STB EX PARTE NO. 347 (SUB-NO. 2)

RATE GUIDELINES--NON-COAL PROCEEDINGS

Decided September 17, 1997

The Board denies the Association of American Railroads petition to reopen the proceeding and to reconsider its *1996 Decision* not to adopt a bright-line test for determining whether to use constrained market pricing or the simplified guidelines in individual cases.

BY THE BOARD:

In *Rate Guidelines - Non-Coal Proceedings*, 1 S.T.B. 1004 (1996)(*1996 Decision*),[1] we adopted simplified evidentiary guidelines to be used to assess the reasonableness of challenged rail rates where constrained market pricing (CMP) procedures cannot practically be applied.[2] On July 31, 1997, the Association of American Railroads (AAR) petitioned to reopen this proceeding. AAR asks that we reconsider our decision not to adopt a bright-line test for determining whether to use CMP or the simplified guidelines in individual cases. Specifically, AAR suggests that we apply the simplified guidelines only to cases where there is no more than $300,000 at stake. Several shipper groups have replied in opposition to AAR's petition.[3]

[1] Petition for judicial review pending, *Association of Am.Railroads v. Surface Transp. Bd.*, No. 97-1020 (D.C. Cir. filed January 10, 1997).

[2] CMP is our preferred method of evaluating the reasonableness of rates assessed for rail transportation. *See, Coal Rate Guidelines, Nationwide*, 1 I.C.C. 520 (1985), *aff'd, Consolidated Rail Corp. v. United States*, 812 F.2d 1444 (3d Cir. 1987).

[3] Replies in opposition to the petition to reopen were filed by The National Industrial Traffic League, National Grain and Feed Association, and Western Coal Traffic League. The United Transportation Union-Illinois Legislative Board filed a reply expressing concern over the cost of presenting a rate case.

In the various comments filed earlier in this rulemaking, a number of bright-line tests for deciding when the simplified procedure will be applied were suggested, but there was no consensus among the parties as to an appropriate test. In the *1996 Decision*, we discussed each of the suggestions that we had received and explained why none appear to be appropriate. Rather than adopt a bright-line standard, we decided to consider the specific circumstances of each case before deciding whether CMP or the simplified guidelines should be used in that case. 1 S.T.B. 1045-49.

In its comments, AAR had argued that the simplified guidelines should only be used in cases where the amount at stake would not exceed $250,000. In its petition to reopen, AAR simply increases its suggested limit to $300,000, without adequately addressing the reservations expressed in the *1996 Decision* about reliance on a total dollar figure. 1 S.T.B. at 1047-48. We do not regard AAR's suggested increase from a $250,000 to a $300,000 limit as a material change in its position. Thus, AAR's petition is merely an attempt to reargue an issue that was already raised and fully addressed in the *1996 Decision*.

Furthermore, AAR has not presented compelling arguments that would persuade us that its $300,000 figure is an appropriate dividing line. While we believe that a case involving less than that amount would likely qualify for use of the simplified procedures, we cannot say with any confidence that all cases above that amount could and should be handled under CMP. AAR's unsubstantiated assertions regarding the cost of making a CMP stand-alone cost presentation are hotly disputed by shipper interests.[4] In any event, we do not believe that a "one-size-fits-all" cost measure is appropriate as the less frequent the shipments involved, and the more scattered throughout the country the origins and destinations involved, the more difficult and/or costly a stand-alone cost presentation would become.

AAR argues that a case-by-case approach to determining when the simplified guidelines will be applied will add substantial cost and uncertainty as the parties debate which rate reasonableness procedures should be used. While some costs will be incurred to present the information called for by the *1996 Decision*, most of what is required is information that would be needed for processing the case in any event. Moreover, we do not intend to permit the selection of which evidentiary guidelines to apply to become a major case within

[4] To the extent that AAR underestimates the expense of litigation, a shipper could be effectively precluded from filing a complaint under its bright-line test.

a case. We are committed to resolving this issue quickly at the beginning of a case, with minimal costs to the parties. Just as we have great discretion to adopt a bright-line standard (as AAR points out), we have ample discretion to decide which rate reasonableness method to use in a particular case without extended and costly litigation over the matter.

In any event, if future experience indicates that a bright-line test is necessary and appropriate, we will not hesitate to consider such a procedure at that time. In the meantime, without experience processing cases under the simplified procedures, we continue to believe that the flexibility provided by a case-by-case determination of which rate guidelines to use is most appropriate. For these reasons, we deny AAR's petition.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources. Nor will it have a significant economic effect on a substantial number of small entities.

It is ordered:

(1) AAR's petition to reopen is denied.

(2) This decision is effective on September 24, 1997.

By the Board, Chairman Morgan and Vice Chairman Owen.