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SERVICE DATE - LATE RELEASE FEBRUARY 23, 2000

SURFACE TRANSPORTATION BOARD

DECISION

STB Ex Parte No. 627

MARKET DOMINANCE DETERMINATIONS--PRODUCT
AND GEOGRAPHIC COMPETITION

Decided: February 22, 2000

Petitioner, the United Transportation Union-Illinois Legislative Board (Petitioner or UTU-IL), has asked us to stay, pending judicial review, our decision not to return to it an improperly assessed \$150 filing fee that we applied to offset amounts that UTU-IL owes the Board. We deny the request for stay.

BACKGROUND

In decisions served December 21, 1998, and July 2, 1999, we determined that the market dominance phase of rate 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 UTU-IL requesting that we either vacate the procedural requirement that all pleadings in this case be submitted on diskette or, alternatively, waive the diskette requirement for rail employees and their organizations. In a decision served January 24, 2000, we determined that there was no basis for concluding that the submission of a diskette was an onerous requirement for UTU-IL, and we denied the petition for reconsideration.

In connection with the filing of its petition for reconsideration, UTU-IL was assessed a filing fee of \$150. UTU-IL appealed the imposition of that fee to the Secretary of the Board, and it paid an additional \$150 fee to lodge the appeal. In our January 24th decision, we found that imposition of a fee in a rulemaking proceeding was inappropriate. Accordingly, we reversed the fee for filing the petition for reconsideration. We did not, however, return the funds to counsel for UTU-IL, but instead retained them as an offset to unpaid court costs owed by UTU-IL to the Board.¹ On

¹ The court costs (totaling \$333.37) stemmed from decisions in four recent court of appeals cases: D.C. Circuit Nos. 97-1027 (costs awarded Mar. 12, 1998), 97-1038 and 97-1057 (costs awarded Jan. 2, 1998), and Seventh Circuit No. 94-3412 (costs awarded Sept. 28, 1999). UTU-IL has declined payment despite repeated requests for the payment of court-awarded costs.

February 14, 2000, UTU-IL filed a petition to stay, pending judicial review,² the effect of our decision applying the \$150 fee as an offset to costs owed the Board.³

DISCUSSION AND CONCLUSIONS

In addressing a request for a stay pending judicial review, we must consider whether: (1) the petitioner is likely to prevail on the merits of the appeal; (2) the petitioner will be irreparably harmed in the absence of a stay; (3) issuance of a stay would substantially harm other parties; and (4) issuance of a stay would be in the public interest. Washington Metropolitan Area Transit Comm. v. Holiday Tours, Inc., 559 F.2d 841 (D.C. Cir. 1977); Virginia Petroleum Jobbers Ass'n v. FPC, 259 F.2d 921, 925 (D.C. Cir. 1958); Hilton v. Braunskill, 481 U.S. 770 (1986). We find that UTU-IL has failed to satisfy the criteria for a stay.

1. The Merits. Petitioner's arguments on the merits are (1) that the courts should not have awarded costs to the Board under Rule 39 of the Federal Rules of Appellate Procedures; (2) that the Board is not entitled to receive the costs awarded to it by the courts because of an asserted longstanding arrangement or agency practice not to seek court costs from UTU-IL; and (3) that the Board is not entitled to exercise an administrative offset because it failed to follow the appropriate procedures for doing so.

We find no support for Petitioner's arguments. Petitioner asserts that costs were not awarded in the specially constituted three-judge district courts that reviewed the decisions of our predecessor, the Interstate Commerce Commission (ICC), prior to 1975,⁴ and thus that the courts of appeals may not award costs in cases involving review of our decisions. This argument is without merit, but in any event, Petitioner failed to present it to the courts or otherwise object to the awards in the cases where the costs at issue here were awarded. We should note that costs are routinely awarded by the courts of appeals in cases involving review of our decisions, and are routinely remitted by parties other than this Petitioner.

² UTU-IL has sought judicial review of our requirement in this proceeding that all pleadings be filed on diskette and our retention of the filing fees assessed UTU-IL as an offset to unpaid court costs. United Transp. Union-III. Legis. Bd. v. STB, No. 99-1366 (D.C. Cir. filed Aug. 31, 1999) and United Transp. Union-III. Legis. Bd. v. STB, No. 00-1047 (D.C. Cir. filed Feb. 14, 2000).

³ Our prior decision overlooked the second fee that was assessed. Here, we reverse the second \$150 fee as well, but again offset it against the amounts owed to us. In this decision, we treat the stay request as also extending to the offset of the second fee.

⁴ Those courts were usually composed of a Circuit court judge and two District court judges under former 49 U.S.C. 1336, 2284 (1974). In March 1975, the amended Hobbs Act, 28 U.S.C. 2341 et seq., transferred jurisdiction to review nearly all ICC (and now Board) decisions to the courts of appeals.

Petitioner alleges an agreement not to seek court costs against it, but it has provided no evidence of any such agreement. To the contrary, as the correspondence submitted by the Petitioner reflects, the Board's General Counsel has made repeated requests for remittance of court costs. Moreover, even if, as Petitioner suggests, the ICC had a practice of not insisting upon payment of such costs, the Board is entitled to change any such practice and collect all monies to which it is entitled. Finally, Petitioner has not pointed to any specific procedural requirement for an administrative offset that has not been met here, nor are we aware of any procedural deficiency that would preclude us from applying the offsets here.

2. Harm to the Parties. Petitioner has not shown that it will suffer irreparable harm absent a stay. Petitioner merely asserts that injury will occur through the "time and expense of litigation"⁵ if the Board commences action to collect the awards. We are not sure what UTU-IL means by this statement -- at this point, all we have done is offset money that we owe Petitioner against money that Petitioner owes us -- but in any event, litigation costs are not considered to constitute irreparable harm. United States v. Western Elec. Co., 777 F.2d 23, 30 (D.C. Cir. 1985). And if UTU-IL's claim that it does not owe court-awarded costs were to prevail on judicial review, we would promptly refund the filing fees.

On the other hand, should Petitioner not prevail on judicial review (as we expect), we have no assurance that in the absence of an offset UTU-IL would remit the court-awarded costs. Indeed, UTU-IL has steadfastly refused to obey the court orders to pay costs in the past and has shown no inclination to pay them in the future.

3. The Public Interest. The Board is a taxpayer-funded agency, and we have an obligation to minimize the costs to the taxpayer and collect costs to which the agency is entitled. Thus, a stay in this situation, and a return of the \$300 to a party that, thus far, has refused to pay court-awarded fees could harm the Board and would be contrary to the public interest.

For these reasons, the petition for stay will be denied.

It is ordered:

1. UTU-IL's petition for stay is denied.
2. The assessment of a \$150 fee for appealing the assessment of an earlier fee is reversed but retained as an offset to unpaid court costs owed by UTU-IL to the Board.
3. This decision is effective on its service date.

⁵ UTU-IL Pet. at 6.

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

Vernon A. Williams
Secretary