

STB EX PARTE NO. 542

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

Decided August 2, 1996

The Board adopts its 1996 user fee update.

BY THE BOARD:

I. BACKGROUND OF THE PROCEEDING

The Surface Transportation Board (Board or STB) published a notice of proposed rulemaking (NPR) at 61 Fed. Reg. 15,208 (1996) in which it proposed its 1996 user fee update. In the NPR, the Board proposed to: (1) revise 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) modify selected fees to reflect new cost study data; (3) establish new fees for services and activities that had not been previously included in the Board's user fee schedule; and (4) remove the caps on various fee items. Comments on the proposal were received from 128 companies, organizations, and individuals. A listing of those who submitted comments and the fees on which they commented is set forth in Appendix A to this decision.

II. USER FEE UPDATE PROCESS

Based on comments received in this proceeding, there appears to be confusion about the Board's update process and how the fee increases proposed here were calculated. Some commenters apparently believe that this proposal

was motivated solely by political considerations relating to future funding for the Board. Some commenters assume that this proposal was only the result of the Office of Management and Budget's (OMB) proposal that the Board be totally user fee funded in Fiscal Year (FY) 1997. Other commenters contend that the fee levels were randomly chosen to achieve an OMB or Congressionally mandated revenue goal.

In *Regulations Governing Fees for Services*, 1 I.C.C.2d 61 (1984) (*1984 Fee Decision*), the Interstate Commerce Commission (Commission or ICC) created the user fee schedule and regulations that serve as the basis for the Board's current user fee program. Since 1985, the Commission has updated its user fee schedule at least once a year, as required by the regulations at 49 CFR 1002.3, which was initially adopted in the *1984 Fee Decision* and subsequently modified in *Regulations Governing Fees for Service--1994 Update*, 10 I.C.C.2d 194 (1994). While the Commission generally issued its annual user fee update in August so that new fees would take effect in October, the schedule for issuance has often varied. Indeed, the Commission's last update was issued in *Regulations Governing Fees For Service et al.*, 10 I.C.C.2d 464 (1994).¹ Updates have varied in terms of degree of impact on fee amounts.

This 1996 User Fee Update proceeding was initiated so that the Board would be in compliance with its regulation in 49 CFR 1002.3 that requires fees to be updated at least once annually. The review and updating of user fees is an on-going process. The Board's staff conduct cost studies of the various existing fee items and new activities throughout the year. Because the level of activity for each fee item varies, individual cost studies often continue over a period of years. For example, the cost study data relied upon to propose new fees for such fee items as complaint and declaratory order proceedings included cases that were decided as far back as 1993. When sufficient data are collected, proposals are made in the annual user fee update to revise the costing for

¹ The only exception to this pattern of annual updates was last year, during which the future of the ICC and its functions was debated and remained uncertain until the very end of the year, when the ICC Termination Act of 1995 (ICTTA) was signed into law on December 29, 1996. Because of this uncertainty, it was decided that the Commission would not perform its usual annual update in deference to the Congressional debate.

existing fee items or to establish new fee items for activities not previously included in the Board's fee schedule.

Furthermore, as required by the Independent Offices Appropriation Act of 1952, 31 U.S.C. 9701 (IOAA), our proposed fees are based on the actual costs of providing a service. The fee levels that were proposed for each new or revised fee item were based on the cost studies that captured the direct labor costs for each individual fee item. These results were documented and discussed in the NPR along with an explanation of the application of the overhead factors contained in our costing formula. There was no attempt to adopt fees that would achieve some predetermined revenue goal or to artificially allocate fees among the various groups involved in STB proceedings.

III. COMMENTS ON INDIVIDUAL FEE ITEMS

Most of the 128 comments that were received individually addressed only one fee item. The proposed fee items that engendered the most comments in opposition related to trails use requests, formal complaints, and motor carrier undercharge proceedings. Appendix A to this decision lists the commentors and the fee items on which they commented. We will discuss the issues related to those fee items below in the order that the fee item appears in the Board's proposed 1996 user fee schedule. No comments were received on any of the fees that are not listed in Appendix A. Accordingly, the fees for those items are adopted without any further discussion.

Fee Item 11(iii) - Petitions for exemption under 49 U.S.C. 10502 (except construction petitions).

Lone Star Railroad, Inc., and its affiliated rail carriers (Lone Star Group) are the only commentors who filed in opposition to the increase of this proposed fee from \$3,000 to \$7,000. They contend that the proposed fee increase might deter non-carriers from entering the rail industry. This fee is capped in the existing schedule; the proposed increase for this fee item results from the proposed elimination of capped fees in the current schedule.

This type of petition is only one of several procedures that a non-carrier can use to acquire a line of railroad. In FY 1995, none of these petitions were filed, while 46 notices of exemption under 49 CFR 1150.31-1150.35 were filed. Most non-carriers are likely to continue to file notices of exemption to acquire rail lines, for which there will be a fee of \$1,000 in the 1996 user fee schedule that the Board is adopting by this decision. Consequently, the proposed fee increase for this item should not be a deterrent to non-carriers entering the rail industry. Therefore, we adopt the proposed increase to this fee item.

Fee Item 12 - Petitions for exemption under 49 U.S.C. 10502 involving construction of a rail line.

Joint commenters, the Rubber Manufacturers Association and the Society of Plastics Industry, Inc. (RMA-SPI), North Dakota Grain Dealers (North Dakota Grain), the National Grain and Feed Association (NGFA), and joint commenters, Western Coal Traffic League and the National Mining Association (Western Coal), filed comments opposing the proposed \$41,700 fee for petitions for exemption involving the construction of a rail line. RMA-SPI assert that the Board has failed to properly allocate the cost of such petitions between the public and purely private benefits for this activity because the construction of a new rail line promotes new competitive rail service, which RMA-SPI contend is an important statutory goal. North Dakota Grain maintains that the proposed fee would block economic development.

Under the IOAA, an agency is not required to deduct the costs of any incidental benefits that may flow to the public in general from the activity for which a fee is proposed. A railroad or non-carrier that files a petition for exemption to construct a rail line receives the direct economic benefits that flow from the establishment of the new rail line. Because the public benefit of increased competition which RMA-SPI references is an incidental benefit, the Board is not required to deduct the costs associated with such incidental benefit. See, *Miss. Power & Light v. NRC*, 601 F.2d 223, 230 (5th Cir. 1979) (*Miss. Power*) and *Cent. & Southern Motor Freight Tariff Ass'n v. United States*, 777 F.2d 722, 732 (D.C. Cir. 1985) (*Central & Southern*). Arguably, every filing before the Board has incidental public benefits; the purpose behind the IOAA, which is to ensure that agencies recover the specific costs of specific services

rendered to specific beneficiaries, clearly would be frustrated if incidental public benefits would be accounted for in this way.

Even though the costs of construction for a rail line are substantial, we do not agree with North Dakota Grain that our proposed fee of \$41,700 will be a significant deterrent to filing a petition for exemption involving the construction of a rail line. Significant financial resources are needed for a line construction project; it is likely that parties otherwise willing to undertake such a project, which could cost in excess of \$1 million per track mile, would not be deterred by a filing fee of \$41,700. If in an individual case, however, the filing fee would be an obstacle to constructing a needed rail line, the parties have the opportunity to seek a waiver of the filing fee under our regulation in 49 CFR 1002.2(e).

NGFA acknowledges that most of the regulatory attention in construction cases involves environmental matters. NGFA, however, asserts that the Board is relieved of a substantial part of its costs for the environmental analysis in these cases because the applicant is required to pay for an environmental consultant, who under direction of the Board analyzes environmental issues and reports to the Board. Moreover, NGFA asserts that the cost of an environmental consultant ranges from \$35,000 to \$75,000 and that amount added to the Board's proposed fee of \$41,700 may discourage many construction projects. In this regard, RMA-SPI urge the Board to adopt a two-tier fee for these two types of proceedings. They recommend that the proposed fee be adopted for those cases in which a third-party consultant is not used in the environmental review process and that a lower fee be adopted for those proceedings in which the railroad pays for a third-party consultant to prepare the environmental assessment.

The commentors are correct that significant environmental work is done in most of these proceedings by third-party consultants that are paid by the railroad or party seeking to construct the rail line. The Board's analysis of cost for environmental work in these proceedings reflects the staff time required to direct and review the activities and work product of the consultant. If the environmental consultants were not involved in these cases, the Board's environmental review cost would be even higher, resulting in an even higher fee. Accordingly, we adopt the \$41,700 fee for these types of proceedings, as we proposed in our NPR.

Moreover, as explained in our NPR, the Board's proposed fee of \$41,700 for a petition for exemption involving construction of a rail line was based on the labor cost attributable to the environmental phase of the proceeding and the legal review of the petition performed by the Office of Proceedings. At least the same amount of staff time would be expended by the Board in the environmental and legal review of a construction application. Maintaining the existing fee of \$4,000 for a construction application might force parties to file the more complex construction application instead of the streamlined petition for exemption because of the significant difference in the fees for those proceedings. Therefore, we believe that a construction application should be deleted from Fee Item 11 and included in Fee Item 12 so that same fee will be assessed for a construction application and a petition for exemption involving construction of a rail line. Our action here will eliminate any potential barriers to filing a petition for exemption involving construction of a rail line. We will modify our final fee schedule accordingly.

Fee Item 13 - Feeder line development application.

NGFA, which opposes the increased fee of \$12,800 for this type of proceeding, contends that these proceedings are designed either to save rail properties for public use in lieu of abandonment or to place rail properties in the hands of a carrier that will provide more responsive service than the incumbent. NGFA asserts that these proceedings serve a public purpose rather than a private interest, even though they result in operations being conducted by a private party. It argues that the fees for these proceedings should remain capped.

As NGFA correctly observes, feeder line application proceedings involve attempts to maintain service on marginal rail lines that are being considered for abandonment, or to improve poor rail service through transfer of the line to a new carrier. The lines involved in such proceedings are primarily located in rural areas with limited access to rail service. Because efforts to continue or improve rail service in rural areas should be encouraged, we believe that the fee for these activities should not be increased to the fully allocated cost level of \$12,800 proposed in our NPR. Therefore, we will set the fee for these activities at \$2,600, which is the lower of the two prior fees that applied to feeder line applications.

Fee Item 14(iii) - Petitions for exemption under 49 U.S.C. 10502 relating to 49 U.S.C. 10902.

The Lone Star Group opposes the \$3,700 fee for this proposed new fee item. It maintains that an existing Class II or Class III rail carrier should not have to pay more than a non-carrier for a petition for exemption to acquire a rail line. The Lone Star Group proposes that a more reasonable fee for this type of proceeding would be \$3,000.

The New Jersey Department of Transportation (NJDOT) is concerned that the Board's proposed fee of \$3,700 for this activity may be higher than the cost of some lines that shortline railroads purchase. It asserts that Consolidated Rail Corporation has been known to sell a rail line for \$1.00 to relieve itself of the capital and maintenance costs associated with the rail line.

In addition, NJDOT contends that the cost of seeking an exemption from the Board's fee schedule, which it assumes has a fee of \$5,200, would be a hardship for shortline railroads. NJDOT asserts that most shortline railroads have a cash flow problem, which would make the Board's proposed fees, such as this fee item, a hardship. It recommends that the Board consider either eliminating the requirements that are considered in exemption proceedings involving shortline railroads or reducing the fees for shortlines so that the fees would not be a hardship.

This proposed new fee item was developed because the ICCTA established a new statutory provision in 49 U.S.C. 10902 under which Class II and Class III railroads may acquire new rail lines or extend existing lines by purchasing the rail lines, with limited labor protection requirements. Because the Board has no specific cost data for this new type of proceeding, the proposed user fee was based on the cost for Fee Item 41(vi), Petition for exemption involving a carrier or carriers purchase, lease or contract to operate the properties of another, or to acquire control of another by purchase of stock or other, which would have applied to this type of proceeding if the ICCTA had not been adopted. Thus, the proposed fee, which is less than the \$7,000 fee set forth in Fee Item 11(iii) that would apply to petitions for exemption involving acquisition of rail lines by a non-carrier, seems reasonable.

The petition for exemption procedure involved here is only one of several procedures that a shortline railroad can use to acquire a line of railroad. Many

shortline railroads will be able to use that notice of exemption procedure that the Board adopted in *Class Exem. For Acq. or Oper. Under 49 U.S.C. 10902*, 1 S.T.B. 95 (1996), and published at 61 Fed. Reg. 32,355 (1996), (*Class Exemption*). The fee for that procedure is \$950.

NJDOT assumes incorrectly that a petition for exemption with a filing fee of \$5,200 must be filed to obtain a fee waiver. The Board's regulations in 49 CFR 1002.2(e) only require that a request for fee waiver be filed with the Secretary, and there is no fee for such a request. Therefore, if in a particular situation, a shortline railroad believes that a Board filing fee would be a hardship, the railroad can request a fee waiver. Accordingly, we adopt the proposed fee of \$3,700 for this item.²

Fee Item 15 - Notice of modified certificate of public convenience and necessity.

Only one commenter, the Lone Star Group, opposes the proposed new fee for modified certificates of public convenience and necessity. The Lone Star Group's argument against the proposed fee is that the fee would discourage a short line railroad's acquisition of rail lines. Our proposed fee of \$950 for this item cannot be significant enough to serve as a barrier to a short line railroad's acquisition of a rail line given the fact that this type of proceeding, which involves a carrier's request to operate a qualified State-owned rail line, is rarely pursued. Therefore, we adopt this proposed new fee item, set at \$950.

Fee Item 24 - Request for waiver of a filing requirement for an abandonment application proceeding.

The Lone Star Group, the only commenter that opposes this proposed fee, contends that no fee should be charged for such a routine request. It also states

² In *Class Exemption*, the Board adopted Fee Item 36, Notice of exemption under 49 CFR 1150.41-1150.45. To be consistent with the revisions that are being made to the fee schedule in this proceeding, that fee item will be renumbered as Fee Item 14(ii) and the proposed fee item discussed above will be renumbered as Fee Item 14(iii).

that the need to file such requests is not remote because two of the carriers in its group recently filed such requests.

These requests are not routine because they are not filed in each and every abandonment application proceeding. Staff must determine, on an individual basis, whether the involved data are necessary in that particular abandonment application and then whether a waiver of the information requirements is appropriate. Moreover, the requestor can obtain a substantial benefit if a waiver is granted because it can be relieved of the expenses related to compiling and filing the involved data in abandonment applications. Therefore, we adopt our proposed fee of \$1,000 for such requests.

Fee Item 25 - An offer of financial assistance filed under 49 U.S.C. 10904, and
Fee Item 26 - Request to set terms and conditions for the sale of or subsidy for a rail line.

The Iowa Department of Transportation (Iowa DOT) is concerned about the proposed \$900 filing fee for offers of financial assistance (OFA) and the proposed fee of \$12,700 for setting terms and conditions for the sale of or subsidy for a rail line. Iowa DOT maintains that these new fees will have a significantly detrimental financial impact on many shippers and short line railroads wishing to participate in the abandonment process.

The United States Department of Agriculture, Agricultural Marketing Service (USDA) also opposes the new fees for a request to set terms and conditions for the sale of or subsidy for a branch line. USDA contends that these fees are prohibitive for all but the largest and most well-financed businesses who ship by rail. In addition, USDA states that small to medium agricultural rail shippers that are often located in rural, economically depressed regions and communities cannot afford to pay such "exorbitant" fees.

We believe that our proposed fees for OFAs and requests to set terms and conditions are reasonable. In the first instance, the Board must determine if the OFA is "bona fide." A \$900 filing fee should not be a deterrent to filing such a request. A request to set terms and conditions is *only* filed if the parties cannot agree to the conditions for the transaction and purchase price or subsidy amount for the involved rail line -- many OFA transactions are finalized without such

requests. The Board serves as an expert arbitrator for the parties to facilitate the transaction only when they cannot agree. The proposed fee of \$12,700 reflects the work entailed in handling such requests, because a substantial financial analysis is performed to determine the appropriate terms and conditions for the involved transaction. Therefore, we adopt the fees that we proposed in the NPR for these activities.

Fee Item 27 - Trails use requests.

Thirty-nine commenters objected to the proposed new fee of \$650 for a trails use request. Those commenters included the United States Representative David R. Obey, the Rails To Trails Conservancy (RTC), the Department of Interior's National Park Service, various state and city agencies involved in the establishment of trails, individual trail groups and individuals interested in establishing or maintaining trails.

The comments of RTC are representative of the many comments that we received concerning the fee for trails use requests.³ RTC's primary argument is that the proposed fee for a trails use request is not authorized by the IOAA. RTC asserts that Budget Circular No. A-25, which interprets the IOAA, states that "when the identification of the ultimate beneficiary is obscure and the service can be primarily considered as benefitting broadly the general public" no charge should be assessed. Therefore, RTC asserts that the trails use requestor does not receive the benefits of the postponement of the effective date of an abandonment and an opportunity to negotiate with the railroad that were described in the Board's NPR. RTC alleges that the trails use requestor does not receive any benefit from its request unless the railroad consents to the issuance of a railbanking order, and that even if the railroad consents to railbanking, the requestor may be totally ignored by the railroad. Consequently, RTC argues that

³ In its comments, RTC asked that the filing date for comments in this proceeding be extended until May 31, 1996, so that it could file supplemental comments. Because of the strict timetable for completing this proceeding, it was not possible to formally extend the due date for comments in this proceeding. However, numerous comments, including many for commenters concerned about the proposed fee for trails use, were submitted after the May 6, 1996 deadline and those comments were accepted for filing. RTC did not submit any additional comments, and its request will be denied because it is now moot.

the "beneficiary" of a trails condition request is "obscure," and that therefore, under the IOAA no fee should be assessed for that activity.

Moreover, RTC maintains that the Board's reasoning regarding the benefit received by a trails use requestor is flawed because the issuance of a trails use condition only prevents the application of state or local laws treating the line as abandoned for the duration of the trails use condition. RTC contends that the true beneficiaries of the trails use condition are the railroads that retain that ability to re-acquire the corridor for possible rail service and the public that is able to enjoy the preserved corridor for public use and possible future rail use. Therefore, RTC asserts that because the primary beneficiary of the trails use request is the general public, no fee should be charged for such a request.

In addition, RTC contends that the Board and its predecessor, the ICC, have long maintained that the agency's role in issuing railbanking orders is wholly "ministerial," because the agency has no discretion and must act when a railbanking request is filed and the railroad gives its consent. RTC asserts that because the Board's action in trails use requests is only ministerial, acting on the request does not impose any additional burdens or costs on the Board. Moreover, RTC asserts that the proposed fee will generate more paperwork and administrative burdens for the STB because many private trail groups will file requests for a discretionary fee waiver. In addition, RTC contends that more trails requests potentially could be considered late filed because of the length of time that is usually taken to act on fee waiver requests.

RTC also argues that the proposed fee is too high because the Board failed to calculate the cost savings that occur when multiple requests are filed for the same line or when the railroad and trails use requestor file a joint request at the same time the abandonment is filed. Moreover, RTC alleges that the proposed fee does not take into account the additional costs that result from the participation of organizations, such as the National Association of Revisionary Property Owners, in proceedings involving trails use. Consequently, RTC urges the Board to establish a fee for requests seeking to oppose or revoke a trails use condition because such a request requires significant staff time and parties that file such requests benefit directly from such a service.

The views of many of the commentators opposed to the imposition of a fee for trails use requests also are expressed by former Congressman John F.

Seiberling of Akron, OH. He was the Chairman of the House Interior Committee's National Parks and Public Lands Subcommittee when it reported the Trails Act Amendments, and he was the Floor Manager for that bill when the House considered it. He states that Congress never intended any sort of fee to be charged for the implementation of section 8(d) of the Trails Act. He argues that the intent of the Trails Act was to preserve rail corridors through interim trails use for railbanking purposes to ensure that trails were to be generally available to all members of the public. He maintains that Congress intended that the rail corridors were to be treated as a national asset, worthy of preservation. He urges the Board to eliminate the fee for trails use requests.

Many of the commenters opposing the imposition of a fee for trails use requests maintain that the cost of such a request is already covered by the fee that the railroad pays to abandon a rail line. In addition, they argue that imposition of a fee for a trails use request will impede the establishment of trails on abandoned rail rights-of-way. They contend that most small trails use groups have limited funding and would have difficulty raising the funds for the filing fee in the short time period during which trails use requests can be filed. Several commenters, including the Texas Parks and Wildlife Department, suggest that if a fee must be charged for trails use requests, it should be lowered to \$50.

The commenters' contention that the fees paid by the railroads for abandonment proceedings include the cost of processing trails use requests is inaccurate. Under current practice, most trails use requests are handled in subsequent separate decisions that are promulgated after the abandonment decision or notice is issued. The fees for various types of abandonment proceedings only include the costs associated with the preparation and issuance of the initial abandonment decision (or notice of exemption decision) and do not cover the issuance of any subsequent decisions. Because trails use requests are not filed in every abandonment proceeding, it would not be appropriate to include the cost for handling a trails use request in the cost of processing an abandonment. Furthermore, in most abandonment proceedings, only one trails use request is filed and the requests are not frequently made jointly by the railroad and the trails requestors. Therefore, our cost study accurately reflects the average costs of acting on such requests.

Moreover, RTC is incorrect in its statement that the issuance of a trails use request does not involve additional expense for the Board. Initially the request must be reviewed to determine if the requestor has satisfied the regulatory requirements for such filings that are set forth in 49 CFR 1152.29. Often STB staff has to determine the railroad's position on the request. Finally, a decision must be written and issued by the Board. Our cost study captured data for 20 cases and produced the average direct labor cost for this activity. We conclude that our cost study for this activity reflects the Board's cost for acting on trails use requests.

We do not agree with the contentions of the RTC and the other parties that the true identifiable beneficiary of a trails use request is the general public. The direct beneficiary of the service that the Board performs is the trails use requestor, who, as we stated in the NPR, receives that opportunity to negotiate with the railroad to acquire the rail right-of-way and to delay the abandonment process during the negotiation period.⁴ The requestor also may receive a fee simple or easement interest in valuable property from the railroad. The benefits that flow to some members of the public in a local area, who may use the right-of-way for recreational purposes, or to the railroad, which has the option of reinstituting rail service, are incidental. Those benefits arise only as a consequence of the requestor's action. Therefore, it is appropriate to assess a fee for this activity. Furthermore, as discussed previously, incidental public benefits need not be reflected in the fee by way of reduction. See, *Miss. Power*, 601 F.2d at 230 and *Central & Southern*, 777 F.2d at 732.

We have taken note of the commenters' concerns that the \$650 fee may be an impediment to trail groups filing trails use requests. Therefore, we are reducing the fee for trails use requests to \$150. The reduced fee should not be

⁴ RTC also argues that no fees should be charged because a trails use request is denied if the railroad does not agree to negotiate with the trails use requestor. It is appropriate to charge a fee for these requests whether or not they are later denied. The Board's rules in 49 CFR 1002.2(c) provide that no fees are refunded if the proceeding is denied, dismissed, or withdrawn. Moreover, in such proceedings the Board has expended time and resources on the matter, and the service is clearly attributable to the party requesting action on the trails use request. See, *New England Power Co. v. NRC*, 683 F.2d 12, 14 (1st Cir. 1982)

a burden on trails requestors because it represents only a small portion of the funds that a trails use group must obtain to acquire the rail right-of-way for the trail.

However, in the event that this fee is an obstacle for a particular trails use requestor, the requestor may ask for waiver of the fee under our procedures at 49 CFR 1002.2(e). Such requests will be handled as expeditiously as possible. We also note that under our fee waiver regulations in 49 CFR 1002.2(e)(1) no fee is required if the trails use request is filed by a state, county, or other governmental entity.

Fee Item 42 - Notice of a joint project involving the relocation of a line of railroad under 49 CFR 1180.2(d)(5).

The Lone Star Group, the only party to oppose this proposed new fee item, contends that the proposed \$1,300 fee will discourage short line railroad acquisition of rail lines. The transactions involved here are ones in which the parties have mutually agreed to relocate a rail line. These transactions generally would not involve a short line railroad's acquisition of a rail line and thus there is no merit to the argument that this fee will impede such transactions. We adopt our proposed fee of \$1,300 for this activity.

Fee Item 47 - National Rail Passenger Corporation (Amtrak) conveyance proceeding under 49 U.S.C. 562, and Fee Item 48 - Amtrak compensation proceeding filed under Section 402(a) of the Rail Passenger Service Act.

Amtrak opposes both of these proposed fees, which would apply only to Amtrak. Amtrak states that under the IOAA, agencies can charge fees only for services that produce a special private benefit to the recipient and cannot charge fees for services that can be primarily considered as benefiting broadly the general public. It is Amtrak's contention that any special benefits related to an Amtrak conveyance or compensation proceeding are conferred on the public rather than Amtrak. Moreover, Amtrak points out that under the statutory provisions that govern these proceedings (§ 402(a) and § 402(d) of the Rail Passenger Service Act), the Board may approve an application by Amtrak only if the Board finds that approval is "necessary" to carry out a statutory objective,

and that under § 402(d) the Board must also consider Amtrak's obligations to provide intercity rail passenger service.

In addition to the *National Railroad Passenger Corporation and Consolidated Rail Corporations--Application Under Section 402(a) of The Rail Passenger Service Act for an Order Fixing Just Compensation*, Finance Docket No. 32467 (ICC served January 19, 1996), which was relied on in the Board's NPR decision, Amtrak also references seven other § 402(a) compensation proceedings that have been handled by the Commission in prior years. Amtrak asserts that in all those proceedings and the proceedings referenced in the Board's decision, the Commission decided that Amtrak's applications were filed for a public purpose and found Amtrak's access to be necessary because such access would result in public benefits. Also, Amtrak notes that in many of those compensation proceedings Amtrak was required by Congress to conduct the involved operation to determine the feasibility of passenger service over the involved rail line. Moreover, Amtrak states that the *National Railroad Passenger Corporation and Consolidated Rail Corporation--Conveyance of the Boston and Maine Corporation Interests in The Connecticut River Line in Vermont and Maine*, 4 I.C.C.2d 761 (1988) (*Boston and Maine*) proceeding was filed because Congress directed Amtrak to restore rail passenger service between Springfield, MA, and Montreal, CD, through Vermont.

Amtrak argues that it receives no special benefits in these proceedings and in fact that the service involved in the *Boston and Maine* case was a money-losing operation. Also, Amtrak asserts that it only earns modest profits on special trains involved in the compensation cases, and that those profits are used to offset a small portion of the losses Amtrak incurs from the operation of its other intercity trains. See, *National Railroad Passenger Corporation--Application for Order Requiring the Bay Colony Railroad to Provide Service and Fixing Just and Reasonable Compensation and Liability*, Finance Docket No. 31473 (ICC served August 1, 1989) and *National Railroad Passenger Corporation--Section 402(a) of the Rail Passenger Service Act--Order to Require Service and Set Compensation Terms (Bay Colony Railroad)*, Finance Docket No. 31895 (ICC served March 9, 1992).

Finally, Amtrak asserts that assessment of these fees would make it prohibitively expensive for Amtrak to file applications that would reduce its need for federal subsidies, such as applications to operate special trains or to challenge excessive access charges sought by freight carriers. Moreover,

it maintains that in six of the nine cases which Amtrak filed § 402(a) applications since 1980, the proposed \$102,100 filing fee would have exceeded both the total additional revenues or cost savings that Amtrak realized from the Commission's approval of its application and the total compensation it paid to the involved railroad to operate the service. Because in most of its compensation cases the proposed fee exceeded the amount at stake, Amtrak argues that payment of the fee would merely result in a transfer of funds from one federally-subsidized entity, Amtrak, to another, the Board. Accordingly, Amtrak requests that the Board not impose either fee.

We are not persuaded by Amtrak that it does not receive any benefits as a result the Board's action in the these proceedings. Under the statutory provisions involved here the Board provides these services only to Amtrak. In conveyance proceedings Amtrak may receive a substantial benefit because it may acquire valuable rail properties as a result of our decision. In compensation proceedings the Board serves as a special arbitrator to determine whether Amtrak should have access to other rail lines and the compensation for Amtrak's use of the involved lines. Even though Amtrak is directed by Congress in some instances to file these proceedings, the services that we perform assist Amtrak in complying with these Congressional directives. The benefits that flow to the general public are again incidental to the benefits that the service produces for Amtrak. Therefore, it is appropriate to charge a fee for these activities, and it is not necessary to reduce the fee in consideration of public benefits that stem from these activities. *See, Miss. Power*, 601 F.2d at 230 and *Central & Southern*, 777 F.2d at 732.

We are aware, however, that Amtrak may not have ready access to the funds to pay the fees for these activities that were proposed in the NPR. In particular, because these proceedings do not occur frequently, Amtrak may not be able to project its needs for such funding in its annual budget submission. We do not want to preclude Amtrak from bringing such cases to the Board. Therefore, we are reducing the fee for these activities to \$150. Such a fee should not be a financial burden on Amtrak, and it will provide some minimal reimbursement to the Board for handling these cases.

Fee Item 56(i) - Formal complaints filed under the coal rate guidelines, and Fee Item 56(ii) - All other formal complaints.

We received 22 comments opposing our proposed fee of \$233,200 for formal complaints filed under the Board's coal rate guidelines and 26 comments opposing the \$23,100 fee for all other formal complaints. The commenters who were opposed to these fees were United States Senators Conrad Burns, Byron Dorgan, Ernest F. Hollings, John D. Rockefeller III, Max Baucus, Carl Levin, and Paul Wellstone; United States Representatives Dave Camp and Nick Smith; USDA; the State of Montana; and various state agencies, including the Public Service Commission of South Dakota and Iowa DOT. We also received comments in opposition from organizations such as the NGFA; Consumers United for Rail Equity (CURE); Western Coal; the Edison Electric Institute (EEI); and various smaller grain and farming associations, such as the Farmers Elevator Association of Minnesota, the Michigan Agri-Business Association, and Women Involved in Farm Economics. All these commenters argue that the STB's proposed fees for complaints are too high and in particular would preclude small shippers from pursuing rate complaints at the Board.

In their comments, the Senators state that the dramatic increases proposed for the complaint fees will make filings impossible for small shippers and consumers and effectively make the Board irrelevant in terms of providing shippers and consumers with a forum to seek relief, and they urge the Board to reject the proposed increases. In addition, they state that if there is a demonstrated need to increase the filing fee, the increases should be reasonable and not jeopardize the ability of shippers and consumers to file complaints with the Board.

CURE, which represents public power generators, rural electric cooperatives, investor-owned electric utilities and their national trade associations, presents its opposition to the proposed fee for formal complaints as representing the concerns of those who view themselves as captive shippers. CURE asserts that captive shippers have little choice: they either come before the Board to seek redress for what they consider to be unlawful conduct on the part of rail carriers or they accept their captivity and the existing service conditions and rates that follow.

CURE contends that the proposed fees for complaints will have a chilling effect on the rights of captive shippers to exercise a choice. Specifically, CURE

provides the following reasons for its objection to the proposed fees for complaints: (1) the decision to file a formal complaint under the coal rate guidelines already is a significant economic decision because of the substantial commitment of financial resources for attorneys and experts who prepare and prosecute the case; (2) the proposed fees add to this cost, particularly since the complainant must be prepared to pay the fee because it cannot be sure that the Board will exercise its authority to waive the fee; and (3) as the ability of the shipper to pursue a Board remedy of filing a complaint can have a beneficial impact for a captive shipper in its negotiation with a rail carrier, the proposed \$233,200 filing fee will diminish the importance of this remedy as a real option to pursue and thus have a negative impact on the negotiating position of a captive shipper with its railroad.

NGFA presents its comments on behalf of many of the grain and farming interests that oppose the Board's proposed complaint fees. NGFA maintains that these high fees have the potential to make regulatory recourse effectively unavailable in a great many instances where either the amount of the fee would outweigh the benefits obtainable or the party does not have sufficient resources to pay the fees. Moreover, NGFA contends that these exorbitant fees for such proceedings will only discourage recourse to the Board and ultimately will undermine the Board's existence.

In addition, NGFA contends that the proposed fees will have a negative impact because they will expand the scope of unlawful activities that can be conducted without fear of corrective action. NGFA asserts that under the ICCTA the Board has lost most of its power to correct, on its own motion, statutory violations by railroads because under 49 U.S.C § 11701 "the Board may begin an investigation under this part only on complaint" by a private party to determine if a rail carrier is in violation of the Act. NGFA maintains that if a shipper's monetary injury from an unlawful carrier act is \$20,000, the filing fee of \$23,100 would make a complaint by the shipper futile. NGFA urges the Board to continue to allow the complaint fees to be capped at levels that will not provide recourse-free zones for railroads.

Other commentators, such as EEI, question the Board's cost study for these fee items and the Board's costing methodology in general. To support its contentions, EEI presents the verified statement of Mr. Gerald Fauth, a cost

consultant, who submitted comments on various cost and user fee issues. We address Mr. Fauth's verified statement in Appendix B to this decision.

Most of the commenters do not believe that the Board's fee waiver procedures provide any protection for small shippers. In particular, NGFA and other commenters argue that a party considering recourse to the Board will not know whether a filing fee will be reduced or waived until after its complaint is filed and the fee is paid. They contend also that fee waivers are rarely granted. NGFA also disagrees with any suggestion that the Board follow a policy which turns each proceeding in which fees are contested into an evaluation of the complainant's net worth. NGFA's position is that fees should be fair and affordable to all in the first instance. The commenters also point out that the fee waiver process adds additional expense for a shipper because it will have to pay an attorney to file the waiver request. Several commenters propose that all Board fees be automatically waived for shippers. The State of Montana suggests that any shipper paying less than \$500,000 annually in transportation charges should be exempt from the proposed fees for complaints.

The American Bus Association (ABA) opposes the increased filing fee for formal complaints that are not filed under the coal rate guidelines. The ABA asserts that if the fee is raised to \$23,100, bus companies could not bring complaints involving the rates and practices of other bus carriers before the Board. It is the ABA's contention that such a fee increase would make the statutory protections for bus companies contained in the ICCTA meaningless.

Fees for complaints are appropriate under the IOAA because complaints involve the resolution of disputes between private parties. Even though the public may benefit from the resolution of a complaint, which for example might result in lower prices to consumers, these benefits are incidental. As previously discussed, fees do not have to be reduced as a result of incidental benefits that flow to the general public from the activity for which the fee is charged. *See, Miss. Power*, 601 F.2d at 230 and *Central & Southern*, 777 F.2d at 732. Therefore, a fee can be assessed for these activities.

The fee for all formal complaints has remained at \$1,000 since 1992. Since that time, the Commission has increased most other fees to the fully allocated cost levels or established a formula for gradually increasing fees over time to the

fully allocated cost levels. In the 1995 user fee update, the Commission deferred action on the complaint fee until cost studies for that activity were completed. Those new cost studies have been completed, and we believe that they accurately document the Board's actual costs to process complaint proceedings.⁵ Increases in our complaint fees are warranted at this time.

However, we are sympathetic to the concerns expressed by the commenters that the level of increases proposed for complaint fees in the NPR may impede the filing of complaints, particularly by smaller shippers, before the Board. Accordingly, we are persuaded that our fees for formal complaints should not be increased to the fully allocated cost levels at this time.

We have tentatively determined that to soften the impact of increased complaint fees, we should gradually increase the fee over a period of years, and apply the Commission's prior policy related to increasing fees by setting the formal complaint fees at 10% of the fully allocated cost for those activities and by increasing the fees annually by 10% of the fully allocated cost until the fully allocated cost level is achieved.⁶ Also, we will continue to conduct cost studies for all formal complaints to refine our costing and to develop other subcategories for complaint fees, if necessary. Accordingly, although the fees in the fee schedule for these items will remain at their current levels of \$1,000 for the time being, the fee for Item 56(i) for a formal complaint filed under the coal rate guidelines is tentatively set at \$23,300, and the fee for Item 56(ii) applicable to all other formal complaints is tentatively set at \$2,300.

We note that the fees that we are tentatively setting here represent only a small percentage of the monetary amount that shippers pay attorneys and expert witnesses to prepare and file such complaints with the Board. The shippers and other complainants accept those attorney and witness fees as part of their necessary business expenses. Our fee likewise should be viewed as an ordinary

⁵ As indicated previously, our discussion of the cost issues raised by EEI and its cost witness is contained in Appendix B.

⁶ Fee items 56(i) and 56(ii) are currently the subject of legislative debate. Therefore, the fees for these items are being set tentatively, but will not take effect at this time. The Board will issue a further decision addressing these items after the legislative debate is concluded. In the meantime, they will remain at \$1,000 each in the Board's fee schedule.

and necessary business expense. We should point out that the potential recovery involved in many of these complaint cases can be substantial, amounting to as much as several million dollars.

Finally, depending on the level at which the fees for complaints are ultimately set, the "loser pay" concept that some commentators suggest may have merit. After the legislative debate over the appropriate fees for complaints is concluded, we will consider instituting a separate notice of proposed rulemaking to explore the application of that concept in Board proceedings.

We find no justification to adopt a blanket fee waiver exempting all agricultural shippers from our filing fees, as some commentators have recommended. However, we remind the parties that if the fee would constitute a hardship in a particular case, the complainant can request relief under the Board's fee waiver procedures. Our fee waiver regulations, which are contained in 49 CFR 1002.2(e) procedures, are not as onerous as the parties portray them to be. Those regulations state that a written request should be made to the Board's Secretary at the time the proceeding is filed. The waiver can be requested on the grounds that either a waiver or a reduction of the fee is in the best interest of the public or the payment of the fee would impose an undue hardship on the requestor. 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.

Fee Item 57 - A complaint seeking or a petition requesting institution of an investigation seeking the prescription or division of joint rates, or charges. 49 U.S.C. 10705.

The Wisconsin Association of Manufacturers & Commerce, Inc., General Traffic Committee (Wisconsin Association) objects to this fee as well as the Board's other proposed complaint fees. The Wisconsin Association contends that the proposed fees will preclude shippers' access to relief. The current fee for this particular activity is \$4,700; we are only proposing a modest \$200 increase to this fee, based on the normal update process. We see no compelling reason not to adopt this increase. Accordingly, we adopt the NPR fee of \$4,900.

Fee Item 58(i) - A petition for declaratory order involving a dispute over an existing rate or practice, and Fee Item 58(ii) - All other petitions for declaratory order.

Eight commentors object to the proposed fee of \$5,000 for Fee Item 58(i) petitions for declaratory order involving an existing rate or practice, and the proposed fee of \$3,700 for all other petitions for declaratory order. Those commentors, such as CURE, EEI, and the Wisconsin Association, oppose the increase in these fees because they allege that the fees are too high and will prohibit shippers from filing petitions for declaratory order regarding the conduct of rail carriers. Joseph Szabo, on behalf of the United Transportation Union (UTU), Illinois Legislative Board asserts that the proposed fees are inconsistent with fees of other federal agencies such as the Federal Maritime Commission, which charges a fee of \$162 for declaratory orders. The commentors urge the Board to maintain the fees at the existing level.

We are concerned that our proposed fees for these petitions for declaratory order may limit shipper and consumer access to the Board's adjudicatory process. Therefore, to avoid any possible chilling effect, we are maintaining the fees for these items at the current levels of \$1,000 and \$1,400, respectively. However, we will continue to conduct cost studies for these activities, and we reserve the right to adjust these fees, if necessary, in future fee update proceedings.

Fee Item 60 - Labor arbitration proceedings.

Joseph Szabo and the Transportation Intermediaries Association (TIA) object to the new proposed fee of \$7,600 for labor arbitration proceedings. Mr. Szabo states that, even though the Illinois UTU unit that he represents has not participated in labor arbitration proceedings and is unlikely to do so in the future because such matters are handled by the General Committee of Adjustment within UTU, his unit has an interest in the proper administration of employee protective conditions under 49 U.S.C. 11326. He asserts that no separate fee should be charged for labor arbitration proceedings because such proceedings are part of rail consolidation or merger proceedings, for which there already is a substantial fee.

TIA, which represents brokers, freight forwarders, shipper agents and other transportation intermediaries, maintains that filing a labor arbitration review proceeding before that Board is nondiscretionary as a result of Commission precedent. TIA contends that the proposed \$7,600 fee for labor arbitration proceedings is unreasonable and will limit appeals.

Mr. Szabo's assumption that the fee paid in a rail merger proceeding covers the arbitration proceeding is incorrect. Even though the arbitration proceeding is assigned a sub-number under the merger's finance docket number, it is a separate proceeding, which is filed after the merger proceeding is decided. The costs for arbitration proceedings have never been included in the cost for a merger proceeding. In fact, some labor arbitration appeals result from line sales or lease transactions rather than from merger proceedings.

Neither the labor union representatives nor the railroads that normally file requests for arbitration review have objected to the proposed fee for this activity. We are not persuaded by the comments submitted by Mr. Szabo and TIA that the proposed fee will chill the filing of arbitration review proceedings with the Board. We believe that our proposed fee is reasonable and therefore adopt the proposed new fee of \$7,600 for such proceedings.

Fee Item 61 - Appeals to a Surface Transportation Board decision and petitions to revoke an exemption pursuant to 49 U.S.C. 10502(d).

NGFA, one of the five parties that commented on the proposed fee for appeals, contends that the costs of interlocutory appeals should already be included in the Board's cost for the primary proceeding and that no separate fee should be charged for an appeal that is necessary to correct an agency error. In addition, NGFA asserts that if frivolous appeals are filed for the purpose of obtaining delay, the opposing party should seek the imposition of sanctions pursuant to 49 U.S.C. 10704(d).

The National Industrial Transportation League (NIT League) objects to the proposed fee for an administrative appeal because it contends that the cost of an administrative appeal should already be included in the total cost of handling the proceeding. In addition, the NIT League maintains that an appeal should not be characterized as an effort to obtain a special benefit because an administrative

appeal seeking to correct an error provides the public benefit of ensuring confidence in the Board's decisionmaking.

RMA-SPI contend that establishment of a fee for appeals is inappropriate because a party is entitled to a final adjudication of its case. RMA-SPI argue that the imposition of such a fee at different stages of the proceeding would further serve to chill the opportunity to secure redress of grievances before the Board.

Mr. Szabo argues that the Board's NPR did not provide a basis for imposing fees on the exercise of rights to oppose a carrier application. He asserts that it is "absurd" for the public to pay a fee to revoke a transaction for a carrier that has already paid a fee. TIA maintains that there should be no fee for an appeal in which the parties complain to the Board about a Board decision.

The commenters' assumption that the costs for administrative appeals are included in the costs for the initial proceeding is incorrect. Our costs for a proceeding do not include costs for staff time expended beyond issuance of the initial decision in that proceeding.

We are not persuaded by the comments that it is inappropriate to assess a fee for appeals or petitions to revoke an exemption. In each instance the parties have the benefit of another opportunity to argue their case to the Board or to seek clarification of the Board's decision. The public benefit of ensuring confidence in the Board's decisionmaking certainly is an incidental benefit. Therefore, it is proper to charge a fee for this activity. *See, Miss. Power*, 601 F.2d at 230 and *Central & Southern*, 777 F.2d 732.

However, because we are concerned that our proposed fee may have a chilling effect on the filing of appeals and petitions to revoke exemptions, we will limit the fee to \$150. Such a fee should not impose a burden on parties seeking to appeal a Board decision or revoke an exemption.

In this regard, it is important to note that if multiple parties file individual appeals, each party is required to pay the \$150 filing fee. However, if multiple parties file a joint appeal, only one fee of \$150 will be assessed.⁷

⁷ We note that this fee does not apply to appeals from decisions of employees acting under authority delegated by the Chairman and petitions for stay of Board decisions.

Fee Item 62 - Motor carrier undercharge proceedings.

Comments in opposition to our proposed fee of \$5,800 for motor carrier undercharge proceedings were received from 43 shippers and shipper associations. These include the NIT League; the National Small Shipment Traffic Conference, Inc., the Health and Personal Care Distribution Conference, Inc. and the PIE Defense Group (jointly NSSTC); and the Transportation Claims and Prevention Council, Inc. (Council).

Certain smaller shippers, who generally have been involved in one or more motor carrier undercharge proceedings, filed comments expressing concern that they would be forced to settle meritless claims because the proposed fee of \$5,800 would prohibit them from bringing their case before the Board. They also assert that if the proposed fee was adopted, bankrupt carriers, or their trustees or attorneys, would be encouraged to file additional frivolous claims.

NSSTC maintains that the Board's rationale that substantial staff time is expended on undercharge proceedings does not provide an adequate reason for abandoning the prior policy of not assessing fees for undercharge proceedings. NSSTC asserts that the STB's waiver procedures do not provide any solution because the cost of filing a waiver could easily equal \$500 and therefore, the waiver procedure could have its own chilling effect. Moreover, NSSTC alleges that, because court referral orders give the shipper defendant a limited time to institute a proceeding at the Board, a shipper in a small case would have to file its complaint and waiver simultaneously and would expose itself to the risk of a \$5,800 fee. NSSTC noted its surprise that the Board proposes relief in the form of waivers based on the size of the defendant rather than on the size of the case because it contends that the Board is aware that litigation is only feasible where the cost is a small fraction of the value of the case.

In addition, NSSTC asserts that the fee proposed here will effectively eliminate the option of litigation for many small and medium-sized cases. NSSTC maintains that because the cost of litigating these undercharge cases before the Board, including both attorneys' fees and the Board's fee, would total \$10,000, there would be no economic advantage to litigate unless the undercharge claim amount exceeds \$50,000. It is NSSTC's position that the proposed fee of \$5,800 will force the settlement by shippers of meritless claims. Also, NSSTC alleges that some trustees and carrier representatives now are

using the prospect of the proposed fees to force more and larger settlements by shippers in meritless cases.

NSSTC alleges that the Board's cost study for undercharge proceedings, which included five dismissed cases and five cases in which a decision on the merits was issued, is unreliable because it only involved ten cases. It challenges the cost of \$500 for dismissed cases and questions the appropriateness of a \$5,800 fee if the bulk of the undercharge cases are being dismissed or discontinued without a decision on the merits. Also, it inquires why a significant amount of time in cases in which decisions were issued was expended on tariff analysis when allegedly most cases are decided under Section 2(e) of the Negotiated Rates Act of 1993, Pub. L. 103-180, 107 Stat. 204 (NRA). Moreover, it maintains if the purpose of Board's tariff analysis is to satisfy the Board that the carrier has asserted a colorable claim for undercharges, then that cost should be borne by the carrier because the carrier has the burden of establishing the applicability of the tariff rate sought.

NSSTC raises further concerns with the undercharge fee because it: (1) allocates all costs to shipper complainants and none to carrier defendants; (2) assumes that every proceeding will be litigated to a conclusion; and (3) ignores the fact that proceedings can be resolved summarily based on decisions in related or similar cases. It proposes that the Board consider the following alternatives: (1) impose no fee until after the carrier defendant files its reply statement and, if the carrier fails to reply, issue a decision based on a finding that the carrier has not shown itself entitled to collect undercharges; (2) impose a fee for a tariff applicability finding on the carrier and only charge the shipper when the shipper files its rebuttal; (3) consider a "loser pays" fee system for undercharge proceedings; and (4) set up more lead case determinations so that related cases can be summarily handled.

The Council asserts that the proposed revision of user fees for undercharge proceedings raises the fundamental question of what future role the Board will play in protecting the shipping and traveling public. The Council questions whether the Board will continue to provide its expertise as mandated by the law in a manner accessible to the public or whether the Board will virtually abandon the premise for its existence by eliminating realistic remedies, thereby subjecting the public to carrier abuses.

In addition, the Council states that a shipper seeking relief granted to it by Congress in the ICCTA has no choice but to file a petition with the Board to obtain that relief, as the Board is empowered with exclusive jurisdiction over these issues. Thus a fee seems inappropriate. Moreover, it maintains that a particularly obvious inequity lies in the proposed fee of \$5,800 for filing undercharge proceedings because imposition of a \$5,800 fee would have the effect of forcing all shippers to settle at the 20% level provided for by the NRA unless the total claim was greater than \$35,000.⁸

The Council asserts that based on its experience in defending undercharge claims, most claims are less than \$30,000. Therefore, it argues that the new fee would effectively prohibit most shippers from obtaining the relief granted and intended by Congress. The Council urges the Board to continue to waive the fee for motor carrier undercharge proceedings or alternatively impose a sliding scale so that the fee is commensurate with the amount of the claim. It argues that the carriers who are the "perpetrators of these unreasonable claims" should pay the fees for these proceedings. In addition, it suggests that the Board seek a legislative amendment providing that in the event the Board finds that a carrier is engaged in an unreasonable practice, as defined in 49 U.S.C. § 13711(a) the Board shall require the carrier or its representative, trustees, attorney, or collection agencies to pay the Board filing fee. It proposes that such legislation should also postpone payment of the filing fee until the Board concludes the proceeding. In the alternative, the Council proposes that the Board recommend to Congress a legislative change that would declare all undercharge claims to be unlawful and thus free defendants from the necessity of filing petitions before the Board.

Under the IOAA, a fee can be charged for these proceedings because clearly these cases involve disputes between private parties. Any benefit that flows to the public by virtue of the Board's action in these cases is clearly incidental. Therefore, it is appropriate to charge a fee for this activity, and it is not

⁸ This assertion is based on the Council's calculation that 20% of a \$29,000 claim equals \$5,800 and the cost of defending a claim in court, including obtaining a stay to allow referral to the Board and preparation of the petition itself, would be at least \$1,000.

necessary to adjust this fee to account for any such incidental public benefit. *See, Miss. Power*, 601 F.2d 230 and *Central & Southern*, 777 F.2d 732.

NSSTC contends that it is inappropriate to assess the costs of tariff analysis against a shipper. We disagree because in many cases the Board's experts can determine that the alleged charges sought by the carrier are not appropriate based on their tariff review. Such expert findings serve as a solid basis in denying the undercharge sought. A tariff analysis benefits the shipper that has sought review of the undercharge claim, and the cost of such an analysis thus can be included in the fee for an undercharge proceeding.

Contrary to NSSTC's assertion, our cost study for undercharge proceedings is reflective of the actual average costs for handling undercharge proceedings. NSSTC is concerned about our use of data from only five dismissed cases and five cases in which decisions were issued on the merits. We believe that this mix of cases is generally representative of the Board's current undercharge case load. Moreover, the cost of \$500 for a dismissed proceeding accurately captures our cost for preparing the various procedural orders that are required to institute and subsequently dismiss a proceeding. In fact, our costs for handling dismissed cases can actually be higher because cases are often dismissed after substantial work has been performed on those cases.

However, we are persuaded that our proposed fee of \$5,800 may cause a hardship for shippers. Based on the information presented by the commenters, it is clear that a fee of \$5,800 would make the cost of filing an undercharge proceeding at the Board more expensive than settling the claim. We do not want to force shippers faced with what they consider to be meritless claims to settle such claims because of the high cost of litigating the claim at the Board. A fee of \$150 should not be a hardship on any shipper nor should it force them to settle meritless claims, and it will provide some reimbursement to the Board for the cost of resolving these cases. Accordingly, we establish the fee for undercharge proceedings at \$150.

Because we are limiting the fee for these proceedings to \$150, it is not necessary to consider adopting a tiered fee for undercharge proceedings or the case processing alternatives that NSSTR suggests.

Capped Fees.

In our NPR we proposed to eliminate all remaining caps on fees. The American Short Line Railroad Association (Short Line) urges the Board to continue to cap the fees for unspecified rail finance and abandonment activities, and complaints and declaratory order proceedings. Short Line maintains that these caps are critical to the interests of small carriers. The Wisconsin Association objects to increases for capped fees for complaints and declaratory orders.

As previously discussed, we are revising the fees for complaints and are maintaining the capped fees for declaratory order proceedings. The caps for some of the rail finance and abandonment proceedings referenced by Short Line were eliminated in previous user fee update proceedings. The remaining capped fee items cover activities such as major and minor rail mergers and would not affect short line railroads. Therefore, we see no need to continue capping any fee involving rail finance activities. The revised fees for those activities are adopted.

IV. ADDITIONAL MATTERS

Appendix C contains the revised fee schedule that we are adopting here. Also included in Appendix C are various minor modifications to the user fee regulation in 49 CFR Part 1002, which are designed to update the regulation by removing references to the Commission and substituting the proper references to the Board. These modifications appeared in a different format in the NPR. The format for these changes has been revised based on guidance from the Office of the Federal Register.

Finally, we note that the NPR also identified a number of fee items, previously maintained by the ICC, which were transferred to the Federal Highway Administration (FHWA) pursuant to the ICCTA. Our decision here is not intended to alter the fees charged by FHWA. In a separate proceeding to be instituted shortly, FHWA will adopt its own fee schedule for these items.

V. REGULATORY FLEXIBILITY ANALYSIS

The Board certifies that this rule will not cause a significant economic effect on a substantial number of small entities. The Board has modified this proposal so that the fee for formal complaints will be phased in over a number of years and limits its fee for motor carrier undercharge proceedings to \$150. While increases adopted here may impact on some small entities, it appears that such an impact will not be significant, particularly because the Board's regulations provide for a waiver of filing fees for those entities that can make the required showing of financial hardship.⁹

VI. ENVIRONMENT

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

It is ordered:

1. All late filed comments submitted in this proceeding are accepted for filing.
2. The RTC's motion for an extension of time to file additional comments is dismissed as moot.

⁹ NSSTC contends that the new Small Business Regulatory Enforcement Fairness Act of 1996 (Act) applies to this rulemaking proceeding. NSSTC argues the rules proposed here are "major rules" under the Act because they involve "a major increase in costs or prices for consumers, individual industries, Federal, State or local government agencies or geographic regions." 5 U.S.C. 804(2)(B). Moreover, NSSTC states that the Act requires Congressional notification and a 60-day delay in the effective date of rules if the rules are considered major rules.

The Board is aware of the requirements of this new Act, and we are complying with those requirements. However, we do not find that these rules as modified in this proceeding constitute major rules. Rather, Congress and the General Accounting Office will be immediately notified of the adoption of these final rules, which then will be effective in 30 days.

3. The final rules set forth in Appendix C to this decision are adopted. Notice of the rules adopted here will be published in the *Federal Register* on September 16, 1996, and will be transmitted to Congress pursuant to Pub. L. 104-121 (March 29, 1996).

4. This decision will be effective on September 16, 1996.

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

APPENDIX A

This appendix contains individuals or groups that have commented on the appropriateness of various user fee item or sub-fee item changes, as well as comments relative to a few general issues. Below, you will find an alphabetical listing of the commenters by fee item, sub-fee item, or general issue. The listing is in fee item order.

FEE ITEM #11(iii) - PETITIONS FOR EXEMPTION/FINANCIAL TRANSACTION (EXCEPT CONSTRUCTION) - one comment

Lone Star Railroad Inc. *et al.*

FEE ITEM #12 - PETITIONS FOR EXEMPTION (CONSTRUCTION) -four comments

National Grain & Feed Association
North Dakota Grain Dealers Association
Society of the Plastics Industry & The Rubber Manufacturers Association
Western Coal Traffic League *et al.*

FEE ITEM #13 - FEEDER LINE DEVELOPMENT PROGRAM - one comment

National Grain & Feed Association

FEE ITEM #14(iii) - PETITIONS FOR EXEMPTION (CLASS II OR III RAILROAD TO ACQUIRE A LINE OF TRACK UNDER 10902) - two comments

Lone Star Railroad Inc. *et al.*
New Jersey Department of Transportation

FEE ITEM #15 - NOTICE OF MODIFIED CERTIFICATE - one comment

Lone Star Railroad Inc. *et al.*

FEE ITEM #24 - ABANDONMENT PROCEEDINGS (WAIVER REQUEST FOR FILING REQUIREMENTS) - one comment

Lone Star Railroad Inc. *et al.*

FEE ITEM #25 - OFFER OF FINANCIAL ASSISTANCE - one comment

Iowa Department of Transportation

FEE ITEM #26 - OFFER OF FINANCIAL ASSISTANCE (SET TERMS AND CONDITIONS) - two comments

Iowa Department of Transportation
United States Department of Agriculture

FEE ITEM #27 - TRAILS USE REQUESTS - 39 comments

Bicycle Advocacy Group of Mississippi
Brohman, Mark A.
Butler County Conservation Board
Chaparral Trails to Trails, Inc.
City of Anniston, Alabama
City of Jacksonville
City of Weaver, Alabama
Colorado State Parks
Cummings, Brent P.
Department of Theology, The University of Notre Dame
East Alabama Regional Planning and Development Commission
Foote, Kathleen A.
Friends of the Pumpkinvine Nature Trail
Goshen College
Hill Country Rail=Trail Steering Committee
Hoosier Rails to Trails Council
Iowa Department of Transportation
Iowa Trails Council
Kentucky Rails to Trails Council
Madison County Conservation Alliance
Maryland National Capitol Park & Planning Commission
National Park Service's Rivers, Trails, and Conservation
Nebraska Trails Council
Nemaha Natural Resources District
North Carolina Rail-Trails (Project Coordinator)
North Carolina Rail-Trails
David R. Obey (United States Representative)
Ozark Greenways, Incorporated (12 identical letters signed by various executives and Board members of Ozark)
Pine Line Rail Trail Association
Portage County Parks Department

Rails to Trails Coalition of Kansas
Rails to Trails Conservancy
Richland County Park District
Seiberling, John F.
Seniors for Peace
Texas Parks and Wildlife Department
Transportation Corridor Development Alliance
United States Department of the Interior, National Park Service
Zeis, Rich

FEE ITEM #42 - NOTICE OF A JOINT PROJECT RELOCATION OF A LINE - one comment

Lone Star Railroad Inc. *et al.*

FEE ITEM #47 - AMTRAK CONVEYANCE PROCEEDING - one comment

National Railroad Passenger Corporation (AMTRAK)

FEE ITEM #48 - AMTRAK COMPENSATION PROCEEDING - one comment

National Railroad Passenger Corporation (AMTRAK)

FEE ITEM #56(i) - FORMAL COMPLAINTS (FILED UNDER COAL GUIDELINES) -
22 comments

American Public Power Association
Association of American Railroads
Dave Camp (United States Representative)
Consumers United for Rail Equity
Edison Electric Institute
Fertilizer Institute
Michigan Agri-Business Association
Montana Wheat and Barley Committee
National Grain and Feed Association
National Industrial Transportation League
North Dakota Grain Dealers Association
Oklahoma Grain & Feed Association *et al.*
Nick Smith (United States Representative)
Society of the Plastics Industry & The Rubber Manufacturers Association

Szabo, Joseph C.
Twomey Company
United States Department of Agriculture
United States Senate (one letter from United States Senator Burns and another letter signed
by the United States Senators Baucus, Dorgan, Hollings, Levin, Rockefeller, and
Wellstone)
Western Coal Traffic League *et al.*
Wisconsin Association of Manufacturers & Commerce General Traffic Committee
Women Involved in Farm Economics

FEE ITEM #56(ii) - FORMAL COMPLAINTS (OTHER THAN COAL) - 26 comments

American Bus Association
Association of American Railroads
Dave Camp (United States Representative)
Consumers United for Rail Equity
Edison Electric Institute
Fertilizer Institute
Idaho Barley Commission and Idaho Wheat Commission
Iowa Department of Transportation
Michigan Agri-Business Association
Montana Farmers Union
Montana Wheat and Barley Committee
National Grain and Feed Association
National Industrial Transportation League
North Dakota Grain Dealers Association
Oklahoma Grain & Feed Association *et al.*
Public Service Commission - State Of North Dakota
Nick Smith (United States Representative)
Society of the Plastics Industry & The Rubber Manufacturers Association
State of Montana
Szabo, Joseph C.
Twomey Company
United States Department of Agriculture
United States Senate (one letter from United States Senator Burns and another letter signed
by United States Senators Baucus, Dorgan, Hollings, Levin, Rockefeller, and
Wellstone)

Wisconsin Association of Manufacturers & Commerce General Traffic Committee
Women Involved in Farm Economics

FEE ITEM #57 - COMPLAINTS SEEKING AN INVESTIGATION - one comment

Wisconsin Association of Manufacturers & Commerce General Traffic Committee

FEE ITEM #58(i) - PETITIONS FOR DECLARATORY ORDER (EXISTING RATES AND PRACTICES) - eight comments

Consumers United for Rail Equity
Edison Electric Institute
Fertilizer Institute
National Grain & Feed Association
National Industrial Transportation League
Society of the Plastics Industry & The Rubber Manufacturers Association
Szabo, Joseph C.
Wisconsin Association of Manufacturers & Commerce General Traffic Committee

FEE ITEM #58(ii) - PETITIONS FOR DECLARATORY ORDER (ALL OTHERS) - eight comments

Consumers United for Rail Equity
Edison Electric Institute
Fertilizer Institute
National Grain & Feed Association
National Industrial Transportation League
Society of the Plastics Industry & The Rubber Manufacturers Association
Szabo, Joseph C.
Wisconsin Association of Manufacturers & Commerce General Traffic Committee

FEE ITEM #60 - LABOR ARBITRATION APPEALS - two comments

Szabo, Joseph C.
Transportation Intermediaries Association

FEE ITEM #61 - APPEALS TO STB DECISIONS - five comments

National Grain & Feed Association
National Industrial Transportation League
Society of the Plastics Industry & The Rubber Manufacturers Association
Szabo, Joseph C.
Transportation Intermediaries Association

FEE ITEM #62 - MOTOR CARRIER UNDERCHARGE PROCEEDINGS - 43 comments

ALCO Standard Corporation
American Business Machines
Associated Business Products
Automated Office Systems
Big O Tires
Brady Marketing Company
Camping World
Camping World (Attorneys for)
Compucom Systems, Inc.
Cornnuts
Cory, Michael P.
Dana Corporation
Dierickx, Wm Company
Foster, Swift, Collins & Smith PC
Fuller, HB Company
Kump, Lon Rodney
Lakeshore Learning Materials
MacPherson's
Master Builders, Inc.
Maytag Corporation
Miller Beauty Supply, Inc.
National Industrial Transportation League
National Small Shipments Traffic Conference *et al.*
Nestle Distribution
OMI of California
Pacquet Oneida, Inc.
Phifer Wire Products, Inc.
Precision Silicones, Inc.
Radiator Specialty Company
Reynolds, Mary K.
Rubenstein, Samuel Freight Transportation Consultants, Inc.

Seider & Reynolds
Society of the Plastics Industry & The Rubber Manufacturers Association
Stafford, R.
State Chemical Manufacturing Company
Transportation Claims & Prevention Council, Inc.
Transportation Intermediaries Association
Trend Corporation
Ultimate Salon Services, Inc.
Van Zyverden, Inc.
Web Service Company, Inc.
Wisconsin Association of Manufacturers & Commerce General Traffic Committee
Yost Office Systems

ISSUE - REMOVAL OF CAPS ON CERTAIN FEE ITEMS - two comments

American Short Line Railroad Association
Wisconsin Association of Manufacturers & Commerce General Traffic Committee

ISSUE - GENERAL DISSATISFACTION WITH PROPOSED FEE CHANGES - four comments

Association for Branch Line Equality
Farmers Elevator Association of Minnesota
Michigan Agricultural Commodities, Inc.
Montana Department of Agriculture

ISSUE - USE OF A TIER APPROACH FOR COMPLAINTS (INSTALLMENTS) - four comments

Association of American Railroads
Edison Electric Institute
Fertilizer Institute (Attorney for)
Western Coal Traffic League *et al.*

APPENDIX B

*VERIFIED STATEMENT OF MR. GERALD FAUTH¹⁰
CONSULTANT FOR EDISON ELECTRIC INSTITUTE (EEI)*

EEI is primarily concerned about the proposed user fee increases for all formal complaint proceedings (coal and non-coal). In this regard, the verified statement of Mr. Fauth (cost witness or witness) filed with the EEI comments claims that the Board's analysis accompanying the proposed new user fees overstates costs and does not rely on the appropriate case work. We believe that these claims are without merit.

DISCUSSION OF ARGUMENTS

*A. Alleged Overstatement of Proposed User Fees**1. Direct Labor Costs*

EEI's cost witness claims that it is reasonable and logical to assume that the STB's direct labor costs are substantially lower than the ICC's direct labor costs were, although he notes that STB's cost *per employee* will be higher than the ICC's FY 1995 cost per employee was. [\$114,507 - STB v. \$97,704 - ICC]. The *total* direct labor costs for the STB obviously have decreased. However, the user fee cost studies develop an *average* direct labor cost to process the various fee items or sub-fee items. Because the Board has fewer staff than the ICC had does not necessarily mean that less direct labor will be devoted to the completion of a particular proceeding.

For example, coal proceedings processed by the ICC required staff with diversified expertise (attorneys, cost analysts, economists, engineers, financial analysts, etc.) and also required many hours of direct labor to complete. Coal proceedings before the Board still require this same expertise and also require many hours to process. The time and effort devoted to completion of these proceedings, as well as other types of proceedings, has not changed as a result of the decrease in *total* staff and *total* direct labor available.

Thus, EEI's cost witness is incorrect when he asserts that the user fee direct labor costs are overstated. Moreover, by his own admission, the STB's cost per employee will be higher than the ICC's FY 1995 cost per employee. With this in mind, higher graded employees may have to become involved in processing these complaint cases and other cases as well. Therefore, the direct

¹⁰ This verified statement is also endorsed by The National Grain and Feed Association, The Society of the Plastics Industry, Inc., The Rubber Manufacturers Association, and The Fertilizer Institute.

labor costs for the user fee program may indeed be somewhat understated rather than overstated as claimed by the cost witness.

2. Use of ICC's FY 1995 Budget Data

The witness has questioned the Board's use of actual FY 1995 budget data in the development of fully allocated costs for the various fee items. The witness claims that use of the FY 1995 budget data is backward-looking and thus unsound because it relies upon past information, rather than on the future costs the Board will incur when the next large shipper rate case is filed.

The Board does not agree with the witness's position relative to the appropriateness of using the actual FY 1995 budget data. For over ten years, the ICC relied upon the previous year's actual budget data in the development of its fully allocated costs for the user fee update process, and this approach was never challenged. In fact, as with the staffing level decrease as between the ICC and the Board, there were years in which the ICC staffing level dropped. Nevertheless, the previous year's actual budget data was utilized, based on the view that these data are the latest *actual* data available. The Board, as did the Commission, does not believe that it is appropriate to base the fee cost analysis on projections as to what the upcoming year's budget data *might* be.

3. Use of Government Fringe Benefit Data

The cost witness has also questioned the Board's use of the standard "Government Fringe Benefit Cost" for developing the fully allocated cost for user fee items. The witness claims that use of this standard fringe benefit data results in an overstatement of the actual benefits included in the ICC's FY 1995 budget.

The standard fringe benefit factor of 49.55% has been applied in *all* ICC user fee update proceedings dating back to the late 1980's and has been accepted in each of those proceedings. The Board continues to believe it is appropriate to rely upon the standard factor in our calculation of fully distributed cost for each of the user fee or sub-fee items.

4. Overheads

The witness has made a claim that all overhead accounts should have decreased in the 1996 user fee update from what they were for the Commission. Specifically, he argues that the Board's General & Administrative Overhead went down from a percentage standpoint in the 1996 update compared to the 1995 update (11.36% - 1996 v. 14.39% - 1995) but questions why the Operations Overhead and the Office General & Administrative Overhead percentages both increased when they also should have decreased (Operations Overhead 13.97% - 1996 v. 11.39% - 1995, and Office Overhead 26.73% - 1996 v. 22.76% - 1995). Furthermore, he notes that the STB allocated

\$26,733,000 in benefits and overheads, which is substantially higher than the STB's total FY 1996 budget of \$15,344,000.

To support his position, the cost witness has submitted a very detailed calculation of the *dollar* impact resulting from an application of the fringe benefit and overhead factors. However, the STB's calculation and application of fringe benefits and overheads are reflected on a *percentage* basis, not on a dollar basis. The various percentage factors applicable to fringe benefits (49.55%), the Board's General & Administrative Overhead (11.36%), the Operations Overhead (13.97%), and the Office General & Administrative Overhead (26.73%) have been applied against the average direct labor cost for the various user fee or sub-fee items. A dollar impact resulting from these costs could only be calculated once the fee schedule is actually in place, which obviously cannot be done as part of the costing in anticipation of the fee schedule being in place.

Furthermore, the witness' argument that all overheads should have decreased is without merit. For example, the Operations Overhead, which shows the relationship between the offices' management levels and the general staff, *would* be even higher if we used Board data only. Since most of the employees separated as a result of the termination of the ICC were general staff, the denominator used in our Operations Overhead calculation (*total* salaries and wages for the offices) would decrease because of lost general staff but the numerator (management) would remain relatively unchanged.

Regarding the Office General & Administrative Overhead, the witness suggests that certain cost elements that go into the calculation of this overhead should be reduced. These elements include rent, telephones, building maintenance, etc. However, the witness has failed to consider in this argument that the *total* Board expenses for the offices involved in the user fee program also more than likely have decreased. If the total expenses for the offices involved in the user fee program decreased by a greater percentage than the elements in the Office General & Administrative Overhead, then the overhead application percentage could in fact increase over the percentage used in the 1996 user fee update (based on FY 1995 actual data).

We do not consider it necessary or appropriate to adjust the Operations Overhead or the Office General & Administrative Overhead percentages at this time. If any adjustment is appropriate, it seems more likely that the percentages for these two overheads actually could increase over the comparable percentages used in the 1996 user fee update.

B. Allegation of Inappropriately Limited Scope of Case Work

1. Formal Complaints - Coal

The cost witness has made claims that the coal complaint cases used in the cost studies developed by the Board are of an extremely limited nature and therefore not representative of these types of proceedings. We strongly disagree with these claims. Our cost studies for coal rate

proceedings included eight cases filed and/or completed subsequent to the beginning of our current user fee cost studies (late 1992). Of the eight cases included in the study, only two (*West Texas*¹¹ and *Nevada Power*¹²) have been completed subsequent to late 1992, while the other proceedings are still pending before the Board and could not be included in the 1996 finalized cost study data.

We also disagree with the cost witness that the two coal cases relied upon are not representative of these types of proceedings. We emphasize that the processing of these two cases are the most recent coal cases adjudicated by the Commission/Board and they adequately represent the manner in which the Board has and will continue to handle these types of proceedings. Moreover, the *West Texas* proceeding was completed and served almost simultaneously with the date of the NPR in this proceeding.

In addition, the cost witness argues that the STB has established numerous precedents in previous coal cases, and thus any handling of future coal cases should be easier and more efficient. We disagree with this conclusion. While we are working to handle these cases, as well as the other cases pending at the Board, more expeditiously, each of these cases presents distinct facts and legal questions and cannot necessarily be handled the way previous cases were handled.

2. Other SAC Proceedings

The cost witness has also questioned why the Board did not include six additional coal complaint cases in its cost study.¹³ We have reviewed those six proceedings and have determined

¹¹ *West Texas Utilities Co. v. Burlington Northern Railroad Co.*, ICC Docket No. 41191, served May 3, 1996. (*West Texas*)

¹² *Bituminous Coal -- Hiawatha, Utah, to Moapa, Nevada*, ICC Docket No. 37038, 6 I.C.C. 2d 1 (1989) (*Nevada Power*). We note that Nevada Power was initiated many years ago. However, the staff-hours and resultant direct labor costs used for this proceeding in the cost study are only applicable to the phase of the proceeding that went into the ICC's decision in *Bituminous Coal - Hiawatha, Utah to Moapa, Nevada*, Docket Nos. 37038 and 37409, 10 I.C.C. 2d 259 (1994).

¹³ The six proceedings are: (1) *Metropolitan Edison Company v. Consolidated Rail Corporation, et al.*, ICC Docket No. 37931S; (2) *Arkansas Power & Light Company, et al. v. Burlington Northern Railroad Company, et al.*, ICC Docket No. 36719, 3 I.C.C. 2d 757 (1987); (3) *Detroit Edison Company v. Consolidated Rail Corporation, et al.*, ICC Docket Nos. 38279S, 38304S, and 38306S; (4) *Pennsylvania Power & Light Company v. Consolidated Rail Corporation*, ICC Docket Nos. 38184S, 38185S and 38186S; (5) *Coal Trading Corporation, et al. v. The Baltimore & Ohio Railroad Company, et al.*, ICC Docket No. 38301S (I.C.C. 2d, 361 (1990)); and (6) *Omaha Public Power District v. Burlington Northern Railroad Company*, ICC Docket No. 38783, 3 I.C.C. 2d 853 (1987).

that there are logical reasons for not including those cases in the cost study. Each of the six proceedings was opened either in the late 1970's or early 1980's, and all six proceedings were either dismissed or found to be administratively final prior to mid-1990, almost two and one-half years prior to the beginning of our current user fee cost studies.⁷ The data for those cases would not be relevant in terms of how the Board currently handles coal rate proceedings.

3. Formal Complaints - Non-Coal

The cost witness has made a claim that the non-coal complaint cases used in the 1996 cost studies developed by the Board are of too limited a nature. As with the coal proceedings, we strongly disagree with the witness on his claim. Our cost studies for non-coal rate proceedings included almost twenty cases filed and/or completed subsequent to the beginning of our current user fee cost studies (late 1992). Of the cases included in the cost study, only seven were completed subsequent to late 1992, while the remaining proceedings are still pending before the Board and could not be included in the 1996 finalized cost study data. Of the seven completed cases, only the results of five were used to determine the average cost of processing non-coal complaint proceedings. We indicated in the NPR that the remaining two non-coal complaints had been excluded from the average results because their direct labor cost was exceptionally low in comparison to the other five cases.

C. Claim of Inaccurate Staff-Hour Resources

West Texas v. Nevada Power

The cost witness notes that the two coal cases utilized by the STB in its cost study involved substantially different staff-hours. *West Texas* staff-hours totalled 3,495 while *Nevada Power* totalled 1,964 staff-hours. The cost witness claims that the optimal average time required by the STB to review, analyze and decide a SAC case should be utilized. Therefore, he contends if the staff-hours for *Nevada Power* are representative of the optimal time required by the STB to analyze the SAC evidence and decide the coal case, the cost would be reduced from \$233,240 to \$171,951, not taking into account the STB's overstatement of benefits and overheads that he alleges.

The witness in particular claims that the *West Texas* proceeding dealt with a unique issue involving traffic moving under contract rates that were about to expire, and for which there were no existing tariff rate levels. The witness contends that the ICC ordered the railroad to publish rates, which delayed the proceeding and increased the ICC's costs. Therefore, the witness argues that this case is an aberration and should not be used as a representative case for costing purposes.

We disagree with the cost witness that this case is an aberration and should not be included in the study. The fact that the ICC required the railroad to publish a tariff, and that this caused some delay in the case's progression at the ICC/Board has no bearing on the staff-hours and resultant direct labor costs used for the *West Texas* proceeding. The staff-hours and direct labor costs reflected in the study for this proceeding represent *actual* work done and do not reflect any period of delay. Moreover, *West Texas* is a good case to use in the cost study because it entailed the normal phases of a maximum coal rate case (market dominance, rate reasonableness, etc.). Therefore, we reject the witness's depiction of the *West Texas* proceeding as being an aberration and inappropriate for use in the costing analysis.

Regarding *Nevada Power*, the reason the staff-hours are substantially lower than those for *West Texas* is because the phase of the *Nevada Power* proceeding relied upon in the cost study only deals with rate reasonableness and does not cover market dominance at all, which reduces the staff-hours and direct labor cost attributable to a proceeding. *Nevada Power's* inclusion gives consideration to the proceeding that covers less than all facets of a normal maximum rate reasonableness complaint proceeding.

APPENDIX C

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. Section 1002.1 is amended as follows:

- a. In the introductory paragraph remove the words "Interstate Commerce Commission" and add in their place the words "Surface Transportation Board."

- b. In paragraph (e)(2) remove the word "Commission's" and add in its place the word "Board's;" remove the words "Section of Systems Development, Interstate Commerce Commission," and add in their place the words "System Services Branch, Surface Transportation Board."

- c. In paragraph (f)(11) remove the word "Commission's" and add in its place the word "Board's."

- d. In the concluding text of paragraph (f)(14) remove the phrase "ICC's Freedom of Information Office, 12th and Constitution Avenue N.W. Room 3122, Washington, DC 20423." and add in their place the words "Surface Transportation Board's Freedom of Information Office, Washington, DC 20423."

- e. In paragraph (g) remove the words "Interstate Commerce Commission," and in their place add the words "Surface Transportation Board."

- f. In paragraph (h) remove the word "Commission's" and in its place add the word "Board's;" remove the words "Interstate Commerce Commission." and add in their place the words "Surface Transportation Board."

- g. Paragraphs (b), (e)(1) and the chart in paragraph (f)(6) are revised to read as follow:

§1002.1 *Fees for records search, review, copying, certification, and related services.*

* * * * *

(b) Service involved in examination of tariffs or schedules for preparation of certified copies of tariffs or schedules or extracts therefrom at the rate of \$24.00 per hour.

* * * * *

(e) * * *

1 S.T.B.

(1) A fee of \$42.00 per hour for professional staff time will be charged when it is required to fulfill a request for ADP data.

* * * * *

(f) * * *

(6) * * *

Grade	Rate	Grade	Rate
GS-1	\$ 7.13	GS-9	\$16.65
GS-2	7.76	GS-10	18.33
GS-3	8.75	GS-11	20.14
GS-4	9.82	GS-12	24.14
GS-5	10.99	GS-13	28.71
GS-6	12.25	GS-14	33.93
GS-7	13.61	GS-15 and	39.91
GS-8	15.07	over	

* * * * *

3. Section 1002.2 is amended as follows:

a. In paragraph (a)(2) remove the word "Commission's" and add in its place the word "Board's."

b. In paragraph (a)(2)(ii) after the words "Debt Collection Act" add the words "of 1982," remove the word "Commission's" and add in its place the word "Board's."

c. In paragraph (a)(2)(iii) remove the words "room 1330, Interstate Commerce Commission, Washington, DC 20423:" and add in their place the words "Surface Transportation Board, Washington, DC:."

d. In paragraph (a)(3) remove the words "Interstate Commerce Commission" and add in their place the words "Surface Transportation Board."

e. In paragraphs (b), (c), and (d)(4) remove the word "Commission" wherever it appears and add in its place the word "Board."

f. In paragraph (e), the heading, remove the first "of" and add in its place the word "or." Also, in the introductory text, paragraphs (e)(2), (e)(2)(i), and in the heading of paragraph (e)(2)(iii) remove the word "Commission" and add in its place the word "Board."

g. In paragraphs (g)(1), (g)(1)(ii), (g)(1)(iii) and (g)(2) remove the word "Commission" wherever it appears and add in its place the word "Board."

h. In § 1002.2, paragraphs (a)(1), (d), and (f) are revised to read as follows:

1 S.T.B.

§ 1002.2 *Filing fees.*

(a) *Manner of payment.* (1) Except as specified below, all filing fees will be payable at the time and place the application, petition, notice, tariff, contract summary, or other document is tendered for filing. The filing fee for tariffs, including schedules, and contracts summaries including supplements (Item 78) may be charged to tariff filing fee accounts established by the Board in accordance with paragraph (a)(2) of this section.

* * * * *

(d) *Related or consolidated proceedings.* (1) Separate fees need not be paid for related applications filed by the same applicant which would be the subject of one proceeding.

(2) A separate fee will be assessed for the filing of an application for temporary authority to operate a motor carrier of passengers as provided for in paragraph (f)(5) of this section regardless of whether such application is related to a corresponding transfer proceeding as provided for in paragraph (f)(2) of this section.

(3) The Board may reject concurrently filed applications, petitions, notices, contracts, or other documents asserted to be related and refund the filing fee if, in its judgment, they embrace two or more severable matters which should be the subject of separate proceedings.

* * * * *

(f) *Schedule of filing fees.*

Type of Proceeding	Fee
--------------------	-----

PART I: Non-Rail Applications or Proceedings to Enter Upon a Particular Financial Transaction or Joint Arrangement:

- | | |
|---|-----------|
| (1) An application for the pooling or division of traffic | \$2,400. |
| (2) An application involving the purchase, lease, consolidation, merger, or acquisition of control of a motor carrier of passengers under 49 U.S.C. 14303 | \$1,100. |
| (3) An application for approval of a non-rail rate association agreement.
49 U.S.C. 13706 | \$15,400. |
| (4) An application for approval of an amendment to a non-rail rate association agreement: | |
| (i) Significant amendment | \$2,500. |
| (ii) Minor amendment | \$50. |

- (5) An application for temporary authority to operate a motor carrier of passengers.
49 U.S.C. 14303(i) \$250.
- (6)-(10) [Reserved]

PART II: Rail Licensing Proceedings other than Abandonment or Discontinuance Proceedings:

- (11) (i) An application for a certificate authorizing the extension, acquisition, or operation of lines of railroad. 49 U.S.C. 10901 \$4,000.
- (ii) Notice of exemption under 49 CFR 1150.31-1150.35 \$1,000.
- (iii) Petition for exemption under 49 U.S.C. 10502 (except petitions involving construction of a rail line) \$7,000.
- (12) An application or a petition for exemption under 49 U.S.C. 10502 involving the construction of a rail line \$41,700.
- (13) A Feeder Line Development Program application filed under 49 U.S.C. 10907(b)(1)(A)(i) or 10907(b)(1)(A)(ii) \$2,600.
- (14) (i) An application of a class II or class III carrier to acquire an extended or additional rail line under 49 U.S.C. 10902. \$3,400.
- (ii) Notice of exemption under 49 CFR 1150.41 - 1150.45 \$950.
- (iii) Petition for exemption under 49 U.S.C. 10502 relating to an exemption from the provisions of 49 U.S.C. 10902 \$3,700.
- (15) A notice of a modified certificate of public convenience and necessity under 49 CFR 1150.21-1150.24 \$950.
- (16)-(20) [Reserved]

PART III: Rail Abandonment or Discontinuance of Transportation Services Proceedings:

- (21) (i) An application for authority to abandon all or a portion of a line of railroad or discontinue operation thereof filed by a railroad (except applications filed by Consolidated Rail Corporation pursuant to the Northeast Rail Service Act [Subtitle E of Title XI of Pub. L. 97-35], bankrupt railroads, or exempt abandonments. \$12,400.
- (ii) Notice of an exempt abandonment or discontinuance under 49 CFR 1152.50 \$2,000.
- (iii) A petition for exemption under 49 U.S.C. 10502 \$3,500.
- (22) An application for authority to abandon all or a portion of a line of a railroad or operation thereof filed by Consolidated Rail Corporation pursuant to Northeast Rail Service Act \$250.
- (23) Abandonments filed by bankrupt railroads \$1,000.
- (24) A request for waiver of filing requirements for abandonment application proceedings \$1,000.
- (25) An offer of financial assistance under 49 U.S.C. 10904 relating to the purchase of or subsidy for a rail line proposed for abandonment \$900.
- (26) A request to set terms and conditions for the sale of or subsidy for a rail line proposed to be abandoned \$12,700.

- (27) A request for a trail use condition in an abandonment proceeding under 16 U.S.C. 1247(d) \$150.
 (28)-(35) [Reserved]

PART IV: Rail Applications to Enter Upon a Particular Financial Transaction or Joint Arrangement:

- (36) An application for use of terminal facilities or other applications under 49 U.S.C. 11102 \$10,600.
 (37) An application for the pooling or division of traffic. 49 U.S.C. 11322 \$5,700.
 (38) An application for two or more carriers to consolidate or merge their properties or franchises (or a part thereof) into one corporation for ownership, management, and operation of the properties previously in separate ownership. 49 U.S.C. 11324:
 (i) Major transaction \$830,500.
 (ii) Significant transaction \$166,100.
 (iii) Minor transaction \$3,400.
 (iv) Notice of an exempt transaction under 49 CFR 1180.2(d) \$950.
 (v) Responsive application \$3,400.
 (vi) Petition for exemption under 49 U.S.C. 10502 \$5,200.
 (39) An application of a non-carrier to acquire control of two or more carriers through ownership of stock or otherwise. 49 U.S.C. 11324:
 (i) Major transaction \$830,500.
 (ii) Significant transaction \$166,100.
 (iii) Minor transaction \$3,400.
 (iv) A notice of an exempt transaction under 49 CFR 1180.2(d) \$750.
 (v) Responsive application \$3,400.
 (vi) Petition for exemption under 49 U.S.C. 10502 \$5,200.
 (40) An application to acquire trackage rights over, joint ownership in, or joint use of any railroad lines owned and operated by any other carrier and terminals incidental thereto. 49 U.S.C. 11324:
 (i) Major transaction \$830,500.
 (ii) Significant transaction \$166,100.
 (iii) Minor transaction \$3,400.
 (iv) Notice of an exempt transaction under 49 CFR 1180.2(d) \$650.
 (v) Responsive application \$3,400.
 (vi) Petition for exemption under 49 U.S.C. 10502 \$5,200.
 (41) An application of a carrier or carriers to purchase, lease, or contract to operate the properties of another, or to acquire control of another by purchase of stock or otherwise. 49 U.S.C. 11324:
 (i) Major transaction \$830,500.
 (ii) Significant transaction \$166,100.
 (iii) Minor transaction \$3,400.
 (iv) Notice of an exempt transaction under 49 CFR 1180.2(d) \$800.
 (v) Responsive application \$3,400.
 (vi) Petition for exemption under 49 U.S.C. 10502 \$3,700.

- (42) Notice of a joint project involving relocation of a rail line under 49 CFR 1180.2(d)(5) \$1,300.
- (43) An application for approval of a rail rate association agreement 49 U.S.C. 10706 \$39,000.
- (44) An application for approval of an amendment to a rail rate association agreement. 49 U.S.C. 10706:
 - (i) Significant amendment \$7,200.
 - (ii) Minor amendment \$50.
- (45) An application for authority to hold a position as officer or director under 49 U.S.C. 11328 \$400.
- (46) A petition for exemption under 49 U.S.C. 10502 (other than a rulemaking) filed by rail carrier not otherwise covered \$4,400.
- (47) National Railroad Passenger Corporation (Amtrak) conveyance proceeding under 45 U.S.C. 562 \$150.
- (48) National Railroad Passenger Corporation (Amtrak) compensation proceeding under Section 402(a) of the Rail Passenger Service Act \$150.
- (49)-(55) [Reserved]

PART V: Formal Proceedings:

- (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) \$1,000.
 - (ii) All other formal complaints \$1,000.
- (57) A complaint seeking or a petition requesting institution of an investigation seeking the prescription or division of joint rates, or charges. 49 U.S.C. 10705. \$4,900.
- (58) A petition for declaratory order:
 - (i) A petition for declaratory order involving a dispute over an existing rate or practice which is comparable to a complaint proceeding. \$1,000.
 - (ii) All other petitions for declaratory order \$1,400.
- (59) An application for shipper antitrust immunity. 49 U.S.C. 10706(a)(5)(A) \$3,900.
- (60) Labor arbitration proceedings \$7,600.
- (61) Appeals to a Surface Transportation Board decision and petitions to revoke an exemption pursuant to 49 U.S.C. 10502(d) \$150.
- (62) Motor carrier undercharge proceedings \$150.
- (63)-(75) [Reserved]

PART VI: Informal Proceedings:

- (76) An application for authority to establish released value rates or ratings for motor carriers and freight forwarders of household goods under 49 U.S.C. 14706 \$650.

- PART VII: Services:**

- 1 S.T.B.

- (iii) Updated URCS PC version Phase III cost file, if computer disk provided by the Board \$20.
- (iv) Public requests for *Source Codes* to the PC version URCS Phase III \$500.
- (v) PC version or mainframe version URCS Phase II \$400.
- (vi) PC version or mainframe version Updated Phase II databases \$50.
- (vii) Public requests for *Source Codes* to PC version URCS Phase II \$1,500.
- (101) Carload Waybill Sample data on recordable compact disk (R-CD):
 - (i) Requests for Public Use File on R-CD - First Year \$450.
 - (ii) Requests for Public Use File on R-CD - Each Additional Year \$150.
 - (iii) Waybill - Surface Transportation Board or State proceedings on R-CD - First Year \$650.
 - (iv) Waybill - Surface Transportation Board or State proceedings on R-CD - Second Year on same R-CD \$450.
 - (v) Waybill - Surface Transportation Board or State proceeding on R-CD -Second Year on different R-CD \$500.
 - (vi) User Guide for latest available Carload Waybill Sample \$50.

* * * * *

§ 1002.3 [Amended]

- 4. Section § 1002.3 is amended as follows:
 - a. In paragraph (a) remove the word "Commission" and add in its place the word "Board."
 - b. In paragraph (d)(1) remove the word "Commission" and add in its place the word "Board;" remove the phrase "the Commission's FY 1983-1984 User Fee Cost Study," and add in its place the phrase "the cost study set forth in *Revision of Fees For Services*, 1 I.C.C.2d 60 (1984) or subsequent cost studies."
 - c. In paragraph (d)(3)(i) remove the words "and Bureaus" following the words "the Offices."
 - d. In paragraph (d)(3)(ii) remove the word "Commission" wherever it appears and add in its place the word "Board."
 - e. In paragraph (d)(4) add a period after the words "*Federal Register*" and remove the remainder of the sentence.

1 S.T.B.