

21221
EB

SERVICE DATE - DECEMBER 17, 1996

This decision will be included in the bound volumes of printed reports at a later date.

SURFACE TRANSPORTATION BOARD

DECISION

STB Ex Parte 542

REGULATIONS GOVERNING FEES FOR SERVICE PERFORMED IN CONNECTION WITH LICENSING AND RELATED SERVICES--1996 UPDATE

Decided: December 5, 1996

OVERVIEW

In Regulations Governing Fees for Service Performed in Connection with Licensing and Related Services--1996 Update, 1 STB 179 (1996) (1996 Fee Update), the Surface Transportation Board (Board) issued final rules that established its 1996 user fee schedule. In that decision the Board: (1) revised its entire fee schedule based on the cost study formula set forth at 49 CFR 1002.3(d) related to inflationary increases in direct labor and overhead costs; (2) modified selected fees to reflect new cost study data; (3) established fees for new services and activities that had not previously been included in the Board's user fee schedule; and (4) removed the caps on various fee items.

Labor Petition to Reopen. On September 3, 1996, Joseph C. Szabo, the Illinois Legislative Director for the United Transportation Union (Petitioner or Mr. Szabo), filed a petition to reopen this proceeding. Petitioner requests that the \$1,000 filing fee for Item (56), Formal complaints, and Item (58)(i), Petitions for declaratory orders, which are comparable to complaints, and the \$1,400 filing fee for Item (58)(ii), All other petitions for declaratory order, be eliminated for rail employees and their unions.

In addition, he seeks elimination of the new \$7,600 filing fee for Item (60), Labor arbitration proceedings, and the new \$150 filing fee for item (61), Appeals to a Surface Transportation Board decision and petitions to revoke an exemption pursuant to 49 U.S.C.10502(d).¹ In letters filed August 26, 1996, Charles L. Little, International President of the United Transportation Union (UTU), and C.V. Monin, International President of the Brotherhood of Locomotive Engineers (BLE), also objected to the establishment of these two new fees and supported petitioner's request.

¹ On August 26, 1996, Mr. Szabo filed a petition to stay these two new fee items. In Regulations Governing Fees For Service Performed In Connection With Licensing and Related Services--1996 Update, 1 STB 231 (1996), Chairman Morgan issued a "housekeeping" stay to allow the Board sufficient time to consider the issues raised in this petition to reopen.

Based on the new evidence submitted by the labor officials who support Mr. Szabo's petition, we conclude that the \$7,600 filing fee for Item (60), Labor arbitration proceedings should be reduced to \$150. However, we find that there is no basis for granting petitioner's request that the fees for formal complaints and petitions for declaratory order be eliminated for rail employees or their unions. Furthermore, after reviewing petitioner's arguments we conclude that the \$150 filing fee for Item (61), Appeals to Surface Transportation Board decisions and petitions to revoke exemption under 49 U.S.C. 10502(d), which was adopted in 1996 Fee Update, remains appropriate.

Fees For Formal Complaints. As we indicated in 1996 Fee Update, we tentatively concluded that filing fees for formal complaints should be increased. However, the existing \$1,000 filing fee for Item (56), Formal complaints, was maintained because of the on-going legislative debate regarding that filing fee. That legislative debate has now been resolved by the enactment of section 1219 of the Federal Aviation Authorization Act of 1996, Pub. L. 104-264, 110 Stat 3213, (Oct. 9, 1996), which prohibits any increase in the fee for complaints filed by small shippers in connection with rail maximum rate complaints until after September 30, 1998. As discussed below, we are maintaining the filing fee for formal rail rate complaints at \$1,000 for small shippers and adopting the fees that we tentatively concluded were appropriate for formal complaints for all other shippers.

DISCUSSION AND CONCLUSIONS

Fee Item 60, Labor arbitration proceedings. Petitioner raises several arguments in opposition to this fee. First, petitioner asserts that the Board does not have the authority to establish a filing fee for arbitration review proceedings because these proceedings result from a carrier application and Board mandated review of arbitration proceedings. This argument is unfounded. There is no question that a filing fee for labor arbitration proceedings can be adopted under the Independent Offices Appropriation Act of 1952, 31 U.S.C. 9701. The rail employees or the railroads that seek the Board's review of a labor arbitration case are the identifiable beneficiaries of the Board's action on the matter. In these types of proceedings, either the rail employees or the railroad receive the special benefit of the Board's review of the arbitration awards.

Petitioner also questions the cost data which served as the basis for the \$7,600 filing that was proposed for arbitration proceedings. The cost study for these proceedings included seven completed observations, which were filed during the cost study period of 1993 to 1995. Because these cases are deemed to be representative of the types of arbitration appeals that come before the Board, we stand by our costing data for this fee item.

Finally, petitioner argues that our decision to adopt a \$7,600 filing fee for labor arbitration proceedings was based on the erroneous conclusion that rail labor interests do not oppose this filing fee. He maintains that the Legislative Director of the Illinois UTU historically has filed objections to the Board's fees on behalf of rail labor. Petitioner points out that Mr. Little, UTU's International President, clearly speaks for the entire UTU. Therefore, he asserts that his comments should have been given great weight because he represented rail labor on this issue.

In 1996 Fee Update, we identified Mr. Szabo as a union official and recognized him as a representative of rail labor. Although we observed in our decision that other labor organizations² and railroads that file arbitration proceedings did not comment on this fee, our decision to adopt the \$7,600 filing fee for labor arbitration proceedings was not based on the limited opposition to the fee. Our decision was premised on the fact that we did not find the comments of Mr. Szabo or those of the Transportation Intermediaries Association (TIA) to be compelling regarding the potential adverse effects of this fee, particularly because the Illinois UTU and TIA are not the parties that actually file labor arbitration appeals.

Petitioner now has submitted additional statements from other labor officials supporting his view that a \$7,600 filing fee will have a chilling effect on the filing of labor arbitration proceedings.³ The UTU and BLE officials argue that neither their individual members nor the unions themselves have the financial resources to pay the \$7,600 filing fee for each labor arbitration proceeding. We are now persuaded by this additional evidence that a \$7,600 filing fee for a labor arbitration proceeding may have a chilling effect on the filing of such proceedings. Therefore, we will reduce the filing fee to a nominal level of \$150. If the \$150 presents a problem to an individual or a union, that party can request a waiver of the filing fee under our fee waiver policy.

Fee Item (61). Appeals to a Surface Transportation Board Decision or a petition to revoke an exemption under 49 U.S.C. 10502(d). Petitioner contends that the new \$150 filing fee for appeals to a Surface Transportation Board decision is inappropriate for several reasons. First, petitioner argues that it is unfair because the rail employees do not initially invoke the Board's jurisdiction in these proceedings. As we stated in 1996 Fee Update, a filing fee for these activities is appropriate because the filing party receives the benefit of another opportunity to argue their case to the Board or to seek clarification of the Board's decision.⁴

² Petitioner has stated in his comments that his UTU unit did not file labor arbitration appeals because such matters were handled by the UTU General Committee on Adjustment.

³ Petitioner states that the evidence contained in the UTU letter was not submitted earlier because the Illinois UTU; unit over the years has handled the representations for UTU in user fee proceedings. He requests that the record of this proceeding be reopened to accept the letters from the UTU and BLE, if necessary. To ensure that the record in this proceeding is complete, we are reopening the record of this proceeding and accepting the August 26, 1996 letters of UTU and BLE.

⁴ Petitioner also asserts that it is prejudicial to fully decide on the fees involved here, especially the fees for appeals and petitions to revoke, because the Board has not completed its proposed procedural changes in Expedited Procedures for Processing Rail Rate Reasonableness, Exemption and Revocation Proceedings, STB Ex Parte No. 527 (STB served Jul. 18, 1996). Petitioner primarily objects to the proposed rule set forth in that proceeding that would have required a party to pay the filing fee for a petition to revoke an exemption at the time it filed a discovery request related to the petition to revoke. Petitioner's concern is now moot because the final rules that have been issued in the proceeding on October 1, 1996, did not include that proposed rule.

In addition, petitioner argues that the purpose of this fee is to insulate the actions of Board's staff from effective review by the Board Members. This argument also is without merit. The Board Members are the initial decisionmakers for many of the proceedings in which appeals can be filed. Moreover, the Board will have continual direct oversight over decisions made by its employees because under the procedural changes adopted by the Board in Expedited Procedures for Processing Rail Rate Reasonableness, Exemption and Revocation Proceedings, STB Ex Parte No. 527 (STB served Jul. 18, 1996), all appeals of initial decisions made by the employees will be heard directly by the Board. We believe that a filing fee of \$150 will not preclude parties from filing appeals or petitions to revoke exemptions in cases where the initial decisionmaker was a Board employee.

Petitioner further alleges that the new \$150 filing fee for petitions to revoke an exemption is another anti-labor effort by the Board against rail employees. Mr. Monin of the BLE agrees with petitioner and states that the filing fee for petitions to revoke exemptions, and the filing fee for appeals is "...openly directed toward the unions and their members." (August 25, 1996, letter at p. 2). The allegation that this proposed fee is directed at labor is without merit. Labor interests are not the only parties that file appeals or petitions to revoke transactions. Shippers, community groups, and rail carriers also file these types of cases. The filing fee for this activity applies to those parties as well as labor interests.

Petitioner also argues that a \$150 filing fee for petitions to revoke exemptions would have a chilling effect on labor's ability to file such petitions and deny rail employees their right to participate in the regulatory process. In 1996 Fee Update, we reduced the filing fee for these activities from the proposed level of \$3,700 to \$150 because we were concerned that the proposed fee could have a possible chilling effect on the filing of appeals and petitions to revoke an exemption. We believe that parties should be able to afford the nominal \$150 filing fee that was adopted for this fee item. If a party believes that an appeal or a petition to revoke an exemption that relates to a matter of public interest or that the \$150 filing fee is a financial hardship, that party can file a fee waiver request. We conclude that the filing fee for this activity was appropriately established at \$150 in our prior decision.⁵

Although we do not anticipate that the procedural changes adopted in that proceeding will have any effect on our user fees at this time, we will review the impact of those procedural changes in future fee updates.

⁵ The Board wishes to clarify that the filing fee for petitions to revoke an exemption does not apply to routine letters that labor unions submit in many of the rail class exemption proceedings involving acquisition or operation of rail lines or abandonment of rail lines. Typically, these letters only state that mandatory labor protective conditions must be imposed in the involved proceedings. Because these filings are often received after the effective date of the exemption, the filings technically could be considered as a petition to revoke the exemption. A separate decision acting upon that type of filing generally is not issued. Therefore, we will not assess a filing fee for this type of routine filing, even if it is received after the exemption is effective. We reserve the right, however,

Fee Items (56)(i)-(ii), Formal Complaints, and Fee Items 58(i)-(ii), Petitions for Declaratory Order. Petitioner argues for a blanket waiver for labor from the fee for formal complaints and petitions for declaratory order. In this regard, petitioner asserts that the Board erred in stating that complaints only involve resolution of disputes between private parties. He maintains that complaints, especially those filed by labor interests, serve as a mechanism to enforce rail carrier statutory obligations or to seek a rail carrier's compliance with an agency order. He asserts that these filing fees would prohibit rail employees from filing complaints and petitions for declaratory order with the Board because these fees would constitute a significant additional litigation cost for rail employees.

Petitioner maintains that in the past the filing fees for formal complaints and petitions for declaratory order have not applied to rail employees because the Secretary has used the fee waiver power to exempt rail employees from these fees.⁶ He argues that the practice of exempting rail employees and their unions from these filing fees should continue because labor interests file complaints and petitions for declaratory order that aid the Board in enforcing rail carriers' statutory obligations and agency mandates.

We are opposed to a blanket fee waiver, such as petitioner seeks here, that would affect only one class of private parties.⁷ In 1996 Fee Update, we denied a similar request for a blanket waiver of filing fees for complaints for all agricultural shippers. We believe that it would be unfair to grant this blanket waiver because other private parties, such as shippers and rail carriers, file complaints or petitions involving enforcement issues. Our fee waiver procedures, which operate on a case by case basis, are the appropriate mechanism to determine whether public interest considerations or financial hardship warrant waiver of a filing fee for a specific proceeding. Accordingly, we will not exempt rail labor as a class from these filing fees.

Fee Waiver Policy. Petitioner contends that in 1996 Fee Update the Board placed too much emphasis upon the Board's ability to waive filing fees as a means to provide access to the Board's services. He asserts that the possibility of obtaining a fee waiver is not an adequate safeguard to ensure that parties can bring proceedings before the Board. Petitioner criticizes the Board's decision because he maintains that the Board focused on the financial hardship grounds for a fee waiver and only mentioned the public interest grounds for waiving a filing fee as an afterthought. Petitioner asserts that, although employees organizations have secure waivers from the Board's fees in the past, he has little confidence that the Board's Secretary will administer the waiver procedures fairly. He

to assess the \$150 filing fee for any such filing that involves substantive issues that must be resolved by a Board decision.

⁶ Mr. Szabo's counsel states that he has never paid a filing fee on behalf of a rail employee.

⁷ The blanket waiver provided for in our regulations that is applicable to Federal, state, or local governmental entities is clearly distinguishable because governmental entities seek the Board's services on behalf of the general public, rather than a specific class of the public.

alleges that because the Board's fee waiver policy has changed in the last two years, employee organizations cannot rely upon receiving waiver grants, which will allow them to bring their cases before the Board.

In 1996 Fee Update, we emphasized that the agency's fee waiver rules in 49 CFR 1002.2(e) are designed to ensure that no part is precluded from bringing a case before the Board. The Secretary's records of fee waiver requests confirm that our fee waiver policy operates to ensure that the public has access to the Board's services. As the following table shows, few fee waiver requests are actually filed each year relative to the total number of filings.

FEE WAIVER ACTIVITY
1991 - 1996

YEAR	TOTAL NUMBER OF FEE WAIVERS	NUMBER GRANTED	NUMBER DENIED
1991	4	1	3
1992	6	6	0
1993	12	5	7
1994	8	6	2
1995	26	14	12
1996	5	3	2
TOTAL	61	35	26

The small number of fee waiver requests filed annually is a strong indication that the agency's filing fees have not limited access to the agency's services. During the period from 1991 to 1996, approximately 57% of all fee waiver requests were granted. Moreover, Board records indicate that when a fee waiver request has been denied, the requestor almost always has proceeded to file the case and paid the required filing fee.⁸ These facts provide ample evidence that our fee waiver policy operates fairly and that parties are not prevented from filing cases.

The previous chart also illustrates that the trend of granting waiver requests in recent years generally followed the 6-year average of 57%. Fee waiver requests were granted 54% and 60% of the time in 1995 and 1996, respectively. Therefore, no support exists for petitioner's assertion that during the last 2 years the Secretary has changed the fee waiver policy and has been less disposed to granting fee waiver requests. Also, there is no basis for petitioner's allegation that the Secretary's implementation of the fee waiver policy demonstrates an anti-labor bias: in fact, the two fee waiver requests filed by rail labor groups during the past 6 years were granted.

Petitioner's contention that the Board has overlooked the public interest grounds for fee

⁸ According to Board records, during the past 6 years, there has only been one instance in which a party declined to pursue a proceeding when a fee waiver request was denied.

waivers is also unfounded. The Board's regulation in 49 CFR 1002.2(e)(ii) continues to state that a party can obtain a fee waiver by showing that "...waiver or reduction of the filing is in the best interest of the public." In 1996 Fee Update, we reaffirmed both the financial and public policy grounds for fee waivers by stating:

This fee waiver policy is intended to ensure that no entity will be precluded from filing a complaint or other proceeding with the Board because it does not have the financial resources to pay the fee. That policy also ensures that matters involving the public interest will be brought to the Board. 1996 Fee Update at 199.

Contrary to petitioner's contentions, the Board continues to entertain fee waiver requests based on public interest considerations. We are confident that our fee waiver policy ensures that the public is not denied access to the Board's services if public interest considerations or documented financial hardship warrant the waiver of a filing fee. The Board's fee waiver regulations and their implementation minimize any chilling effect that our filing fees could possibly have on filing proceedings at the Board.

The Small Business Fairness Act of 1996. Petitioner contends that the Board erred in finding that the proposed increased fees are not a major rule under the Small Business Fairness Act of 1996. He maintains that these new fees should not have been effective until 60 days after the publication of the new rule, which would have been October 15, 1996.

In 1996 Fee Update, we complied with the provisions of the Small Business Fairness Act 1996 (Act). 5 U.S.C. 804(2)(A)-(C). Because we determined that this rule was not a major rule under the criteria of 5 U.S.C. 804(2)(A)-(C), a 60-day delay in the effective date of the rules was not required. The Board complied with the Act by submitting the necessary notification to Congress and the General Accounting Office. Therefore, with the exception of the filing fees that have been stayed, the Board's revised filing fees schedule and rules properly became effective on September 16, 1996.

Modification of Fee Item (56), Formal Complaints. In 1996 Fee Update, we stated that we tentatively concluded that the filing fee for Item 56(i), Formal complaints filed under the coal rate guidelines, should be set at \$23,300 and Item (56)(ii), applicable to all other complaints, should be set at \$2,300. Because of the on-going Congressional debate about the appropriate level for such fees, however, the existing \$1,000 filing fee was maintained for those fee items.

That legislative debate has now been concluded. In section 1219 of the Federal Aviation Authorization Act of 1996, Congress directed the Board not to increase the filing fee for rail maximum rate complaints filed by small shippers, with the prohibition to be effective through

September 30, 1998.⁹

To comply with the mandate of section 1219, we are establishing in revised Item 56(ii) a separate filing fee of \$1,000 applicable only to rail maximum rate cases filed by small shippers. If a complainant seeks to be considered a small shipper for filing fee purposes, the complainant should submit that request to the Secretary when the complaint is filed. The request should include sufficient information, such as the complainant's gross operating revenues, number of employees, corporate affiliations, market share or any other pertinent information to allow the Secretary to determine the complainant's status for filing fee purposes.¹⁰

Because the legislation only limits filing fees for complaints involving rail maximum rates filed by small shippers, for all other shippers, we adopt the \$23,300 filing fee for Item 56(i), Formal complaints filed under the coal rate guidelines, and the \$2,300 filing fee for renumbered Item 56(iii). All other formal complaints, which we found in 1996 Fee Update to be warranted.

The Board reaffirms its previous findings that the fee changes adopted here will not have a significant economic impact on a substantial number of small entities.

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

It is ordered:

⁹ The statutory provisions provide that:

- (a) In General. — Notwithstanding any other provision of law, the Surface Transportation Board shall not increase fees for services to be collected from small shippers in connection with rail maximum rate complaints pursuant to part 1002 of title 49, Code of Federal Regulations, Ex Parte No. 542.
- (b) Applicability. — Subsection (a) shall no longer be effective after September 30, 1998.

Section 1219, Federal Aviation Authorization Act of 1996, Pub. L. 104-264, 110 Stat. 3213 (Oct. 9, 1996).

¹⁰ We emphasize that the qualification as a small shipper is only for purposes of ministerial determination regarding the appropriate filing fee. Qualification as small shipper for filing fee purposes does not affect the determination as to the evidentiary procedure that will be used to resolve the merits of the rate complaint (i.e., use of the Constrained Market Pricing procedures or the simplified procedures that are now being developed for small cases).

1. This proceeding is reopened and the letters filed by UTU and BLE on August 26, 1996, are accepted.

2. The Board's decision of August 14, 1996, is modified as set forth in this decision.

3. Otherwise, petitioner's petition to reopen is denied.

4. The effective date of 49 CFR 1002.2(f), fee item (61), is established as January 16, 1997.

5. The final rules set forth in the Appendix to this decision are adopted. Notice of the rules adopted here will be published in the Federal Register and notice will be transmitted to Congress pursuant to Pub. L. 104-121 (Mar. 29, 1996).

6. This decision will be effective January 16, 1997.

By the Board, Chairman Morgan, Vice Chairman Simmons, and Commissioner Owen.

Vernon A. Williams
Secretary

For the reasons set forth in the preamble, title 49, chapter X, part 1002, of the Code of Federal Regulations is amended as follows:

Part 1002 - FEES

1. The authority citation for part 1002 continues to read as follows:

Authority: 5 U.S.C. 552(a)(4)(A) and 553; 31 U.S.C. 9701; and 49 U.S.C. 721(a).

2. The effective date for 49 CFR 1002.2(f), fee item (61) is established as January 17, 1997.

3. In section 1002.2(f) fee items (56) and (60) are amended to read as follows:

1002.2 Filing fees

* * * * *

(f) * * *

Type of Proceeding	Fee
(56) A formal complaint alleging unlawful rates or practices of rail carriers, motor carriers of passengers or motor carriers of household goods:	
(i) A formal complaint filed under the coal rate guidelines)(Stand-Alone Cost Methodology) alleging unlawful rates and/or practices of rail carriers under 49 U.S.C. 10704(c)(1) except a complaint filed by a small shipper . .	\$23,300.
(ii) A formal complaint involving rail maximum rates filed by a small shipper	\$1,000.
(iii) All other formal complaints	\$2,300.
* * * * *	
(60) Labor arbitration proceedings	\$150.