

SURFACE TRANSPORTATION BOARD

DECISION

STB Ex Parte No. 638

PROCEDURES TO EXPEDITE RESOLUTION OF RATE CHALLENGES TO BE  
CONSIDERED UNDER THE STAND-ALONE COST METHODOLOGY

Decided: July 30, 2003

In a decision in this proceeding served on June 6, 2003 (June decision), the Board, among other rulings, denied requests to allow a 3-day delay after the filing of the “Highly Confidential” version before the filing of the public version of submissions in stand-alone cost (SAC) cases. On June 26, 2003, The Burlington Northern and Santa Fe Railway Company (BNSF) filed a petition for reconsideration of this denial. On July 16, 2003, the Western Coal Traffic League (WCTL) and Otter Tail Power Company (Otter Tail) filed replies in support of BNSF’s petition.<sup>1</sup> For the reasons discussed below, the Board denies the petition.<sup>2</sup>

BACKGROUND

In an earlier decision in this proceeding served on April 3, 2003, the Board found (slip op. at 9-10) that the parties’ prevailing practice in SAC rail rate proceedings of filing virtually their entire case under seal, without filing anything in the public docket, was “contrary to [Board] regulations, [the Board’s] practice in other types of proceedings, and the spirit of open government.” (Footnotes omitted.) The Board stated that, in the future, parties to such proceedings must file a public version simultaneously with any filing designated “Highly Confidential” (or “Confidential”). The Board also

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<sup>1</sup> BNSF, WCTL and Otter Tail will be referred to collectively here as petitioners.

<sup>2</sup> On July 17, 2003, John D. Fitzgerald filed a letter objecting to the collection of a \$150 filing fee upon BNSF for its petition for reconsideration. Mr. Fitzgerald is correct that the Board has not, in the past, 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, and BNSF will receive a refund.

found (*id.* at 9) that parties must prepare for service on their opponent a partially redacted version suitable for review by their opponent's in-house personnel.

On April 25, 2003, the Board invited parties in pending rail rate cases to propose modifications to the protective orders governing their cases, to comply with the requirement of preparing a version suitable for review by an opponent's in-house personnel. The parties proposed various other modifications as well, including, as pertinent here, a 3-day interval between the filing of their "Highly Confidential" and public versions. In the June decision, the Board denied the requests for a 3-day delay, stating (*slip op.* at 5):

The timing of public filings is determined by the Board's regulations, and is intended to benefit the broader public. Thus, it is not an appropriate matter for negotiation or waiver by the parties in a protective order; public versions must be filed simultaneously with any Highly Confidential (or Confidential) Version in these cases.

Petitioners seek amendment of the Board's regulations to permit a 3-day delay after the filing of the "Highly Confidential" version before the public version is due. They argue that both the public interest, and the private interest in protection of commercially sensitive information, would be best served by such a delay. Specifically, they argue that a delay would reduce the risk of disputes over disclosure of information designated "Highly Confidential" because it would allow the parties to discuss proposed redactions; and that simultaneous filings increase the risks of (i) inadvertent disclosure of information designated "Highly Confidential" and (ii) over-redaction to protect against inadvertent disclosure or dispute between the parties. They maintain that there is no significant public interest in immediate access to SAC filings; that a delay would not unduly delay the public's review; and that the need for protection against inadvertent disclosure outweighs the public interest in immediate access to SAC filings. Finally, they note that two other federal agencies permit such delays.

## DISCUSSION AND CONCLUSIONS

As the Board stated in its April 3 and June decisions, public filings are intended to benefit the broader public interest and foster the spirit of open government. When parties such as those to SAC cases avail themselves of the Board's regulatory process, they must be prepared to conform to that process, including the requirement of simultaneously filing a suitably redacted public version of their submissions. Moreover, the petitioners have not shown any new evidence, changed circumstances, or material error that would cause the Board to depart from the June decision.

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

It is ordered:

1. The petition for reconsideration is denied.
2. This decision is effective on the service date.

By the Board, Chairman Nober.

Vernon A. Williams  
Secretary