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SURFACE TRANSPORTATION BOARD

DECISION

STB Docket No. 41940

NATIONAL MOTOR FREIGHT TRAFFIC ASSOCIATION, INC.--PETITION FOR DECLARATORY ORDER

Decided: November 3, 1997

On September 17, 1997, the National Motor Freight Traffic Association, Inc. (NMFTA or petitioner), filed a petition for reconsideration of the decision in this proceeding served August 22, 1997. In that decision, we denied a petition for declaratory order and, alternatively, a petition for relief. We will here deny NMFTA's petition for reconsideration.

BACKGROUND

Petitioner had filed, on October 4, 1996,[1] a petition seeking a declaratory order that the new meeting schedule proposed by NMFTA[2] would be in keeping with the requirements of Rule 5 of the NCC's Agreement. Rule 5(a) of Article V of the NCC Agreement requires that final disposition of a new or changed classification proposal be made by the 120th day after docketing.[3] Petitioner stated that the new meeting schedule may result in the deadline being missed occasionally -- that under the new schedule, only 1 or 2 shipper appeals yearly would not be completed in 120 days.[4] Therefore, it also requested a blanket finding that proposals that require more than 120 days to reach final disposition constitute "unusual circumstances" under Rule 5(a) of Article V and that no petition for extension of the deadline need be filed with the Board in such cases. Petitioner asked, in the alternative, that, if we did not institute a declaratory order proceeding, we grant blanket relief from the Rule 5(a) requirement that proposals must receive final disposition within 120 days of docketing.

In our August 22 decision, we denied the petition for declaratory order and alternative relief. "We are being asked, essentially, not to interpret Article V Rule 5(a), but to rewrite it . . . . Rule 5(a) mandates that a petition with supporting reasons be filed within the 120-day period for there to be a finding of unusual circumstances. Given these clear requirements, petitioners should submit an amended agreement if they want to depart from the rule." Decision at 2 (footnote omitted). We did, however, grant petitioner a 60-day extension for the three extension requests it had filed. Finally, we

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[1] The National Classification Committee (NCC) joined in this petition.

[2] The new meeting schedule reduces the number of NCC meetings that consider appeals from 4 to 3 each year and the number of panel meetings that consider initial proposals from 8 to 6.

[3] The NCC Agreement specifically provides in Article V:

Rule 5. Disposition of Proposals

> (a) Final disposition of proposals for new or changed provisions in the Classification shall be made by the 120th day after docketing, except that in unusual circumstances such period may be extended, if, within the 120-day period, a petition requesting an extension of that period and setting forth supporting reasons is filed with the Interstate Commerce Commission.

[4] In its declaratory order petition, NMFTA argued that in a 5-year period, there were 305 shipper proposals out of 751 docketed proposals. Only 18 of the shipper proposals were appealed and only 7 of these had the potential to take more than 120 days to reach final disposition.

held that, until an amended agreement is approved by the Board, NCC must comply with Rule 5 for future extension requests.

In its petition for reconsideration, NMFTA states that it will "restructure" its petition for declaratory order to be consistent with the NCC agreement. NMFTA now asks that the Board make a blanket finding that taking more than 120 days to handle an appeal of a classification proposal would constitute unusual circumstances under Rule 5(a). Should the Board make such a blanket finding in a declaratory order, NMFTA would then file pro forma petitions that make reference to the declaratory order we issue. This approach, which is essentially the advance waiver process that NMFTA sought earlier, would obviate the NMFTA having to file, and the Board having to review, petitions containing repetitive, full justifications for the relief sought.

DISCUSSION AND CONCLUSIONS

We will deny the petition for reconsideration. The provisions of 49 U.S.C. 722(c) authorize the Board to grant reconsideration "because of material error, new evidence, or substantially changed circumstances." NMFTA has not even alleged, much less demonstrated, that any of these criteria have been met.

As noted, Rule 5(a) provides that final disposition of classification proposals are to be made within 120 days, "except that in unusual circumstances such period may be extended, if . . . a petition requesting the extension and setting forth supporting reasons is filed . . . ." Consistent with the findings in our earlier decision, NMFTA's request -- which has not really been substantively changed in its petition for reconsideration -- would effectively read out of the rule the 120-day limitation. Under the rule, final dispositions must be made in 120 days <u>except</u> in unusual circumstances. NMFTA would have us find that exceeding 120 days <u>is</u> always an unusual circumstance. Essentially, the only difference between this and the previous proposal is that NMFTA would now file a pro forma petition. As we noted in our August 22 decision, if NMFTA believes that the Rule 5(a) is onerous, it can file an amended agreement. In the interim, it must adhere to the rule.

Finally, NMFTA states that it submitted a filing fee with its October 1996 petition. It notes that the purpose of the fee was to defray the expense of a declaratory order proceeding. Notwithstanding the fact that NMFTA's petition generated substantial expenditures of time and resources by Board members and staff, NMFTA notes that we did not institute a proceeding, and it asks that, if we deny its petition for reconsideration, we refund the declaratory order filing fee. Under our rules, regardless of the outcome of the proceeding, filing fees are not refunded. 49 CFR 1002.2(c).[5] Accordingly, we will deny the requested refund.

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

<u>It is ordered</u>:

1. The petition is denied.

2. The request for a refund is denied.

3. This decision is effective on the date of service.

By the Board, Chairman Morgan and Vice Chairman Owen

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[5] "[A]fter the . . . petition . . . has been accepted for filing by the Board, the filing fee will not be refunded, regardless of whether the . . . petition . . . is granted or approved, denied, rejected before docketing, dismissed, or withdrawn." 49 CFR 1102.2(c).

Vernon A. Williams
Secretary