STB EX PARTE NO. 527

EXPEDITED PROCEDURES FOR PROCESSING RAIL RATE REASONABLENESS, EXEMPTION AND REVOCATION PROCEEDINGS

Decided November 8, 1996

The United Transportation Union-Illinois Legislative Board's (UTU) petition to reopen is granted in part and denied in part. The National Industrial Traffic League's petition to reopen is granted to the extent indicated below. UTU's petition to stay is denied.

BY THE BOARD:

In *Expedited Procedures For Processing Rail Rate,* 1 S.T.B. 731 (1996), and published at 61 Fed. Reg. 52,710 (1996) (October decision), the Board adopted final rules to expedite the handling of challenges to the reasonableness of railroad rates and of proceedings involving the granting or revocation of rail exemptions. The rules were initially scheduled to become effective November 7, 1996, but the effective date was postponed until November 16, 1996, in a decision served November 6, 1996.

On October 11, 1996, Joseph C. Szabo, for and on behalf of United Transportation Union-Illinois Legislative Board (UTU), filed a petition to stay a portion of the decision (amended 49 CFR 1104.3) pending disposition of a to-be-filed petition to reopen.[1] On October 21, 1996, UTU filed a petition to reopen, and the National Industrial Traffic League (NITL) filed a petition for reopening and reconsideration.

[1] UTU argues that the public was not given a realistic opportunity to seek a stay because the stay was due on October 11, 1996, and the *Federal Register* notice was issued on October 8, 1996. The decision in this proceeding, however, was served on October 1, 1996, and, according to our records, counsel for UTU was served with a copy of it by mail.

UTU contends that the changed rules constitute material error. UTU objects to the requirement at amended 49 CFR 1104.3 that, in addition to the traditional paper copies, the public submit certain pleadings on computer diskettes.[2] It also argues that the Chairman, rather than the Board, should initially rule on appeals of employee decisions, and that the time period for filing interlocutory appeals and replies should be enlarged.[3] The NITL argues that, in addition to the policy announced in the October decision, we should explicitly state in our regulations that discovery shall proceed even after the filing of a dispositive motion unless otherwise ordered by the Board. The NITL also argues that we should require that copies of diskettes be provided to other parties only upon request.

In response to UTU's and NITL's petitions to reopen, we are modifying some of the regulations issued in our October decision. Our discussion of the petitions to reopen and our amended rules follows.

PRELIMINARY MATTERS

Because we are ruling on the merits of UTU's petition to reopen, it is unnecessary to address the stay petition. UTU's petition to stay will be dismissed as moot.

Further, we disagree with UTU's claims that the Board has contravened the Congressional intent in enacting 49 U.S.C. 10704(d) by issuing rules concerning the handling of all proceedings rather than limiting the focus of this proceeding to rules applicable to rate cases. Section 10704(d), which prompted the agency to institute this proceeding, pertains to developing procedures to ensure the

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[2] Section 1104.3 was amended by adding the following sentence to the end of paragraph (a):

(a) * * * In addition to the paper copies required to filed with the Board, 3 copies of:

(1) Textual submission of 20 or more pages; and
(2) All electronic spreadsheets should be submitted on 3.5 inch, IBM compatible formatted diskettes or QIC-80 tapes. Textual materials must be in WordPerfect 5.1 format, and electronic spreadsheets must be in LOTUS 1-2-3 release 5 or earlier format. One copy of each such computer diskette or tape submitted to the Board must also be served on each party in accordance with section 1104.12 of this part.

[3] The October decision amended the rules at 49 CFR 1011.7 to provide that the Board, rather than the Chairman, would handle appeals of employee decisions, and that any appeals be filed within 3 days of an employee decision.

prompt handling of challenges to the reasonableness of rail rates, and to avoiding delays in the evidentiary and discovery portions "*of such proceedings and exemption and revocation proceedings*" (emphasis supplied).[4] We do not read this language as limiting the procedures, as UTU claims, to proceedings involving rates. In any event, section 10704(d) does not limit our ability to modify our rules. In addition to relying on section 10704(d), our regulations were amended under our general rulemaking authority at 49 U.S.C. 721.[5] *See Intramodal Rail Competition*, 1 I.C.C.2d 822, 825 (1985). Finally, there were other statutory bases beyond section 10704(d) for amending our regulations. Our regulations for exemptions at 49 CFR 1121 were largely based on the requirements of 49 U.S.C. 10502(b) and (d).

DISKETTE ISSUE

UTU argues that it is aware of no other major federal agency that imposes a requirement to file pleadings on diskette. According to UTU, this rule violates the Administrative Procedure Act (APA), which provides that interested persons be given an opportunity to participate in rulemakings through written data, views or arguments.[6] UTU asserts that the ability for the agency to do a word search is not sufficient justification for requiring the submission of diskettes. We reject these contentions.

Initially, we note that other agencies do require the submission of diskettes. The Department of Transportation's rules on complaint proceedings concerning airport fees state that "[a]ll exhibits and briefs prepared on electronic spreadsheet or word processing programs should be accompanied by standard-format

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[4] New section 10704(d) provides:

Within 9 months after the effective date of the ICC Termination Act of 1995, the Board shall establish procedures to ensure expeditious handling of challenges to the reasonableness of railroad rates. The procedures shall include appropriate measures for avoiding delay in the discovery and evidentiary phases of such proceedings and exemption and revocations proceedings, including appropriate sanctions for such delay, and for ensuring prompt disposition of motions and interlocutory administrative appeals.

[5] We are correcting the authority section for Part 1112. In our October decision we cited "49 U.S.C. 701" instead of 49 U.S.C. 721 as part of our authority.

[6] Under section 553 of the APA, "the agency shall give interested persons an opportunity to participate in the rulemaking through submission of written data, views, or arguments with or without opportunity for oral presentation."

computer diskettes containing those submissions." 14 CFR 302.605(b). The Federal Communications Commission (FCC) recently promulgated regulations at 47 CFR 51.329(c)(3) requiring notice of network changes to be submitted on paper and diskette. Published at 61 Fed. Reg. 47,284, 47,351-52 (1996) (Final rules effective October 7, 1996 and November 15, 1996.) The FCC has also requested diskettes in several rulemaking proceedings. *See, e.g., Implementation of the Telecommunications Act of 1996: Accounting Safeguards Under the Telecommunications Act of 1996*, published at 61 Fed. Reg. 40,161 (1996).

Furthermore, assuming, arguendo, that a diskette does not qualify as "written" data, parties can still participate in Board rulemakings by submitting "written" or "textual" data. Indeed, our rules still require the submission of a paper original and copies. The additional requirement of submitting a diskette only applies to textual submissions of 20 or more pages, and we note that pleadings submitted to the Board often do not meet this threshold. In addition, our decision explicitly stated that if the rule imposed a hardship, a party can seek a waiver.[7]

We also reject UTU's argument that the need to do a word search or "to employ other programming" is insufficient justification for amending section 1104.3. Slip op. at 2-3. The law imposes tight decisional deadlines on the Board in a variety of proceedings. The ability to find quickly an issue or a position in a large record is clearly a benefit of using diskettes and is sufficient justification for this requirement. As we noted in our October decision, using "computer diskettes simplifies the task of reviewing and analyzing voluminous records."

Both UTU and the NITL object to the requirement of serving all parties with a diskette. The NITL argues that this requirement is burdensome because in some proceedings there are hundreds of parties on the service list. It submits that a better alternative would be to allow parties to request a copy of a diskette. We find this suggestion reasonable and will modify the last sentence of 49 CFR 1104.3(a)(2) to read:

One copy of each such computer diskette or tape submitted to the Board should, if possible, be provided to any other party requesting a copy.

[7] UTU's claim that seeking a waiver is impractical because the due date for a pleading likely would have passed by the time the Board ruled on the waiver is unfounded. Parties should timely submit their textual submission in paper form with a request for a waiver. The Board can rule on the waiver after the due date.

UTU makes other arguments that ostensibly are related to the diskette issue. It seeks reconsideration of section 1104.3 because, allegedly, without a public terminal to examine the public docket on diskettes, there will arise "a 'secret docket' for the Board staff;" paper pleadings are not available to the public until 4 to 6 weeks after filing; and the Board will not copy transcripts of Board proceedings. UTU also alleges that the Board has improperly changed its procedures for disseminating transcripts and federal court decisions involving agency actions.

UTU's suggestion that it is disadvantaged because there is no public terminal available at the Board to read diskettes is puzzling, as diskettes simply duplicate what is in the paper pleading. Further, its contention that paper pleadings are not available until 4 to 6 weeks after filing is incorrect. An original and one copy of each pleading is sent to our docket file room. The original is then sent to be microfilmed. (UTU is correct that it takes several weeks for the microfilm and original to return to the Board.) Pending completion of the microfilm process, however, the Board makes available in the public docket reading room a paper copy of the pleading, which may be copied.

UTU alleges that our failure to provide the public with copies of court decisions involving agency actions is an example of "agency arrogance." We disagree. In support of its argument, UTU cites *Tax Analysts v. U.S. Department of Justice*, 845 F.2d 1060 (D.C. Cir. 1988) *aff'd, Department of Justice v. Tax Analysts*, 492 U.S. 136 (1989). That case, however, is not on point. In affirming the court of appeals, the Supreme Court held that the Department of Justice was required under the Freedom of Information Act (FOIA) to make available copies of district court decisions it receives. Here, UTU apparently wants the court decisions without having to make a FOIA request, and we can find no support for this position.

UTU contends that the Board has changed its policy of making transcripts of agency proceedings available for copying. However, the Board's contract with the court reporter prohibits the copying of the draft or final paper transcript. Generally, the transcript is available 3 or 4 days after a hearing.[8] The individual can inspect, but not copy, the transcript at the Board; alternatively, the individual can purchase the transcript from the court reporter. Finally, individuals may

[8] This is the "raw" transcript before corrections are made. A corrected transcript is sent to the court reporter, who makes the necessary changes and returns that transcript and a microfilm copy of it to the Board.

obtain for free a copy of the microfilm version of the transcript when it becomes available.

UTU claims that our "regulations clearly provide that transcripts may be inspected and copied * * *," citing 49 CFR 1001.1(d), 1001.4, 1002.1 and section 552 of the APA. UTU's reliance on the cited CFR sections is without merit. Section 1001.1(d) pertains to inspection of transcripts, but not copying. Section 1002.1 concerns the fees charged for copying documents "as may be practicable to furnish * * *." Because of the agency's contract with the court reporter, it is not practicable to copy the paper transcript, although we will, on request, copy the microfilm version once it is available. Section 1001.4 concerns certifying copies of public records, and the Board will certify the microfilm copy of a transcript. Finally, section 552(a)(2) of the APA provides that an agency shall make available for public inspection and copying final opinions and policy statements, "unless the materials are promptly published and copies offered for sale * * *." There is no mention of transcripts but, in any event, copies can be purchased from the court reporter.

OTHER ISSUES

In our October decision at 9, concerning the effect on a procedural schedule of the filing of motions, such as motions to dismiss or motions to compel, we stated that "we will follow a policy that unless we issue an order altering the procedural schedule, parties to a proceeding will be expected to adhere to the established schedule pending a decision on the motion." The NITL notes, however, that we did not codify this policy in our regulations, and assert that "it may not have the salutary effect that an explicit provision would have." To address the NITL's argument, we will add the following language to the end of 49 CFR 1112.2:

> The filing of motions or other pleadings will not automatically stay or delay the established procedural schedule. Parties will adhere to this schedule unless the Board issues an order modifying the schedule.

UTU objects to our rule at 49 CFR 1011.7(b), providing that appeals to decisions of employees will be decided by the Board, and not the Chairman, contending that it "simply gives Staff interplay greater force." It also objects to making interlocutory appeals and replies due in three days under 49 CFR 1115.9(b), arguing that railway employees frequently participate in Board

proceedings from a significant distance from Washington, D.C. It requests that the 3-day period should be expanded to at least 7 days.

We will retain the requirement that appeals of employee decisions will be heard by the entire Board. As we noted in our October decision at 12, this action will reduce the number of appellate levels and direct the appeal to the body that often ultimately decides the appeal. Moreover, the appeals will still be handled by the Board membership, not the agency's staff.

Finally, in our October decision, at 13, we noted that our three-business day limit for interlocutory appeals and replies[9] was necessary because we were allotting 75 days to complete discovery in stand-alone cost cases. We will, however, modify our rules to allow 7-calendar days for interlocutory appeals and replies in proceedings not involving stand-alone costs.

The Board certifies that these rules will not have a significant economic effect on a substantial number of small entities. These rules clarify previously announced policy and make participation in proceedings less burdensome.

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

List of Subjects

49 CFR Parts 1104, 1112 and 1115

Administrative practice and procedure.

49 CFR Part 1111

Administrative practice and procedure, Investigations.

49 CFR Part 1121

Administrative practice and procedure, Rail exemption procedures, Railroads.

COMMISSIONER OWEN, commenting:

With regard to the NITL alternative to allow parties to request a copy of a diskette in lieu of paper, I would have provided that service might also be accomplished, where agreeable to the applicable parties, via electronic mail or electronic facsimile. Furthermore, STB is moving toward placing all pleadings and decisions on a "home page" on the Internet's World Wide Web in mid-

[9] With weekends and legal holidays, this period could amount to 5 or 6 calendar days.

1997 so that all interested parties, whether or not on the service list, might have immediate access to the public business of this agency.

It is ordered:

1. UTU's petition to reopen is granted in part and denied in part.
2. The NITL's petition to reopen is granted to the extent indicated in this decision.
3. The petition to stay is denied.
4. These rules will be published in the *Federal Register* on November 15, 1996.
5. This decision is effective on November 16, 1996.

By the Board, Chairman Morgan, Vice Chairman Simmons, and Commissioner Owen. Commissioner Owen commented with a separate expression.

APPENDIX

For the reasons set forth in the preamble, title 49, chapter X, parts 1104, 1111, 1112, 1115 and 1121 of the Code of Federal Regulations are amended as follows:

PART 1104 - FILING WITH THE BOARD-COPIES-VERIFICATIONS-SERVICE-PLEADINGS, GENERALLY

1. The authority citation for part 1104 continues to read as follows:

Authority: 5 U.S.C. 559; 21 U.S.C. 853a; 49 U.S.C. 721.

2. Section 1104.3 is amended by revising paragraph (a)(2) to read as follows:

§ 1104.3 Copies.

(a) * * *

(1) * * *

(2) All electronic spreadsheets should be submitted on 3.5 inch, IBM compatible formatted diskettes or QIC-80 tapes. Textual materials must be in WordPerfect 5.1 format, and electronic spreadsheets must be in LOTUS 1-2-3 release 5 or earlier format. One copy of each such computer diskette or tape submitted to the Board should, if possible, be provided to any other party requesting a copy.

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PART 1111 - COMPLAINT AND INVESTIGATION PROCEDURES

3. The authority citation for part 1111 continues to read as follows:

Authority: 5 U.S.C. 559; 49 U.S.C. 721.

§ 1111.3 [Amended]

4. Section 1111.3, 6th sentence, is amended by removing the words "Ten copies of the complaint" and adding in their place the words "An original and ten copies of the complaint."

PART 1112 - MODIFIED PROCEDURES

5. The authority citation for part 1112 is revised to read as follows:

Authority: 5 U.S.C. 559; 49 U.S.C. 721.

6. Section 1112.2 is amended by adding the following sentence to the end of the paragraph to read as follows:

§ 1112.2 Decisions directing modified procedure.

* * * The filing of motions or other pleadings will not automatically stay or delay the established procedural schedule. Parties will adhere to this schedule unless the Board issues an order modifying the schedule.

PART 1115 - APPELLATE PROCEDURES

7. The authority citation for part 1115 continues to read as follows:

Authority: 5 U.S.C. 559; 49 U.S.C. 721.

8. Section 1115.3 is amended by revising paragraph (a) to read as follows:

§ 1115.3 Board actions other than initial decisions.

(a) A discretionary appeal of an entire Board action is permitted. Such an appeal should be designated a "petition for reconsideration."

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9. Section 1115.9 is amended by revising paragraph (b) to read as follows:

§ 1115.9 Interlocutory appeals.

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(b) In stand-alone cost complaints, any interlocutory appeal of a ruling shall be filed with the Board within three (3) business days of the ruling. Replies to any interlocutory appeal shall be filed with the Board within three (3) business days after the filing of any such appeal. In all other cases, interlocutory appeals shall be filed with the Board within 7 calendar days of the ruling and replies to interlocutory appeals shall be filed with Board within 7 calendar days after the filing of any such appeal as computed under 49 CFR 1104.7.

PART 1121 - RAIL EXEMPTION PROCEDURES

10. The authority citation for part 1121 continues to read as follows:

Authority: 5 U.S.C. 553; 49 U.S.C. 10502 and 10704.

§ 1121.4 [Amended]

11. Section 1121.4(e), second sentence, is amended by adding the words "petitions for reconsideration or" prior to the words "petitions to reopen."