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SERVICE DATE - JANUARY 24, 2000

SURFACE TRANSPORTATION BOARD

DECISION

STB Ex Parte No. 627

MARKET DOMINANCE DETERMINATIONS--PRODUCT
AND GEOGRAPHIC COMPETITION

Decided: January 18, 2000

In a notice of proposed rulemaking (NPR) served May 12, 1998,¹ we solicited comments on whether evidence of product and geographic competition should no longer be considered in determining, in a rail rate case, whether the defendant railroad has market dominance over the traffic involved.² Because of the anticipated widespread interest in the proceeding, we required that an electronic copy of all pleadings, regardless of length, be submitted on diskettes to facilitate posting on the Board's website for access by the public.³ We noted that this requirement, which was specific to this case, superseded our general requirement that only lengthy pleadings be submitted on diskette.⁴

In decisions served December 21, 1998, and July 2, 1999, we determined that the market dominance phase of cases needed to be streamlined and that it was no longer administratively practicable to consider evidence of product or geographic competition. While our decisions fully addressed the substantive comments that were filed, we inadvertently failed to rule on a petition for reconsideration filed May 15, 1998, by the United Transportation Union-Illinois Legislative Board (UTU-IL) requesting either that we vacate the procedural requirement that all pleadings in this case be submitted on diskette or, alternatively, that we waive the diskette requirement for rail employees

¹ 63 FR 24588 (1998).

² Market dominance "means an absence of effective competition from other rail carriers or modes of transportation for the transportation to which a rate applies." 49 U.S.C. 10707(a). Market dominance is a prerequisite to our jurisdiction to review the reasonableness of a challenged rail rate. 49 U.S.C. 10701(d)(1), 10707(b), (c).

³ At the time the NPR was issued, our ability to scan documents was limited. The submission of pleadings on diskette simplified the process of posting such documents to our website.

⁴ See 49 CFR 1104.3(a).

and their organizations.⁵ We address the merits of that petition here.⁶

In its petition for reconsideration, UTU-IL asserts that the requirement that all pleadings be submitted on diskette will result in a “manifest injustice” for rail employees⁷ and that our procedural requirement “serves to preclude meaningful participation in the proceeding by railroad employees and . . . the public as well.”⁸ Nothing in UTU-IL’s petition, however, indicates that any individual rail employee was unduly burdened by our procedural requirements or even desired to participate.⁹ Indeed, UTU-IL acknowledges that market dominance is not an issue in which rail employees normally become involved.¹⁰ Furthermore, the diskette requirement and the posting of pleadings on

⁵ UTU-IL was assessed a \$150 fee for filing the petition for reconsideration. We have not in the past, however, assessed fees for either procedural or substantive appeals of rulemaking decisions. See Regulations Governing Fees, 1 I.C.C.2d 60, 68 (1984). Therefore, the collection of a fee was not appropriate here. However, rather than returning the fee, those funds will be used to partially offset the court costs awarded to the Board against UTU-IL in four recent cases. D.C. Circuit cases Nos. 97-1027 (costs awarded Mar. 12, 1998), 97-1038 and 97-1057 (costs awarded Jan. 2, 1998) and Seventh Circuit case No. 94-3412 (costs awarded Sept. 28, 1999). UTU-IL has declined payment despite repeated requests for the payment of the costs awarded by the courts of appeals. Therefore, pursuant to 31 U.S.C. 3716, UTU-IL is hereby notified that we will retain the \$150 as a partial offset to the monies owed the Board. UTU-IL is admonished to take steps to fully satisfy its obligations to the Board and use of the administrative offset procedures here does not foreclose additional action pursuant to our regulations at 49 CFR 1018 to fully collect all debts owed by UTU-IL.

⁶ UTU-IL has filed a petition for judicial review challenging both the diskette requirement and user fee imposed in this case. United Transp. Union-III, Legis. Bd. v. STB, No. 99-1366 (D.C. Cir. filed Aug. 31, 1999). Our action here in ruling on UTU-IL’s administrative petition will facilitate the court’s review and does not interfere with the court’s jurisdiction. American Farm Lines v. Black Ball Freight Serv., 397 U.S. 532, 541 (1970). Agency self-correction is more expeditious and efficient than judicial review, Commonwealth of Pennsylvania v. ICC, 590 F.2d 1187, 1194 (D.C. Cir. 1978), and eases the burden of the reviewing court.

⁷ UTU-IL Pet. at 6.

⁸ UTU-IL Pet. at 2.

⁹ As UTU-IL points out (UTU-IL Pet. at 6), many participants recognized that it was not necessary to submit their notice of intent to participate on diskette, but only their substantive comments and evidence.

¹⁰ UTU-IL Pet. at 5-6. UTU-IL filed only 3 pages of cursory comments in which it merely asserted that “the present status quo regarding the determination of market dominance . . . should remain undisturbed.” UTU-IL Reply Comments filed June 29, 1998.

our website aided, rather than inhibited as UTU-IL suggests, public awareness and participation. In any event, had an individual rail employee who did not have ready access to word-processing equipment wanted to participate in this rulemaking, a waiver could have been sought and would have been granted.

UTU-IL is represented by counsel who uses word-processing equipment and in fact submitted a diskette. We have no basis for concluding that the submission of a diskette was an onerous requirement for UTU-IL. Rather, it appears that UTU-IL's petition for reconsideration is merely another attack on our effort to utilize computer technology as a tool in processing administrative proceedings.¹¹

It is ordered:

- (1) UTU-IL's petition for reconsideration is denied.
- (2) The \$150 fee assessed for filing the petition for reconsideration is reversed but retained as an offset to the unpaid court costs owed by UTU-IL to the Board.
- (3) This decision is effective 30 days from the date of service.

By the Board, Chairman Morgan, Vice Chairman Burkes, and Commissioner Clyburn.

Vernon A. Williams
Secretary

¹¹ UTU-IL unsuccessfully challenged our general rule that any pleading exceeding 20 pages in length be submitted on diskette. United Transp. Union-Ill. Legis. Bd. v. STB, 132 F.3d 71 (D.C. Cir. 1998).