark method, under which the total available rate relief is limited to $1 million over a 5-year period. UP has answered the complaint, both parties have submitted their evidence, and they have agreed that the case can be decided on the record submitted.

In its November 6, 2009 filing, USM argues that it would be inconsistent with the intent of the Three-Benchmark methodology—an affordable avenue to rate relief for the complainant—to require the parties to participate in oral argument. USM also argues that the cost estimates for litigation in Simplified Standards did not include preparation for and participation in oral argument, and that these unanticipated costs would unfairly reduce the overall relief a complainant might receive due to higher litigation costs and fixed maximum relief.

USM expresses concern that the confidential status of much of the evidence on the record will restrict the extent to which the oral argument can be open to the public. Because of the confidential status of the evidence and the protective order that applies to this proceeding, USM argues that, other than in-house counsel, employees of each party would be precluded from attending the hearing. USM argues that this would be prejudicial to it, as USM does not have in-house counsel, and UP does.

USM states that, in the alternative, it supports a final round of briefing by both parties to summarize the key points of the parties' respective cases; and/or to address specific areas of questions identified by the Board.

UP replies that there would be no benefit from additional briefing as neither party has departed from the positions stated in the opening round of evidence. UP further argues that oral argument would provide the Board with the opportunity to ask questions on issues it views as essential to resolving the case. Moreover, UP disagrees with USM's argument that this proceeding is not conducive to oral argument because the record contains confidential information. UP points to several cases where the Board has successfully held oral arguments on cases with highly confidential records without revealing confidential information. UP suggests that the Board should either proceed with the oral argument, or cancel the argument and not require additional briefing. UP argues that requiring additional briefing would be contrary to the rules established for Three-Benchmark cases in Simplified Standards, and would also be costly—a consequence that USM has expressed a desire to avoid.

USM's petition for reconsideration of this routine scheduling order will be denied. USM cites to 49 CFR 1115.9 and/or 49 CFR 1117 as the basis for its appeal. Section 1115.9(a)(4) states that the ruling of a Board employee—in this case, the Secretary—may be appealed only if the ruling may result in substantial irreparable harm, substantial detriment to the public interest, or undue prejudice to a party.[1] USM has not met this standard.[2]

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[1] Section 1117 does not contain a standard of review.

[2] This appeal could arguably fall within the standard of review set forth at 49 CFR 1115.1(c): "Such appeals are not favored; they will be granted only in exceptional circumstances to correct a clear error of judgment or to prevent manifest injustice." USM likewise has not met this standard.

The additional costs associated with an oral argument do not amount to substantial irreparable harm or undue prejudice. While USM is correct that the Three-Benchmark methodology was designed to be an affordable means for a shipper to obtain limited rate relief, we find that USM has not shown that it would be irreparably harmed, or unduly prejudiced, by participating in oral argument. The lack of harm or prejudice is highlighted by USM's suggestion that instead of holding oral argument, the Board should direct the parties to submit final briefs—preparation for which, we presume, USM would incur additional litigation costs.

Furthermore, we believe an oral argument can be held in this proceeding without disclosing highly confidential information. While the record contains confidential evidence, the critical issues can be discussed abstractly while not referencing specific, confidential information. As the oral argument is open to the public, the parties should refrain from disclosing any highly confidential information in their oral arguments. USM, therefore, need not be concerned that highly confidential information will be discussed and cause irreparable harm or undue prejudice. Finally, USM has not shown that an oral argument in this proceeding would be detrimental to the public interest.

San Benito. In STB Finance Docket No. 35225, San Benito Railroad LLC (San Benito), a noncarrier, has filed a verified notice of exemption to acquire from UP certain railroad assets, including approximately 12.43 miles of rail line extending between approximately milepost 0.7 (near Hollister, CA) and approximately milepost 12.50 (near Carnadero, CA) in San Benito County. San Benito simultaneously filed a motion to dismiss the notice of exemption. San Benito seeks a determination from the Board that it would not become a common carrier and that the Board would not have jurisdiction over the proposed acquisition because the parties have structured the transaction pursuant to the terms and conditions of the Interstate Commerce Commission's decision in State of Maine–Acq. and Op. Exempt., 8 I.C.C.2d 935 (1991) (State of Maine), and subsequent Board decisions addressing State of Maine. The Unions filed a response in opposition to San Benito's motion to dismiss. The Unions argue that State of Maine was wrongly decided and must be overturned because it is contrary to the Interstate Commerce Act.

In the November 9, 2009 motion, counsel for the Unions states that he will be unavailable for the oral argument on the date for which it is currently scheduled because he will be recovering from a previously scheduled medical procedure. Counsel states that no attorney for the Unions or from his firm can be substituted for him for the oral argument. Counsel also states that he has been authorized to represent that San Benito, the petitioner in this proceeding, does not oppose the motion.

We will grant the Unions' motion for postponement. The Board recognizes that the circumstances described above preclude the Unions from being represented by counsel at oral argument. The Board will hold an oral argument on January 26, 2009, and this case will be scheduled for argument on that date.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. USM's petition for reconsideration is denied.

2. The parties in USM v. UP are directed to refrain from disclosing highly confidential information during the oral argument.

3. The Unions' motion to postpone the oral argument in San Benito is granted.

By the Board, Chairman Elliott, Vice Chairman Nottingham, and Commissioner Mulvey.

COMMISSIONER MULVEY, commenting:

While I am sympathetic to USM's argument that requiring oral argument in this case will raise its litigation costs, I vote with the majority to deny its petition for reconsideration because USM has not met its burden of proof on this argument. USM has provided not even a rough dollar estimate of the increased costs it will bear. Without such evidence, the Board cannot weigh how much of an increased burden oral argument would place on USM in relation to the estimate of the Three Benchmark litigation costs.