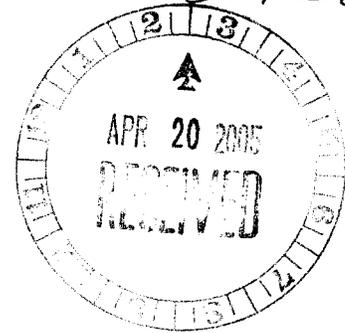


BEFORE THE
SURFACE TRANSPORTATION BOARD



Ex Parte No. 657

RAIL RATE CHALLENGES UNDER THE STAND-ALONE COST METHODOLOGY

Written Testimony

submitted by

THE NATIONAL INDUSTRIAL TRANSPORTATION LEAGUE

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Dated: April 20, 2005

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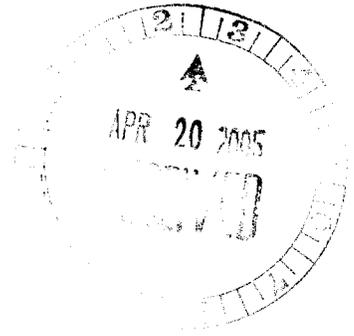
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In a Notice of Public Hearing issued by the Board on February 16, 2005, the Board announced that it would hold a hearing to provide a forum for the expression of views by rail shippers, railroads and other interested persons regarding rail rate challenges under the Stand-Alone Cost Methodology ("SAC") used by the Board in evaluating reasonableness in large rate cases. This Written Testimony is submitted by The National Industrial Transportation League ("League") in response to the Board's Notice.

One of the primary statutory responsibilities of the Board is to ensure "reasonable" rates for captive shippers, and the Board is the sole forum if a captive shipper believes that its rate is unreasonable. As the Board has stated, all parties to a case, both shippers and railroads, have a right to have the case heard in a fair, economical and expeditious manner.

Yet, the Board's procedures and standards for adjudicating large rate cases have -- because of their cost, complexity, and length -- evolved to a point of practical irrelevance. A large case litigation process that costs a shipper complainant well over \$3 million (and rising), extends three to four years (or more), and results in a 700,000 page record that can be understood only by a small cadre of lawyers and consultants for an extremely uncertain result, is useless to



the vast majority of the League's members and indeed to the vast majority of all shippers. Moreover, the League sees no possibility of a reformation of these procedures that would be fundamental enough to be of any use for the very large majority of shippers over any realistic time period.

The Board has publicly stated as its "top priority" the need to develop a more meaningful process for deciding small rate cases. The Board has received three rounds of written comment and testimony on the topic of small case standards and procedures since April 2003. Despite its stated importance, the Board has issued no proposal for rulemaking on small case procedures, and even if such a process were begun immediately, reform of the small case process would likely take at least another year. But now, the Board appears to be reorienting its priorities toward some undefined review of large rate cases, instead of focusing its attention on its stated top priority.

The League is opposed to any diversion of the Board's resources to a review of large rate case procedures until the Board initiates and completes a review and reform of the Board's procedures for small rate cases. Therefore, the Board should not proceed any further with this proceeding.

I. THE BOARD'S LARGE CASE PROCEDURES ARE IRRELEVANT FOR VIRTUALLY ALL SHIPPERS

The Board's SAC case procedures are, because of their cost, length, and complexity, are irrelevant and useless for virtually all shippers. Indeed, the Board itself has come to this conclusion, as it has testified to Congress and as Board members have discussed with the public.

In testimony to the Subcommittee on Railroads of the House Committee on Transportation and Infrastructure, dated March 31, 2004 ("2004 Testimony"), the Board noted that a Stand Alone Cost case "can cost as much as \$3 million to prosecute, \$5 million to defend,

and generate more than 700,000 pages of material.” 2004 Testimony, p. 6. In a contemporaneous speech to a conference attended by industry representatives, Chairman Nober indicated that the \$3 million and \$5 million figures could be even higher.¹ It appears that there is no real dispute that total litigation costs by all parties in a SAC case are at least \$8 million, and might well total more. The League believes that a litigation cost of three to four million dollars for a SAC complaint is large enough, by itself, to disqualify virtually all shippers from the practical use of SAC standards.

Moreover, SAC cases have almost all involved coal movements between a single mine or small geographically-contiguous group of mines to a single destination. Most non-coal shippers, however, ship from one or more origins to a large number of destinations, with each destination consuming a relatively small part of the cost of the total output of the origin facility. A SAC case for all these destinations would tend to be even more complex and expensive than a SAC case between a coal mine and a power plant, since the Stand-Alone Railroad (“SARR”) would need to be configured to replicate a wide and complex network.

At least as problematical as the cost of a SAC case is its length and complexity. A review of recent decisions and pending cases indicate that the minimum time for a SAC case from complaint to decision is two years, and is usually three to four years, or more. The League has previously testified to the Board that most non-coal shippers transport their product to a series of destinations that often changes after a few years, or even less in some cases. See, Ex Parte 586, *Rail Rate Challenges in Small Cases*, Written Testimony submitted by The National Industrial Transportation League, April 16, 2003, p.p. 4-5. Thus, a SAC process that takes three years or more simply does not move at the speed of business.

¹ Speech of Roger Nober, Chairman, Surface Transportation Board, Speech to National Industrial Transportation League Spring Forum, March 23, 2004, p. 5.

The Board has publicly recognized that its SAC procedures are in fact useful to only a very, very small portion of the possible universe of shippers. Chairman Nober, in a March 2004 speech, declared forthrightly: “If no small cases are brought, this means that in practice only about 75 coal shippers have a meaningful opportunity to challenge rail rates. This is unacceptable.”² The League agrees – indeed, the League believes that as SAC cases have increased in length, complexity and cost, the number of shippers with a “meaningful opportunity” to challenge rail rates may well be significantly less than 75 coal shippers. Whatever the exact number, it is clear that the percentage of all shippers that can practicably utilize SAC procedures is very, very small. In its March 2004 Testimony, the Board summarized the situation: “very few rail shippers feel the Board provides an effective regulatory forum in those instances when carriers and shippers cannot privately resolve their differences and the shipper has no effective recourse.” March 2004 Testimony, p. 18.

II. THE BOARD HAS RECOGNIZED THE NEED TO REFORM ITS SMALL CASE GUIDELINES

Recognizing that the agency’s large rate case procedures in reality provide an effective regulatory forum for very, very few shippers, the Board has, over the past two years, recognized that it must change and reform its small case procedures. Thus, in its March 2004 Testimony to the Congress, the Board indicated that its “top priority going forward” would be “to establish a more meaningful process for deciding small cases.” March 2004 Testimony, p. 4. In revising its small rate case procedures, the Board was “pursuing every alternative.” *Id.* at 11. Indeed, the Board indicated that its “next step” would be to improve the agency’s small case procedures, *id.* at 21. It declared:

² See footnote 1, p. 9.

The Board has to remain an effective regulatory backstop when a dispute over rates and service is formally brought before the Board. No cases have ever been brought under our small case guidelines, and we must work to change that.

March 2004 Testimony, p. 19. And, in a contemporaneous speech, Chairman Nober declared:

I feel strongly that shippers who feel they have been charged an unreasonable rate have a right to have that complaint heard by the Board in a fair, impartial, expeditious and economical manner. That is part of our fundamental charge from the Congress. That is not the case now, and our agency can and will offer some solutions to that problem.

These statements were both preceded and followed by significant activity. The Board took written testimony from the industry and held a hearing in April 2003 on the small rate case issue. As a result of the hearing, it sought additional comments from shippers, which were submitted in July 2003. The following year, the Board asked for and received further written comments in July 2004, and held a hearing in September 2004. In various written statements during this period, members of the Board noted that at least a partial solution to the problem involved the development of a "bright line" test for qualifying for small case activity, and the hiring of an Administrative Law Judge to speed the processing of cases. In testimony to the Congress in October 2003, it appeared that there was significant progress being made: "the Board is already working toward hiring an ALJ, and recently received approval to do so from the Office of Personnel Management. The hiring process will be completed once the Board's revised small case regulations are final." See, Testimony of Roger Nober, Chairman of the Surface Transportation Board, Senate Committee on Commerce, Science and Transportation Subcommittee on Surface Transportation and Merchant Marine, October 23, 2003, p. 10.

III. THE LEAGUE IS OPPOSED TO FURTHER PROCEEDINGS ON LARGE RATE CASE PROCEDURES UNTIL THE AGENCY INITIATES AND COMPLETES A REFORM OF SMALL CASE PROCEDURES

Despite the activity at the Board over the past two years related to a reform of small rate case procedures, and despite the fact that a full complement of Commissioners has been in place for over eight months and the Board has cleared away several months ago several large rate case decisions on reconsideration, there has been no activity to initiate promptly and pursue aggressively a reform of small rate case procedures. The inactivity is of great concern, but now that concern is multiplied by the Board's seeming desire to initiate a long and complex proceeding on various aspects of its Stand Alone Cost methodology. At the very time that the Board and its staff should be focusing on a reform of small rate case procedures, the Board seems to be losing its focus and diverting its limited staff resources.

The League well appreciates that the Board may believe that an effective reform of small rate procedures may be unexpectedly difficult. But unexpected difficulties will not be resolved by diverting the Board's resources, but by concentrating the Board's focus. Moreover, if it is true that the Board has been unable to deal with a reform of small rate case procedures because it has been dealing with a backlog of SAC cases, then it will be equally true that the Board will be unable to deal with a reform of small rate case procedures by diverting its attention to a long, complex proceeding on SAC.

In its March 2004 Testimony, the Board indicated that "many shippers do not have full confidence in the Board as a fair and impartial regulatory body." *Id.* at p. 16. The League believes that the Board's development of a fair, impartial, clear, expeditious and inexpensive process for adjudicating small rate cases would materially assist the Board in restoring that full confidence. The development of effective small case rules would help to make the Board a more meaningful entity for the shipping public.

Moreover, the League strongly believes that the development of a clear, effective and expeditious process for small cases would materially advance the prospects for private-sector solutions that the Board so clearly desires. If parties know the rules, and are convinced that a dispute will be heard expeditiously, then they will be more willing to negotiate within the boundaries set by the rules. Conversely, if the parties do not know the rules, then the prospects for a private-sector agreement diminish as parties become convinced that their position is justified.

Therefore, the League believes that the Board should not proceed any further with this proceeding, and instead immediately initiate and promptly complete a rulemaking on the reform of small rate case procedures, as requested in the Joint Written Testimony of numerous associations submitted to the Board on July 16, 2004, in Ex Parte No. 646.

Respectfully submitted,

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