Who Should Pay for Agency Adjudication? A Study of $200,000 Filing Fees at the Surface Transportation Board

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> And having looked to Government for bread, on the first scarcity they will turn and bite the hand that fed them.[1]

In 1995, after one hundred and eight years of existence, the nation's oldest regulatory entity, the Interstate Commerce Commission (ICC or Commission) was terminated.[2] With the enactment of the ICC Termina-

1. Edmund Burke, THOUGHTS AND DETAILS ON SCARCITY 31 (1975)

2. *See* Frank N. Wilner, *Interstate Commerce Commission Dead at Age 108*, 63 TRANSP. L. LOGIST. & POL'Y. 191 (1996) (providing an interesting historical review of the ICC, its commissioners, and the rise and fall of the agency).

tion Act[3] (ICCTA), Congress replaced the ICC with the independent, three-member Surface Transportation Board[4] (STB or Board) to perform the core rail and trucking regulatory responsibilities formerly conducted by the ICC.[5]

The ICC was originally created in 1887, due in large part to concern about the monopoly status of the railroads and to help protect railroad customers, known as "shippers," and communities from abuses by the railroads who possessed a great deal of economic power over them.[6] The protection of shippers and others from unreasonable rates that might be charged by railroads is a stalwart of the nation's rail transportation policy.[7] For over one hundred and ten years, shippers and the public have gone to the ICC/STB seeking prescriptive rate relief from railroads.[8] Today, the STB is the only forum where shippers and communities can seek redress from many railroad abuses, as the federal government has sole authority over economic regulation of interstate rail transportation.[9]

While President Clinton supported the ICCTA, he did not support

3. ICC Termination Act, PUB.L.No. 104-88, 109 Stat. 803 (1995)(codified as amended at various portions of 49 United States Code).

4. The STB is an independent government entity created in 1995 by the ICCTA. While independent, the Board is technically established within the Department of Transportation (DOT). The legal authority for the establishment of the STB is found at 49 U.S.C. § 701(1996). *See* Don Phillips, *ICC Fading But Won't Disappear*, WASH. POST, Dec. 8, 1995, at A25 (reviewing congressional debate on the ICCTA and the proposed establishment of the new STB to handle residual regulatory functions formerly conducted by the ICC).

5. *See generally*, Stephen J. Thompson, *The Surface Transportation Board (STB): An Overview and Selected Public Policy Issues*, CONGRESSIONAL RESEARCH SERVICE (96-67 E, Jan. 10, 1997). The STB currently has a staff of approximately 135, and handles an annual caseload of approximately 500-600 proceedings. *See ICCTA: Hearing Before the Subcommittee on Surface Transportation and Merchant Marine, Senate Committee on Commerce, Science and Transportation*, March 20, 1997 (statement of the Honorable Linda J. Morgan, Chairman, Surface Transportation Board)(unpublished).

6. *See* H.R. REP. NO. 104-311, at 90 (1995); *See* S. REP. NO 104-76, at 2 (1995) (noting that the ICC "originally was created to protect shippers from the monopoly power of the railroad industry").

7. The Interstate Commerce Act, as reaffirmed by the ICCTA, proclaims that "it is the policy of the United States Government . . . to maintain reasonable rates where there is an absence of effective competition and where rail rates provide revenues which exceed the amount necessary to maintain the rail system and to attract capital." 49 U.S.C. § 10101(6)(1994).

8. The STB has general authority to establish reasonable rates by market dominant railroad common carriers. *See* 49 U.S.C. §§ 10701-10709(1994). *See infra* notes 42-49 and accompanying text (discussing the statutory components of pursuing a rate case before the STB).

9. *See* 49 U.S.C. § 10501(b)(1994)(the "transportation by rail carriers, and the remedies provided in this part with respect to rates, classifications, rules (including car service, interchange, and other operating rules), practices, routes, services, and facilities of such carriers . . . is exclusive"); San Antonio, Tex. v. Burlington N., Inc., 650 F.2d 49, 53 (1981) (noting that the ICC (now STB) has principle jurisdiction to determine the reasonableness of rail rates and that "Congress entrusted special authority in the Commission to determine questions of railroad ratemaking").

the creation of the STB; he preferred legislation that would significantly deregulate transportation industries.[10] In early 1996, the President's first publicly manifested his lack of support for the newly created STB in his fiscal year (FY) 1997 budget submission to Congress. The President's budget requested only a fraction of the STB's annual budget from general treasury appropriations.[11] Instead, the President requested that virtually all of STB's funding "be derived from user fees collected from the beneficiaries of the Board's activities"[12] pursuant to the Independent Offices Appropriations Act (IOAA),[13] which authorizes agencies to prescribe and collect fees for their services.[14]

The STB did not wait for Congress before acting itself on the President's budget proposal. In the spring of 1996, while the President's funding plan for the STB was pending in Congress, the Board issued a

10. *See* Statement By the President, Office of the Press Secretary, December 30, 1995. Upon signing the ICCTA into law, the President expressed his "disappoint[ment]" with the legislation. *Id.* The President remarked, "[w]hile [the ICCTA] eliminates the ICC, it creates a new independent agency, the STB, within the Transportation Department. Overall, the bill falls short of my Administration's much bolder proposal for extensive deregulation of transportation industries." *Id.* During the House and Senate conference committee consideration of the ICCTA, DOT Secretary Federico Pena also objected to the ICCTA because it "eliminated the ICC in name only and continued too many of its functions and unnecessary regulations in a newly created independent agency." Letter from Secretary Federico Pena, U.S. Department of Transportation, to the Honorable Larry Pressler, Dec. 6, 1995, at 1. *See* Lisa Burgess, *Rail Industry Awaits Decision on ICC*, J. OF COM., Dec. 20, 1995, at 2B (noting that the Administration particularly was concerned about transferring the ICC's rail merger authority to a new independent board rather than to the Department of Justice). *Compare* David Barnes, *For Congress and Transportation, 1995 was the Year that Wouldn't End*, TRAFFIC WORLD, Jan. 1, 1996, at 8 (reviewing Secretary Pena's complaint that "[w]e're not eliminating the ICC") with David Barnes, *Congress Kills ICC After Last-Minute Haggling*, TRAFFIC WORLD, Jan. 1, 1996, at 10 (quoting Congressman Bud Shuster, Chairman of the House Transportation Committee as stating "[w]e are downsizing government by eliminating an antiquated federal agency, we are reducing unnecessary regulation and we are saving taxpayer dollars. . .").

11. *See* Office of Management and Budget, *Budget of the United States Government, Fiscal Year 1997*, 778-79 [hereinafter FY 1997 Budget].

12. The President's budget requested $15,344,000 to fund the STB in fiscal year (FY) 1997. *Id.* The President's FY 1997 budget request called for $219,000 of the STB's annual budget to be collected through reimbursements from other agencies. *Id.* at 779. The remaining $15,125,000 was to be derived from user fees *Id.*

13. 31 U.S.C. § 9701 (1994).

14. The President's budget submission for FY 1997 describes in detail the term "user fee." *See* FY 1997 Budget, *supra* note 11, at 53. As defined therein, user fee:

> is a general term that refers to amounts assessed against identifiable recipients for special benefits derived from Federal activities beyond those received by the general public. Depending primarily on whether the user charge is based on the Government's sovereign power or business-type activity, it may be classified as a governmental receipt or an offsetting collection. *Id.*

Total federal government offsetting user fee collections in FY 1997 were expected to total $190.4 billion. *Id.* The FY 1997 budget requested a $1.4 billion increase in "user fees and other collections" over the prior year's levels, and an $11.2 billion increase in fees over a six year period. *Id.*

proposal recommending new across-the-board self-financing fee increases.[15] Pursuant to its authority under the IOAA, the Board sought to increase filing fees for formal rail coal rate complaints from $1,000 to $233,200[16] and all other formal rate complaints from $1,000 to $23,100.[17] Meanwhile, a new fee of $3,700 was proposed for appeals or petitions to reopen, reconsider, or revoke Board decisions.[18] The STB's proposed fee package was designed to allow it to cover all labor and other related costs associated with processing agency adjudications. The Board ultimately adopted these filing fees, as modified, in August 1996.[19]

This article focuses on the new and increased rail complaint filing fees adopted by the STB in 1996. Part One provides background on the federal rail regulatory scheme and on the need for an adjudicatory forum for shippers and the public to go to in order to seek redress against railroad economic abuses in the form of unreasonable rail rates. Part Two reviews federal agency authority and the use of self-funding mechanisms under the IOAA. It then reviews the history of filing fees at the ICC/STB and the STB's 1996 user fee proceedings, including congressional attempts to block new complaint filing fees.

Part Three discusses the implications of these new fees, arguing that these new filing fees are against public policy and probably violate the IOAA. In addition to being unfair, the fees will likely discourage the public from submitting complaints and fail to provide offsets for the public benefits associated with filings. Also, similar charges assessed for processing complaints at other agencies and in common law courts fail to justify the STB's complaint fee increases, and the availability of a fee waiver is insufficient to safeguard potential complainants.

Part Four of this article proposes that if the Board's new complaint filing fees are to continue to be imposed, then at a minimum, the Board should: (1) establish fees on an actual cost basis, as opposed to the current flat fee basis; (2) provide for payment on a pay-as-you-go basis, rather than the current up-front payment basis; and (3) establish a "loser pays" system. These measures will help ensure that shippers are not required to pay for proceedings that are settled or otherwise concluded early and are not disproportionately forced to pay for a carrier's violation of the law.

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15. *See* Ex Parte No. 542, *Regulations Governing Fees for Service Performed in Connection with Licensing and Related Services — 1996 Update*, 1 STB 179(1996). Decisions issued by the STB are not generally cited according to "bluebook" form. Accordingly, references to ICC/STB decisions in this article conform to the standard citation practice employed by the STB and practitioners before the Board, and not to the bluebook.

16. *See Id.* at 3 (proposed fee item 56(i)).

17. *See Id.* (proposed fee item 56(ii)).

18. *See Id.* (proposed fee item 61).

19. *See* Ex Parte No. 542, *supra* note 11.

I. The Federal Rail Regulatory Structure

A. The Common Carrier Obligation

The United States' rail network consists of approximately 175,000 miles of lines owned by major, regional, and short line carriers.[20] Unlike many other modes of transportation, rail transportation is unique in that rail carriers own[21] and maintain control over their transportation rights-of-way. Competitor railroads are not allowed to operate on a rail carrier's line absent the express permission of the incumbent carrier or regulatory order. In contrast, other modes of transportation, including trucks and barges, operate on public rights-of-way, highways, and waterways, where there is unrestricted entry.[22]

In exchange for the privilege of obtaining a public charter[23] permitting rail carriers to condemn private property necessary to construct their infrastructure, carriers agreed to operate as common carriers.[24] A railroad's obligation as a common carrier, which requires railroads to provide to the public, upon reasonable request, transportation service over its rail line,[25] is a mainstay of federal rail regulatory policy. A fundamental corollary to this obligation is the duty to provide reasonable rates for the service. The duty provides that rates subject to the STB's jurisdiction "must be reasonable."[26]

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20. *See Disposition of the Railroad Authority of the Interstate Commerce Commission: Hearings Before the Subcommittee on Railroads of the Committee on Transportation and Infrastructure*, 104th Cong. 406-07 (1995) (testimony of William E. Loftus, President, The American Short Line Railroad Association) [hereinafter, ICCTA Hearings].

21. *See* Colin Barrett, Practical Handbook of Transportation Contracting and Rate Negotiations 135 (1st ed. 1987).

22. *See* D. Philip Locklin, Economics of Transportation 47 (7th ed. 1972)(noting that "[p]ublicly provided waterways, highways, airways, and airports are open to all users").

23. *See Id.* at 873 (noting that "[c]ertificates of public convenience and necessity . . . are required before anyone may engage in transportation by rail . . .").

24. *See* John H. Armstrong, The Railroad—What It Is, What It Does 123 (1978). Railroads' private rights of way largely were/are obtained through the government's eminent domain authority. *Id. See* Locklin, *supra* note 22, at 124 ("It is to be observed that the power of eminent domain is the power to take the property of others for a *public purpose.* To take the property of one individual for the benefit of another individual would not be a valid exercise of the power of eminent domain.")(Emphasis in original).

25. *See* 49 U.S.C. § 11101(a)(1994)("[a] common carrier . . . shall provide transportation or service upon reasonable request."). *See* also American Trucking Ass'ns v. Atchison, Topeka and Santa Fe Ry., 387 U.S. 397, 406 (1967) ("From the earliest days, common carriers have had a duty to carry all goods offered for transportation."); Michigan Pub. Util. Comm'n v. Duke, 266 U.S. 570, 577 (1925)(A common carrier is required "to serve all, up to the capacity of his facilities without discrimination and for reasonable pay."); 13 C.J.S. Carriers § 386 (1991) ("Every common carrier is under a duty to receive and transport any property tendered to it for transportation, provided the property is such as it holds itself out as willing to carry, or as it usually carries.").

26. 49 U.S.C. § 10701a(b)(1994).

B. Transportation Regulatory Goals

Professor John Meyer in *The Economics of Competition in the Transportation Industries*, proposes four objectives for transportation regulation in this country.[27] First, "regulation is intended to prevent unreasonable prices which produce excessive earnings" in those instances where transportation industries would otherwise have an incentive to abuse their monopoly position over shippers.[28] Second, regulation is designed to prevent cut-throat competition that might lead to "abnormally low profits in transportation."[29] Third, regulation is designed to prevent discrimination between customers.[30] Finally, regulation is used as a means to ensure that "broad public need[s]" are met and that communities and businesses do not lose vital transportation service.[31] Implicit in these objectives for regulation is the goal to either create an economic balance among individual industries who engage in and are dependent on transportation or "satisfy the transportation needs of the economy at a minimum cost in resources."[32]

1. Rail Deregulation and Rate Complaints

In 1980, Congress enacted the Staggers Rail Act,[33] which significantly changed existing federal regulatory policies affecting the railroads. The legislation was enacted primarily in response to the lagging financial position of rail carriers and to help the railroads compete more effectively with other modes of transportation.[34] In the late 1970s the railroads were finding it difficult to compete for service against the motor carriers, barges, and pipelines.[35] In response to these competitive problems, the Staggers Act significantly reduced the federal regulatory structure for railroads.[36] The Staggers Act, however, was retained as a core principal

27. John R. Meyer, The Economics of Competition in the Transportation Industries 11-12 (1976).

28. *Id.* at 11.

29. *Id.* at 11-12.

30. *Id.* at 12.

31. *Id.*

32. Meyer, *supra* note 27, at 12.

33. Pub. L. No. 96-448, 94 Stat. 1912 (1980).

34. *See* H.R. Rep. No. 104-311, at 90 (1995) (noting that "by the 1970s, the railroad industry was on the brink of financial collapse").

35. *See Id.* at 90-91.

36. *Id.* The Staggers Act has resulted in a dramatic turnaround in the financial stability of the railroad industry. *See* H.R. Rep. No. 104-311, at 91 (1995) (noting that the Staggers Act has "produced a renaissance in the railroad industry"). The industry now enjoys an approximately eight percent return on investment under STB return standards (as opposed to a four percent return immediately prior to 1980) and has a market share of approximately 38 percent. *Id.*; *See* ICCTA Hearings, *supra* note 20 at 211-12 (testimony of Joseph Canny, Deputy Assistant Secretary for Transportation Policy, U.S. Department of Transportation).

rate protection for shippers who are dependent on a single railroad for service and who have few realistic competitive service options.[37]

The ICCTA continued the deregulatory policies of the Staggers Act.[38] The House Report to the ICC Termination Act explained that the Act was to "build on the deregulatory policies that have promoted growth and stability in the surface transportation sector."[39] As for the rail industry, Congress retained only those regulations that were deemed "necessary to maintain a 'safety net' or 'backstop' of remedies to address problems of rates, access to facilities, and industry restructuring."[40]

2. *The Limited Amount of Traffic Subject to Rate Regulation*

As a result of the reforms of the Staggers Act and the ICCTA, a majority of rail traffic today moves under private contract between the carrier and the shipper.[41] This traffic is not subject to government regulation.[42] Regulatory relief is only available where the movement is not under contract and where a carrier has such a large share of the market that competition fails to effectively control rates.

The Board will consider the reasonableness of a challenged rate only if the shipper can prove that the carrier possesses market dominance over the transportation movement.[43] While a market dominance proceeding at the STB involves the consideration of lengthy and complex economic

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37. *See Id.* at 91 (noting that the protections kept for "captive shippers. . .have worked well to maintain a balanced transportation system"). In Rates on Iron Ore, Randville to Escanaba Via Iron Mountain, 367 I.C.C. 506 (1983), the ICC reviewed congressional policy behind the Staggers Act, stating:

> Although Congress gave the railroads great flexibility in ratemaking matters, it did not give them total freedom. Congress was clearly concerned with the impact its changes would have on captive shippers. A specific goal of the Act was "to provide a regulatory process that balances the needs of carriers, shippers, and the public." Even more specific is the statement that: "[t]he conferees intend that (the Rail Transportation) policy include the encouragement and promotion of the transportation of coal by rail in accordance with the objective of energy independence at rates which do not exceed a reasonable maximum where there is an absence of effective competition."

Id. at 536 (citations omitted).

38. *See* H.R. REP. No. 104-311, at 93 (1995).

39. *Id.*

40. *Id.*

41. ICCTA Hearings, *supra* note 20, at 213 (testimony of Joseph Canny, Deputy Assistant Secretary for Transportation Policy, U.S. Department of Transportation).

42. *See* 49 U.S.C. § 10709 (1994). Section 10709(a) provides that "[o]ne or more rail carriers providing transportation . . . may enter into a contract with one or more purchasers of rail services to provide specified services under specified rates and conditions." Under § 10709(b), parties entering into such contracts "have no duty in connection with services provided under such contract other than those duties specified by the terms of the contract."

43. 49 U.S.C. § 10707(a) and (b) (1994). Under the statute, 'market dominance' means an absence of effective competition from other carriers and modes of transportation for the transportation to which a rate applies. *Id.* at § 10709(a).

and legal issues, the basics of a case requires two general inquiries — one quantitative and the other qualitative in nature.[44] First, a finding of market dominance will be found only if the rate exceeds a revenue to variable cost percentage of one hundred and eighty percent for the transportation in question.[45] If so, the STB must next determine if the rate is unreasonable under the Board's standards.[46] With this second market dominance standard, the Board is inquiring whether firms are forced to perform up to standards at reasonable prices or lose desirable business[47] by considering whether the defendant carrier's rates are constrained by any one or a combination of at least four types of competition: intramodal, intermodal, product, or geographic competition.[48] If both prongs of the market dominance test are met, the Board has authority to prescribe a maximum rate to be followed by the carrier.[49]

Overall, approximately eighteen percent of all rail traffic is subject to a rate reasonableness challenge[50] and very few maximum rate challenges are brought before the STB.[51] While there is limited public information available on rail rate complaint adjudications, in the year 1993, for instance, the ICC issued only sixty-five rate decisions.[52] Despite the low number of rate challenges, the presence of rate relief statutes is vital to many shippers who are "captive" to one railroad. Even if a case is not brought, the very ability to bring a rate complaint case can afford shippers an important leverage tool in their contract negotiations with the railroads.[53]

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44. For a detailed review of how the Board regulates rail market dominance *see* Stephen J. Thompson, *Rail Market Dominance: Is ICC Regulation Still Needed?*, CONGRESSIONAL RESEARCH SERVICE, at 38-40 (94-775E, Apr. 18, 1995).

45. 49 U.S.C. § 10709(d)(2)(1994).

46. *Id.* at § 10707(c)(1994). *See also, Id.* at 10707(d)(1)(A) and (B)(1994).

47. Ex Parte No. 320 (Sub-No. 2), *Market Dominance Determinations and Consideration of Product Competition*, 365 I.C.C. 118, 129 (1981) *aff'd* Western Coal Traffic League v. United States, 719 F.2d 772 (5th Cir. 1983) (en banc).

48. *Id.* at 131-135.

49. 49 U.S.C. § 10704(a)(1) (1994).

50. Ex Parte No. 347 (Sub-No. 2), *Rate Guidelines — Non-Coal Proceedings*, at 5 (unpublished decision served Dec. 1, 1995).

51. *See* BARRETT *supra* note 21, at 69 (noting that "[i]f shippers and/or carriers fail to negotiate satisfactory arrangements in the competitive marketplace, the government will not normally intervene to help them.").

52. *See* Kenneth M. Mead, *Transferring ICC's Rail Regulatory Responsibilities May Not Achieve Desired Effects*, United States General Accounting Office, GAO/T-RCED-94-222, 4-5 (June 9, 1994).

53. *See* ICCTA Hearings, *supra* note 20, at 233-34 (1995) (testimony of Richard Dauphin, President, Western Coal Traffic League).

C. Industry Dependence on Railroads and the Cost of Transportation

The ability of a shipper to choose among different carriers within and among rail, truck, and water modes of transportation provides shippers a distinct advantage in obtaining low-cost service. In many industries, however, shippers cannot rely on truck[54] or water carriage[55] for the shipment of a particular commodity for a specific origin and destination.[56] Department of Justice (DOJ) guidelines governing railroad mergers provide a handy reference as to how competition for transportation service impacts bulk commodity shippers:

> For railroad mergers, the analysis begins with identification of the affected routes. For two railroads with largely parallel routes, the logical starting point for defining a market is the carriage of a particular commodity from one point (called an origin) to a second point (called a destination) by the merging railroads.
>
> Once the affected routes are identified, the analysis generally focuses on an evaluation of the other rail, intermodal, product, and source competition options available to shippers. Intermodal competition is the ability of a shipper to substitute another mode of transportation, usually truck or water carriage, for the shipment of a particular commodity between a particular origin and destination. If truck or water service is available and is a close substitute for rail carriage for certain commodities, these competitive alternatives would prevent a rail carrier from raising its rates for these commodities. For other commodities, however, trucks may be at a significant disadvantage to rail where, for example, the distance the commodity is shipped is great, the volume of the commodity shipped is large, or the value of the commodity as compared to its weight is small.[57]

1. *Captive Traffic*

Many industries are highly dependent on rail for their transportation needs, including those that ship bulk commodity products such as coal, grain, chemicals, and plastics. Over five billion bushels of grain products

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54. For example, a railroad car contains the equivalent of over three truck shipments of grain. *See Id.* at 358 (testimony of Russell J. Kocemba, National Grain and Feed Association).

55. To utilize barge or ship vessel movements, of course, a shipper needs to be located near a river or other body of water that can be feasibly used to transport products or goods. *See Id.* Some waterways are also closed to access during certain times of the year due to freezing weather. *Id.*

56. *See* Locklin, *supra* note 22, at 899 (noting that "[i]n the railroad field there are many commodities for which motor transport or transportation by water is not a substitute. . .").

57. *See* ICCTA Hearings, *supra* note 20, at 130-31 (testimony of Steven C. Sunshine, Deputy Assistant Attorney General, Antitrust Division, United States Department of Justice).

are shipped by rail annually.[58] In certain states, virtually all movements of grain to the markets is shipped by rail. In North Dakota, for example, individual farmers bring grain to almost five hundred county grain elevators where the good is processed and shipped onward to the markets.[59] All together, eighty percent of grain commodities are shipped from the elevator to the major markets via rail, and the vast majority of these elevators are served by only one railroad.[60]

The plastics industry transports sixty billion pounds of plastics materials by railroad annually.[61] Plastics transportation accounts for over $1.1 billion in revenues for the railroads.[62] These transportation costs are significant for the industry. Transportation is the second single largest cost component of producing plastics resins, or approximately twenty percent of the total costs of production.[63] Railroads also ship ten million tons of raw clay materials in the United States each year.[64] Shipment of clay via railroad constitutes eighty percent of the clay that is shipped in this country.[65]

Shippers of bulk commodities are dependent on the rail industry for service.[66] Because of their dependence on rail as a sole means of transportation, many shippers must pay disproportionately higher transportation costs than do shippers who have competitive service options. These transportation costs, however, are not only of concern to individual shippers. Ultimately, high transportation costs are paid for by consumers through higher end product costs.[67]

a. The Dependence of Coal Shippers on Rail

Rail transportation is probably more economically crucial for electric utilities than for any other industry. More than eighty percent of all coal production in the United States is purchased by electric utilities as a pri-

58. *Id.* at 357 (testimony of Russell J. Kocemba, Chairman, National Grain and Feed Association's Transportation Committee).

59. *Id.* at 484 (testimony of Congressman Earl Pomeroy).

60. *See Id.* at 520 (testimony of Steven D. Stregen, Executive Vice President, North Dakota Grain Dealers Association).

61. *Id.* at 276-77 (testimony of Robert Granatelli, The Society of the Plastics Industry).

62. *See* ICCTA Hearings, *supra* note 20, at 276-77 (testimony of Robert Granatelli).

63. *Id.*

64. *Id.* at 492 (statement of John P. Prugh, President, U.S. Clay Producers Traffic Association, Inc.).

65. *Id.*

66. Given the high barriers to entry for competitor railroads, it is usually impracticable to bring in new intramodal rail competition to geographic areas that are captive to one carrier.

67. *See* LOCKLIN *supra* note 22, at 4-5 (noting that "[c]heap transportation reduces the price of goods by lowering the cost of producing them"); *see Id.* at 9 ("Since cheap transportation contributes to the prosperity of society by making possible the production of more goods at less cost, it follows that the public interest requires the lowest possible freight rates.")

mary fuel source.[68] In 1994 over 6.6 million carloads of coal were moved by rail.[69] Rail is the only transportation option for most utilities which transport coal. Of the nation's four hundred and fifteen electric utilities that use coal as a power fuel source, two hundred and eleven are served by a single railroad, with the remainder enjoying a second railroad or water-borne transportation options.[70] There are very few service options for utilities because there are only a few railroads offering service. Ninety percent of all coal movements shipped to individual coal burning facilities are made by the nation's four largest rail carriers who control the means of service to power generation plants.[71]

Coal transportation costs are significant for electric utilities. Seven billion dollars is spent annually by utilities on coal transportation.[72] Coal transportation costs alone account for an average of twenty-five percent of the cost of generating power, and in some regions, these costs account for almost fifty percent of a utility's power generation costs.[73]

Electric utilities are regulated at the state and local levels of government on the rates charged to their customers, the consuming ratepayers. While utilities are required to keep their costs to a minimum, any increased transportation costs are passed on directly to ratepayers in the form of higher electricity rates. For example, if an individual utility burns ten million tons of coal annually at its power generation plant, for every dollar per ton of coal in transportation increases, ratepayers must pay ten million dollars more each year on their electricity bills. Likewise, for every dollar saved in transportation costs, the ratepayers save ten million dollars annually.

II. User Fees at the Surface Transportation Board

A. The IOAA and Federal Agency User Fees

The STB currently prescribes and collects user fees pursuant to the

68. Resource Data International, Inc., *The Dependence of Industry on Railroads: The Coal Transportation Industry*, at 1. [Hereinafter RDI Study]. While other sources of fuel are available for utilities, e.g., nuclear power, natural gas, or hydro-power, coal is now, and is expected to remain a lower cost fuel. It is also impracticable for utilities that have built coal burning electric production facilities to switch to another fuel.

69. ICCTA Hearings, *supra* note 20, at 384 (testimony of Joseph E. Lema, Vice President for Transportation, National Mining Association).

70. *Id.*

71. RDI Study, *supra* note 68 at 3. The four railroads that control the nation's coal movements are: Union Pacific, Burlington Northern Santa Fe, CSX Transportation, and Norfolk Southern. *Id.*

72. *Id.* at 1.

73. *Id.* at 4.

IOAA.[74] The IOAA permits agencies to prescribe fees that are "fair" and based on government costs, the "value of the service or thing to the recipient," the "public policy or interest served," and "other relevant facts."[75]

Office of Management and Budget (OMB) guidelines provide that user charges pursuant to the IOAA are to be "assessed against each identifiable recipient for special benefits derived from [f]ederal activities beyond those received by the general public."[76] The IOAA is applicable to all federal agencies, except to "mixed-ownership [g]overnment corporations."[77]

1. Determining the Amount of Charges to be Assessed

In determining the amount of user charges to assess, agencies are expected to collect the full cost to the government of providing the service.[78] However, sometimes agency services provide both a special benefit to an identifiable recipient and a benefit to the general public. In those instances, agencies must determine if the public benefit is "in-

74. 31 U.S.C. § 9701 (1983). The IOAA, set forth at 31 U.S.C. § 9701 provides in pertinent part:

> § 9701. Fees and charges for Government services and things of value
>
> (a) It is the sense of Congress that each service or thing of value provided by an agency. . .to a person. . .is to be self-sustaining to the extent possible.
>
> (b) The head of each agency. . .may prescribe regulations establishing the charge for a service or thing of value provided by the agency. Regulations prescribed by the heads of executive agencies are subject to policies prescribed by the President and shall be as uniform as practicable.

75. *Id.* at § 9701(b)(1) and (2) (1983). *See* Ayuda, Inc. v. Attorney Gen., 848 F.2d 1297, 1300-01 (1988)(stating that the IOAA phrase "service or thing of value" is to be construed broadly, and that new filing fees established by the Attorney General for administrative appeals of Immigration and Naturalization Service deportation orders was proper).

76. User Charges, *Office of Management and Budget Circular No. A-25*, at 6, July 8, 1993. [hereinafter OMB Circular]. The OMB Circular gives three examples of when a user charge may be imposed, including when a government provided service:

> (a) enables the beneficiary to obtain more immediate or substantial gains or values (which may or may not be measurable in monetary terms) than those that accrue to the general public (e.g., receiving a patent, insurance, or guarantee provision, or a license to carry on a specific activity or business or various kinds of public land use); or
>
> (b) provides business stability or contributes to public confidence in the business activity of the beneficiary (e.g., insuring deposits in commercial banks); or
>
> (c) is performed at the request of or for the convenience of the recipient, and is beyond the services regularly received by other members of the same industry or group or by the general public (e.g., receiving a passport, visa, airman's certificate, or a Custom's inspection after regular duty hours).

Id.

77. *Id.* at 4a. The OMB Circular also does not apply to the federal legislative or the judicial branches. *Id.*

78. *Id.* at 6a(2).

dependent of" or "merely incidental to" special benefits incurred.[79] If the public obtains a benefit that is merely incidental to benefits enjoyed by an identifiable recipient, an agency is expected to collect the full cost of providing the benefit.[80] On the other hand, if the "identification of the specific beneficiary is obscure" and the service provided primarily benefits the public at large, no charges should be imposed.[81] The Supreme Court has held that under the IOAA, an agency may charge a fee only for services that confer a special, private benefit on an identifiable beneficiary, and that the fee may not exceed the agency's costs.[82] Any charge not directly related to a private benefit is considered to be a tax. Congress alone, and not federal agencies, may impose taxes.[83]

Under the IOAA, user fees can be understood as a useful economic tool used to reduce the subsidization by general taxpayers for aspects of an agency's operations that are solely enjoyed by beneficiaries of that agency's services.[84] Such fees are designed to ensure that "only the individuals or entities benefitting from the goods or services provided by the government pay for those goods and services."[85] In this sense, many user

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79. *Id.* at 6a(3).

80. *Id.*

81. OMB Circular, *supra* note 76, at 6a(3). The Supreme Court has held that the rule to be applied in such cases is as follows:

> An agency may not charge more than the reasonable cost it incurs to provide a service, or the value of the service to the recipient, whichever is less. National Cable Television Ass'n v. FCC, 554 F.2d at 1104-07 (D.C. Cir. 1976). If the service provides both a specific benefit to an identifiable beneficiary and an independent benefit to the public, then the agency must prorate its costs, lest the specific beneficiary be charged for agency costs attributable to the public benefit. National Cable Television Ass'n v. United States, 415 U.S. 336, 343 (1974); Electronic Indus. Ass'n v. FCC, 554 F.2d 1109, 1115 (D.C. Cir. 1976).

Engine Mfrs. Ass'n v. EPA, 20 F.3d 1177, 1180 (D.C. Cir. 1994).

82. National Cable Television Ass'n v. United States, 415 U.S. 336 (1974). *See supra* notes 75-81 and accompanying text (explaining the "incidental" versus "independent" benefit distinction made when assessing the propriety of imposing a user fee).

83. *National Cable Television Ass'n*, 415 U.S. at 343.

84. *See generally*, Clayton P. Gillette and Thomas D. Hopkins, *Federal User Fees: A Legal and Economic Analysis*, 67 B.U.L.REV. 795, 814-816 (1987) (describing in detail the economic theory of imposing user fees and how "efficient pricing" policies can ensure that the costs of providing agency services are fairly distributed between agency beneficiaries and general taxpayers).

85. Administrative Conference of the United States, *Federal User Fees, Proceedings of a Symposium* (Thomas D. Hopkins, ed., 1988) 1 (introduction by Marshall J. Breger) [hereinafter ACUS User Fee Symposium]. Professor Breger notes that besides fairness considerations, user fees "promote economic efficiency by simulating a market test for commercial products" and "[a]t the very least, user fees create an incentive for fee payers to let government agencies know if their programs are being operated in a cost-efficient manner." *Id.* A review of the papers included in the ACUS User Fee Symposium provides an excellent overview of what user fees are intended to accomplish, the implementation of user fees at various federal agencies, and a glimpse of how their implementation might be improved.

fees are thought to be "fairer" than paying for certain agency operations through general United States Department of Treasury appropriations.

2. *Agency Use of User Fees*

Federal agencies employ many different types of user fees which fall in into four general categories[86]: charges for benefits and services,[87] rents, royalties, and sales of products,[88] regulatory fees,[89] and benefit and liability based taxes.[90] Almost two hundred billion dollars in user fees is collected annually by agencies.[91] The amount and the extent to which user fees are imposed varies from agency to agency. For example, the Securities and Exchange Commission, the Federal Energy Regulatory Commission (FERC), the Nuclear Regulatory Commission (NRC), and the Patent and Trademark Office assess fees on agency users that cover the agencies' entire annual operation costs.[92] Meanwhile, of the STB's approximately fifteen million dollar annual budget, approximately three

86. See Congressional Budget Office, *The Growth of Federal User Charges* 42-55 (Aug. 1993) [hereinafter User Charges]. Information on individual federal agency collection of user fees is difficult to obtain, due mainly to the fact that there is no central government office that collects such data. See Id. at 39-41. However, the Congressional Budget Office ("CBO") in User Charges and in its update to that study published in 1995, Congressional Budget Office Memorandum, *The Growth of Federal User Charges: An Update* (Oct. 1995) [hereinafter User Charges Update] has conducted a comprehensive review of user fees, their role in the federal budget, and their growth since 1980. A complete review of all user fees employed by federal agencies is beyond the scope of this paper.

87. Among other things, charges for benefits and services include, "business-type fees," including fees for postal services; insurance premiums (including health, federal savings and loan depository, federal pension, disaster, and veterans life insurance); and other benefits and services (including such things as charges for park admission, recreational facilities, and agency research and technical services). *See* User Charges, *supra* note 86, at 42-45; User Charges Update, *supra* note 86, at 6-9.

88. Charges for rents and royalties include, fees for use of federal lands for activities such as fee grazing and the rights to extract hardrock minerals, oil, and gas. Sales of products include the sale of timber, sales of federal power, and royalty payments for hardrock minerals, oil, and gas sales. *See* User Charges, *supra* note 86, at 45-47; User Charges Update, *supra* note 86, at 9-10.

89. Regulatory fees include a wide variety of fees such as patent and trademark, inspection and licensing, immigration, passport, inspection and licensing, and filing and registration fees. *See* User Charges, *supra* note 86, at 48-53; User Charges Update, *supra* note 86, at 10-15.

90. Benefit based taxes include: trust and special funds including airport and airway, highway, harbor maintenance, and recreational trails fees. Liability based taxes include: Superfund program cleanup, leaking underground storage tank, and black lung disability based taxes. *See* User Charges, *supra* note 86, at 53-55; User Charges Update, *supra* note 86, at 15-17.

91. *See* FY 1997 Budget, *supra* note 11 (defining the term "user fee" and reviewing annual federal agency user fee collections).

92. *See* User Charges, *supra* note 86, at 50-51; User Charges Update, *supra* note 86 at 13-14. For other agencies, such as the Federal Communications Commission ("FCC"), the Commodity Futures Trading Commission, and the Consumer Product Safety Commission, fees cover a large portion of their annual budgets. User Charges Update, *supra* note 86, at 15.

million dollars, or twenty percent of its total operating costs are paid for by various user fee charges.[93]

a. Different Forms/Levels of Agency Filing Fees

Complaint filing fees such as those paid to the STB for railroad rate complaints are considered a form of a regulatory fee. Other federal agencies impose similar regulatory filing fees. The Federal Maritime Commission (FMC), for instance, charges nominal filing fees for formal and informal complaints.[94] The Department of Justice (DOJ) and the Federal Trade Commission (FTC) charge a forty-five thousand dollars filing fee for reviewing proposed mergers under the antitrust laws; this fee covers the entire costs of reviewing the mergers.[95] The Immigration and Naturalization Service imposes a nominal fee for reviewing immigration applications.[96] The Department of Treasury imposes ruling and determination fees.[97] However, neither the FCC nor FERC assess filing fees for adjudicating complaints.[98]

B. User Fees at the STB

User fees were originally implemented by the ICC (the STB's predecessor) in 1966.[99] While the ICC initially imposed fees for thirty-four services,[100] today, the STB imposes fees for one-hundred and one different services.[101] Because the Commission believed that one-half of the benefit of its services was conferred upon the public at large, prior to 1984, the agency charged private beneficiaries of those services only fifty percent of its costs.[102] The ICC sought to modify this policy in a 1984 proceeding.[103] In that proceeding, the ICC determined that the full costs of its programs would be recovered through fees unless the OMB Circu-

93. *See* Office of Management and Budget, Budget of the United States Government, Fiscal Year 1998, 821-22 [hereinafter FY 1998 Budget].

94. The FMC charges a fee of $166 for the filing of formal complaints, 46 C.F.R. § 502.62 (1994), and $68 for informal complaints, 46 C.F.R. § 502.304(b) (1994).

95. *See* Pub.L.No. 103-317, tit. I, 108 Stat. 1739 (1994) (referenced at 15 U.S.C. § 18a note); User Charges, *supra* note 86, at 49; User Charges Update, *supra* note 86, at 12.

96. *See* 8 U.S.C. § 1356 (1997); 8 C.F.R. § 103.7 (1997); User Charges, *supra* note 86, at 49; User Charges Update, *supra* note 87, at 12.

97. *See* Pub. L. No. 103-465, tit. VII, § 743, 108 Stat. 5011 (1994) (referenced at 26 U.S.C. § 7801 note); User Charges, *supra* note 87, at 50; User Charges Update, *supra* note 86, at 13.

98. *See* 47 C.F.R. § 1.1102-5 (1996) (listing FCC's schedule of charges for filings for common carrier services). The FERC's user fees are set forth at 18 C.F.R. Pt. 381.

99. *See* Ex Parte No. 246, *Regulations Governing Fees for Services*, 326 I.C.C. 573 (1966).

100. *See Id.* at 587-93.

101. *See* Ex Parte No. 542, *supra* note 15, at 225-30.

102. *See* Ex Parte No. 246 (Sub-No. 2), *Fees for Services Performed in Connection with Licensing and Related Services*, 1 I.C.C.2d 60 (1984).

103. *Id.* at 63. Among the fees proposed for the first time by the ICC to be collected, included the labor costs associated with performing a service, and government overhead and associated administrative costs. *Id.*

lar was found to mandate a lesser charge.[104]

1. The History of STB Complaint Filing Fees

Filing fees for railroad rate and other complaints were among the user charges adopted by the Commission for the first time in its 1984 user fee proceedings. The Commission defended its right to collect complaint filing fees, stating that the real beneficiary of an agency's adjudication of rate cases was the private shipper, and not the public.[105] The Commission noted that if other shippers or the public benefit in some way through rate complaint filings, those benefits were only "incidental to the primary purpose and function of settling the complainants' particular claims."[106]

a. The ICC Decision to Cap Complaint Filing Fees

Despite the Commission's imposition of new complaint filing fees in 1984, because the ICC viewed such complaints as a form of enforcement and consumer protection, the Commission limited fees solely to direct labor costs, and the agency assumed the remainder of the adjudicatory costs.[107] In two subsequent reconsiderations of its 1984 decision, however, the ICC determined that even charging for agency labor costs was inappropriate. The Commission found that charging for these costs might pose an impediment to shippers in the filing of complaints, and that to do so would "not be in the public interest given the public policy of maintaining reasonable rates and practices."[108] The Commission therefore reduced complaint filing fees to five-hundred dollars "to allay the potential chilling effect" of the fee on future rate complaints.[109] From 1984 to 1996, the ICC/STB's rate complaint filing fees remained capped at below their fully allocated costs, expanding to a maximum level of one-thousand dollars.

b. The STB's 1996 Decision to Uncap Rate Complaint Fees

In 1996, the Board proposed a dramatic change in its prior policy of capping rail rate complaint filing fees. The STB recommended fee increases for formal complaints filed under the agency's coal rate guidelines

104. *Id.*

105. *Id.* at 108.

106. *Id.*

107. Ex Parte No. 246 (Sub-No 2), *supra* note 102, at 185.

108. Ex Parte No. 246 (Sub-No. 2), Regulations Governing Fees for Services Performed in Connection with Licensing and Related Services, at *8 (decided June 7, 1984) (unpublished decision located at 1984 ICC Lexis 414).

109. Ex Parte No. 246 (Sub-No. 2), Regulations Governing Fees for Services Performed in Connection with Licensing and Related Service, 1 ICC 2d 196, 198 (1984). The Commission noted "[a]t this level, some agency costs will be defrayed, but the filing fee should not represent an actual disincentive." *Id.*

from $1,000 to $233,200.[110] Meanwhile, for the first time, the Board split off all other non-coal related rate complaints and lumped them into a separate category. It proposed increasing these other complaint filing fees to $23,100.[111] Additionally, the Board sought a new fee of $3,700 for appeals and petitions to reopen, reconsider, or revoke ICC decisions.[112]

The STB's fee proposal was based on two reported factors: a decision to uncap all fee items, in order to collect the full costs of agency services, and a revised 1996 cost study, which indicated significant labor costs that previously had not been included in the agency's fee computations.[113] The Board indicated that new appeal fees were being implemented for the first time to cover the agency's costs of processing such appeals, because the appellant would receive a "special benefit" from having the Board reconsider his or her case.[114]

c. Congressional Response to the STB's Proposed Filing Fees

Congressional reaction to the Board's fee proposal was swift. During the Senate's consideration of FY 1996 transportation appropriations legislation, the Senate unanimously passed an amendment offered by Senator Byron Dorgan to prohibit the STB from implementing its proposed rate complaint filing fees.[115] Senator Kent Conrad, co-sponsor of the Dorgan Amendment, proclaimed:

> These fees that were announced earlier this year by that agency indicate that sometimes people completely take leave of their senses here in Washington when they have responsibility over an administrative function. If there was ever an example of an agency going off a cliff with respect to a proposal, these fees by the Surface Transportation Board are a perfect example.[116]

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110. *See* Ex Parte No. 542, Regulations Governing Fees for Service Performed in Connection with Licensing and Related Services—1996 Update, at 3.

111. *Id.* at 3-4.

112. *Id.* at 8-9.

113. *Id.* at 3-4. The Board's decision to remove caps from all fee items was specified as necessary to fulfill the STB's "statutory duty under the IOAA to insure that services that [the Board] provide to identifiable beneficiaries are self-supporting." *Id.* at 11.

114. *Id.* at 9.

115. 142 CONG. REC. S9143 (daily ed. July 30, 1996). The Dorgan Amendment stated as follows: "none of the funds appropriated in this Act or otherwise made available may be used to increase fees for services in connection with licensing and related services fees, pursuant to 49 CFR Part 1002, STB Ex Parte No. 542, for services in connection with rail maximum rate complaints." *Id.*

116. *Id.* at S9144 (statement of Senator Kent Conrad). Senator Dorgan described the fees as "not just out of line but way out of line" and "fundamentally unfair." *Id.* at S9143. While the Dorgan Amendment passed the Senate, the Amendment was ultimately dropped by the House/Senate Conference Committee. *See* CONF. REP. NO. 104-785 (1996), at 68. The Conference Committee, while noting that it would be "imprudent" for Congress to impose restrictions on the amount or type of fees the Board could collect, cautioned that "the Board should be mindful of raising fees to unreasonable levels." *Id.*

In addition to the Dorgan Amendment, a number of Senators sent to the STB Chairwoman a letter urging the Board to reject the proposed filing fee increases. The letter proclaimed: "Such an increase is nothing short of absurd. Dramatic increases of this nature will make filings impossible for small shippers and consumers and effectively make the STB irrelevant in terms of providing shippers and consumers with a forum to seek relief."[117]

Others in Congress also urged the House and Senate appropriations committees to fund the STB through general Department of Treasury appropriations and to reject the President's budget proposal[118] to fund the agency almost entirely through user fees.[119]

d. The Board's Adoption of its Fee Proposal

After reviewing comments, the Board adopted its fee proposal in August 1996.[120] The STB's decision first noted that, contrary to some comments submitted by participants, its decision to impose fee increases was not the result of pressure from the administration to self-fund itself. Rather, the decision was described as a routine increase in fees that complied with the IOAA's mandate that fees be "based on the actual costs of providing a service."[121]

As to the coal rate complaint filing fee of $233,200, and the filing fee of $23,100 for all other rate complaints, the Board reiterated the ICC's position taken in the 1984 proceeding that fees covering the entire cost of processing a complaint are appropriate. Any public benefits resulting from such complaints in the form of lower electricity prices, the Board said, were "incidental" benefits for which the Board was not required to provide.[122] The STB stated that its fee waiver regulations would permit

117. Joint Senate Letter from Senators Byron L. Dorgan, John D. Rockefeller, Paul Wellstone, Ernest F. Hollings, Max Baucus, and Carl Levin to Linda Morgan, Chairwoman, Surface Transportation Board (May 6, 1996).

118. *See supra* notes 11-14 and accompanying text (reviewing the President's FY 1997 Budget request to Congress for STB operations).

119. Senator Larry Pressler, chairman of the Senate Commerce, Science, and Transportation Committee, (the committee with substantive jurisdiction over the STB) in letter to the Senate Appropriations Committee noted that the administration's proposal to fund the STB through "user fees" was "not viable as a proposed funding mechanism" since Congress had not authorized the STB to fully fund itself in this manner. Letter from Senator Larry Pressler to Senator Mark O. Hatfield (May 15, 1995). The chairman of the House Transportation and Infrastructure Committee, Congressman Bud Shuster, and Congressman James Oberstar, ranking member of the committee, sent a similar letter to the House Appropriations Committee. Letter from Congressman Bud Shuster and Congressman James L. Oberstar to Congressman Robert Livingston (May 2, 1996). The letter noted that the Board's user fee proposal was estimated to produce only $3 million of the Board's costs for the year, "and even this increase in fees [had] generated significant controversy." *Id.*

120. Ex Parte No. 542, *supra* note 15.

121. *Id.* at 179-181.

122. *Id.* at 197. The Board noted that newly performed cost studies revealed that the

those who have limited financial resources to petition for a fee reduction or waiver.[123] The Board asserted that these regulations would ensure that no one was denied the opportunity to file a complaint.[124] To "soften the impact of increased complaint fees," the STB also decided to phase in fees over a ten year period.[125] Finally, the Board limited filing fees for appeals or petitions to reopen, reconsider, or revoke Board decisions to $150,[126] noting that its proposed $3,700 fee for these types of filings was too high and would have a "chilling effect" on future filings.[127]

i. Subsequent Modifications to STB's 1996 User Fee Decision

The STB reconsidered its 1996 user fee decision that same year.[128] Between the date of the original decision and the date of reconsideration, however, Congress took further action on the agency's fee program. On October 9, 1996, the President signed into law the Federal Aviation Authorization Act of 1996.[129] Section 1219 precluded the STB from raising rate complaint filing fees for "small shippers" until September 30, 1998.[130] In response to this act, the Board determined that it would maintain all complaint filing fees at $1,000 for small shippers.[131] However, the Board adopted a temporary filing fee of $23,300 for other formal coal rate complainants and $2,300 for any other rate complainant.[132] These fees will be increased to the fully allocated cost levels over a ten year period.

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agency's actual costs of processing a coal rate complaint case was $233,200 and was $23,100 for a non-coal rate complaint case. *Id.* at 198.

123. *Id.* at 199.

124. *Id.* The STB's fee waiver regulations are found at 49 C.F.R. § 1002.2(e) (1996).

125. Ex Parte No. 542, *supra* note 15 at 198. The Board thus tentatively set complaint filing fees at $23,300 for coal rate complaints and $2,300 for non-coal rate complaints. *Id.* The Board's graduated fee schedule will increase fees ten percent annually, until they reach a fully allocated cost level. *Id.* However, recognizing that at the time of its decision Congress had not concluded its debate on STB funding for the year, until the Congress concluded legislative deliberations over the STB's Budget, all complaint filing fees would tentatively remain at $1,000. *Id.* at 198 n. 6.

126. *Id.* at 202.

127. *Id.*

128. *See* Ex Parte No. 542, Regulations Governing Fees for Service Performed in Connection with Licensing and Related Services—1996 Update, (unpublished decision served Dec. 5, 1996 (available at 61 Fed. Reg. 66229 (1996)).

129. Federal Aviation Administration Act of 1996, PUB.L.NO. 104-264, 110 Stat. 3213 (1996).

130. *Id.* at § 1219. The statute stated, in pertinent part: "[n]otwithstanding any other provision of law, the Surface Transportation Board shall not increase fees for services to be collected from small shippers in connection with rail maximum rate complaints. . . ." *Id.*

131. *See* Ex Parte No. 542, *supra* note 128. To determine whether a complainant meets the requirement of a "small shipper," the Board will require that, upon the filing of a complaint, the shipper must include relevant information on its status as a "small shipper" for filing fee purposes. *Id.*

132. *Id.*

III. The Legality of $200,000 Agency Filing Fees

A. The STB's Fee Determination Likely Fails to Meet STB and Court Precedents on Fee Increases

As outlined above, the STB has adopted a user fee program that has dramatically increased complaint filing fees. The Board's new user fee program will allow it to recover the entire government administrative, labor, and other costs associated with processing rate complaint adjudications. These significant new fees clearly stretch the limits of what federal agencies are permitted to implement under the IOAA.

The new fees can potentially be challenged in court as inconsistent with the IOAA on three grounds. First, these fees will have a chilling effect on future rate complaint filings; second, the fees are contrary to requirements that fees be "fair"; and third, the fees fail to provide for necessary public benefit offsets.

To be fair, in the case of coal rate complaints, a $233,200 fee is only a fraction of the amount of money at stake in the controversy. Savings resulting from successfully litigated rate complaints can amount to millions of dollars annually for an electric utility and its customers. However, because of the complex administrative requirements necessary to successfully litigate a rate complaint case, litigation costs are extremely high.[133] Also, because of the high amount of lost railroad revenues at stake, a defendant railroad will likely pour money into defending a rate complaint case by engaging in protracted discovery, motions to dismiss, etc. These factors make it extremely difficult to keep litigation costs down. Lawyer and economic consultant expenses associated with bringing a rate complaint can amount to several million dollars for each case. Compounding these expenses with a escalated filing fee of several hundred thousand dollars, however, will certainly cause electric utilities to think twice about asserting their statutory right to reasonable rates.

1. The Chilling Effect of the New Complaint Filing Fees

For several reasons, the Board's complaint filing fee increases should be of significant concern to the public because, by covering the entire cost of processing rate complaints, the STB likely will deter shippers from enforcing their statutory right to reasonable rates under the law.[134]

First, such a dramatic fee increase is unprecedented and contrary to established STB/ICC authority that complaint fees be set at a level below

133. *See supra*, notes 44-49 and accompanying text (generally discussing the statutory requirements necessary to prove a rate reasonableness case before the STB).

134. *See* 49 U.S.C. § 10101(6)(1994) (noting that the federal government had a duty "to maintain reasonable rates where there is an absence of effective competition. . .").

their fully allocated costs.[135] The ICC/STB has never imposed the full cost of complaints on petitioners.[136] Instead, the agency has viewed rate complaints as an important means of enforcement and consumer protection necessary to maintain reasonable railroad rates and practices.[137] In fact, in its 1996 decision, the STB decided to cap filing fees for appeals at $150 rather than at $3,700 as originally proposed, because of the "chilling effect" that the higher fee would have on future appeals.[138] No such consideration was afforded to the imposition of significantly higher rate complaint filing fees.

Second, as stated by the District of Columbia Circuit, under the IOAA, "the agency must provide a 'public explanation of the criteria used to include or exclude particular [user fee] items.'"[139] An agency must also provide "how it determined which of its costs are recoverable, the justification(s) underlying its choice of cost allocation methods, and a reasoned basis for [its decision]."[140] During its 1984 deliberations on complaint filing fees, the ICC conducted a number of studies on rate cases and concluded that its proposed complaint fee was exorbitant and would chill future rate complaints.[141] In its 1996 user fee proceedings, the STB conducted no such studies.

Finally, the STB's new complaint filing fees ignore other impediments to bringing forward a rate complaint besides filing fees. Grain industry experts estimate that attorney fees, economic consultant fees, and other costs associated with challenging a rate under existing STB market

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135. *See supra*, notes 107-109 and accompanying text (reviewing the ICC's 1984 user fee proceedings that capped user fees). Such a policy also may be at odds with the IOAA's requirement that fees be based on "public policy or interest served." 31 U.S.C. § 9701(b)(2)(c)(1994).

136. The Commission determined that even limiting fees solely to direct labor costs is against public policy because it discourages shippers from submitting complaints, and from seeking self-help. *See supra* notes 107-109 and accompanying text.

137. The Board's 1996 proposed coal rate filing fee increase barely mentions this prior concern about the potential chilling effect of charging more than a minimum amount for complaint filings. Instead, the proposal merely stated:

> Agencies are always faced with the dilemma of balancing the IOAA's statutory requirement of full-cost recovery for services provided by the agency with the concerns that high fees would inhibit parties' ability to file proceedings before the agency. We propose to establish the policy that all Board fees will be set at the fully allocated cost level to comply with our statutory duty under the IOAA to insure that services that we provide to identifiable beneficiaries are self supporting.

STB Ex Parte No. 542, *supra* note 110 at 11.

While the Board set forth the proper balancing mechanism in its 1996 decision, the Board's decision neglected to apply the test or to engage in any balancing.

138. *See supra* note 126-127 and accompanying text.

139. Engine Mfrs. Ass'n v. EPA, 20 F.3d 1177, 1181 (D.C. Cir. 1994).

140. *Id.* at 1183.

141. *See* Ex Parte No. 246 (Sub-No. 2), *supra* note 109, at 198 (reviewing a study of 167 complaints studied by the Commission from the years 1980-1982 in order to determine the chilling effect of its proposal).

dominance standards are between $250,000 - $500,000.[142] As noted above, the litigation costs associated with bringing a coal rate complaint can reach several million dollars. The ICC's decision on rate complaints in 1984 held that,

> [i]n determining a chilling effect, i.e., the level at which the filing fee represents a significant factor in determining whether to bring a complaint, we are mindful that the filing fee is not the only cost of bringing an adjudication. For example, the fee must be considered in conjunction with other costs (such as attorney's fees) in deciding whether it is "worth it" to have a dispute formally adjudicated.[143]

The ICC's 1984 fee decision capped filing fees, in part, because it determined that increased fees, on top of associated litigation costs, would deter future filings. The STB did not address this important factor in its 1996 proceeding.

2. *The Complaint Filing Fees are Contrary to the IOAA Requirement that Such Fees be "Fair"*

The STB's new filing fees also implicate the IOAA statutory requirement that fees be "fair."[144] The District of Columbia Circuit in *Raton Gas Transmission Co. v. FERC*,[145] for example, considered a challenge to a $4,000 filing fee imposed by FERC on gas companies. FERC required gas companies to file with it notices of changes in their charged costs.[146] The fees were originally set at $2,300.[147] The Commission based its new fees on a recalculation of its costs of processing such filings.[148] The court determined, however, that the IOAA "requires fees assessed for agency service to be cost-justified and fair . . . . Since the Commission has not furnished any explanation sufficient to put these concerns to rest, we cannot presently say that the new fees are consistent with the statutory mandates."[149]

In the STB's 1996 user fee proceeding, filing fees were not merely doubled, as was the case in *Raton Gas*, but were escalated over two hundred fold for coal rate complaints and twenty-three fold for all other complaints.[150]

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142. *See* ICCTA Hearings, *supra* note 20, at 369 (testimony of Russell J. Kocemba, National Grain and Feed Association).

143. Ex Parte No. 246 (Sub-No. 2) *supra* note 109, at 198.

144. 31 U.S.C. § 9701(b)(1) (1994).

145. Raton Gas Transmission, Co. v. FERC, 852 F.2d 619 (D.C. Cir. 1988).

146. The court in *Raton Gas* considered an increase ordered by FERC to cost filing charges for gas companies.

147. *Id.*

148. *Id.* at 618.

149. *Id.* at 619 (footnotes omitted).

150. *Raton Gas* involved a fact situation involving a uniform fee, and the overriding concern

3. The Fees Fail to Provide for Necessary Public Benefit Offsets

Under the IOAA, federal agencies must offset user fees with general appropriations to the extent that the general public is afforded a specific benefit.[151] Any fee burden disproportional to a private benefit is considered to be a tax; only Congress may impose taxes.[152] The ICC/STB has acknowledged that the general public enjoys an independent benefit through the filing of rate complaints in the form of maintaining reasonable transportation charges and practices.[153]

For example, in *National Cable Television Association, Inc.*,[154] the Supreme Court refused to sanction a fee arrangement sought by the FCC pursuant to the IOAA. In that case, the FCC proposed charging community antenna television systems thirty cents per subscriber for transmitting television programs over cable television lines.[155] The proposed user fee was designed to support agency operations that otherwise would be paid for by federal appropriations.

The Court held that the fee proposal was improper, because under the IOAA, the agency could not simply add up its total costs of regulation and then "contrive a formula" to have industry pay those costs without factoring in its program's public benefit offsets.[156] The Court continued, "[c]ertainly some of the costs inured to the benefit of the public, unless the entire regulatory scheme is a failure, which we refuse to assume."[157] Such a "contrived formula" seems apparent with the STB's complaint filing fees.

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that small companies making very small filings should not be forced to share disproportionately the financial burden of processing heavy filings made by large companies. The court was therefore, primarily concerned with the fact that a uniform fee would be unfair to smaller companies. However, the dramatic increase imposed on complaint filing fees in the STB's 1996 user fee proceedings implicates the same fairness concerns as evidenced in *Raton Gas*.

151. *Engine Mfrs. Ass'n*, 20 F.3d at 1180 (D.C.Cir. 1994).

152. *National Cable Television Ass'n*, 415 U.S. at 340-41. (1974).

153. *See e.g.*, Coal Exporters Ass'n of the United States v. United States, 745 F.2d 76, 81 (1984)(noting that, with the enactment of the Staggers Rail Act of 1980, "Congress recognized that sometimes competition would be insufficient to protect the legitimate interests of shippers, small carriers, and the public. . . ."); Mark H. Graven, *Recoupment of Regulatory Costs Through User Fees*, 55 GEO. WASH. L. REV. 1000, 1006 (1987) (noting that supporters of legislation that initially created the ICC "wished to prohibit exorbitant rates, discriminations, and other evils and to set up a permanent administrative commission to hear complaints") (quoting A. NEVINS, GROVER CLEVELAND, A STUDY IN COURAGE 355 (1932)).

154. *National Cable Television Ass'n.*, 415 U.S. 336 (1974).

155. *Id.* at 339-40.

156. *Id.* at 343.

157. *Id.*

B. Complaint Filing Fees at Other Agencies and the Courts Fail to Justify the STB's Complaint Fee Increases

Under the governing IOAA legal doctrine as described above, there is no doubt that the Board's new filing fees are legally suspect. In addtion to being subject to challenge under binding legal principles, other factors suggest that the agency's escalated fee levels are wrong.

1. To the Extent that Other Agencies Charge Rate Complaint Filing Fees, Such Fees are Only Nominal

The STB's decision to allocate to the complainant the entire cost of processing rate complaints is inconsistent with the practices of other federal agencies. Like the STB, the FCC, FERC, and FMC all adjudicate rate complaints filed against common carriers including telecommunications carriers, electric utilities, and natural gas pipelines. Neither the FCC nor the FERC assesses fees for filing complaints these complaints.[158] The FMC charges a $166 filing fee for a formal complaint[159] and charges $68 for an informal complaint.[160]

2. Other Agencies Charging the Entire Cost of Processing Applications are Inapposite

Some federal agencies do charge for part or all of their adjudicative costs. The DOJ and the FTC jointly assess a flat $45,000 premerger filing fee on applicants.[161] These fees are collected to offset the agencies' costs of processing applications.[162] Likewise, the Department of Treasury charges fees ranging from $250 to $350 for requests for rulings, opinions, or determination letters; the fees cover the agency's costs of processing such letters.[163]

There are several fundamental differences, however, between these fees and those imposed in 1996 by the STB for complaint filings. First, the DOJ/FTC fees and the Treasury Department fees are imposed by law, at the express statutory direction of Congress. The STB has no similar

158. The FCC's statutory authority to regulate charges for communication service by common carriers can be found at 47 U.S.C. § 201 (1994); *see also* 47 C.F.R. § 1.1102-5 (1996)(listing FCC's schedule of charges for filings for common carrier services). The FERC's user fees are set forth at 18 C.F.R. Pt. 381 (1996).

159. *See* 46 C.F.R. § 502.62(f) (1997).

160. *See Id.* at § 502.304(b) (1997).

161. *See* Pub. L. No. 103-317, tit. I, 108 Stat. 1739 (1994) (referenced at 15 U.S.C. § 18a note).

162. *See* User Charges, *supra* note 86, at 49.

163. *See* Pub.L.No. 103-465, tit. VII, § 743, 108 Stat. 5011 (1994) (referenced at 26 U.S.C. § 7801 note). Such letters are normally filed by individuals to inquire as to the potential tax consequences of certain proposed actions. *See* 26 C.F.R. § 601.201 et seq. (1996). *See* User Charges, *supra* note 86, at 50; User Charges Update, *supra* note 86, at 13.

statutory authorization to impose on users the agency cost of adjudicating rate complaints. Second, while a Treasury Department determination or a DOJ/FTC merger opinion may provide benefits to petitioners and applicants, a rate complaint does not bestow a similar business advantage upon the complaining party. Rather, it effectively prevents the unlawful practices of a defendant railroad and mandates statutory compliance with the law. In this regard, an agency determination assisting individuals to further their personal/business plans arguably implicates less important public interest considerations than does the filing of a defensive rate complaint.

3. *Common Law Courts Eschew Cost-Based Fees as Unfairly "Rationing Justice"*

The 1984 ICC decision capping rate complaint fees noted that this fee is similar to a fee charged by a court to file a complaint.[164] To be sure, it is customary for courts to require that a complainant pay costs associated with litigating a case.[165] However, as stated in Corpus Juris Secundum, "if they bear no reasonable relationship to the expenses of the administration of justice, they are unreasonable impediments to the access to justice in violation of constitutional provisions prohibiting the sale of justice."[166]

Courts have opposed cost-based user fees for judicial proceedings because courts provide a public service that the public as a whole should fund.[167] A court will charge a litigant the entire costs of processing a case only when it is levying sanctions in response to an abusive litigation practice. As stated by the District of Columbia Circuit:

> [m]indful of [the] underlying philosophy of the need to permit access to the courts, we are loathe "to stifle the enthusiasm or chill the creativity that is

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164. *See* Ex Parte No. 246 (Sub-No. 2), *supra* note 102, at 67.

165. *See e.g.*, Frederick v. Schwartz, 296 F.Supp. 1321 (D. Conn. 1969) (noting that a filing fee of $7.00 did not unconstitutionally deprive an individual equal access to the courts).

166. 20 C.J.S. Costs § 5 (1990).

167. As stated by one commentator:

> Suggestions for instituting cost-based user fees in the courts raise the heated opposition of many lawyers. Often Judge Learned Hand's (1951) words are invoked: "If we are to keep our democracy, there must be one commandment: Thou shalt not ration justice."
>
> It is generally argued that providing an impartial system for arbitrating disputes among citizens and determining the guilt or innocence of criminal defendants is a societal obligation. To expect suspected criminals and tortfeasors to bear the costs of defending their actions, in this view, is unfair and unreasonable. It would lead to justice on the basis of ability to pay — to rationed justice, in other words. In his treatise on public finance, Carl Shoup (1969) points out that providing the court system as a forum for enforcing the law appears basically to be a public good that benefits all members of society. On that assumption, he costs of the system should be borne by everyone.

David Bresnick, *User Fees For the Courts: An Old Approach to a New Problem*, 7 JUST.SYS.J. 34, 35-36 (1982).

> the very lifeblood of the law." Eastway Const. Corp. v. City of New York, 762 F.2d 243, 254 (2d Cir. 1985). Sanctions for bringing a case or an argument into court ought to be reserved for unusual circumstances. The sanction device is not to be simply another weapon for battling litigators to use, an additional poker chip which allows a player to stay in the game for one more hand. Sanctions for one party's wasteful use of the judicial system must not be allowed to become a basis for the other party to reply, "Wastrel," you have cost me and I am determined to cost you.[168]

This rationale should likewise guide the setting of filing fees at the STB.

C. The Ability to Seek a Fee Waiver Does Not Adequately Safeguard Complainants

Under STB regulations, a fee reduction or waiver can be requested by a complainant where an action is "in the best interest of the public," or that payment "would impose an undue hardship."[169] However, requests for a fee waiver or reduction are to be granted only in "extraordinary situations" and a showing that the waiver is in the best interest of the public or that payment of a fee would impose an "undue hardship" upon the requester[170] A shipper seeking to protect itself against economic abuses by common carriers should not be obligated to show that the situation is "extraordinary."

IV. Alleviating the Burden of New Filing Fees

Based on the numerous factors discussed in part II of this article, the 1996 complaint filing fees implemented by the Board should be rescinded. There is no doubt that the public pays the price through costs of any increase in railroad freight rates. Is it right to close a shipper's access to the only forum available to adjudicate rate disputes by imposing a $200,000 filing fee? Bringing a suit to force common carriers to live up to their statutory obligation to provide reasonable rates should not be prejudiced in this manner. It is not right that the public, without whose support the railroads would never have been built,[171] should be saddled with these additional litigation costs.

If the fees are to be continued, at a minimum, the Board should: establish fees on an actual cost basis, as opposed to the Board's current flat fee basis; provide for payment on a pay-as-you-go basis instead of

168. Greenberg v. De Tessieres, 902 F.2d 1002, 1005 (D.C. Cir. 1990).

169. *See* 49 C.F.R. § 1002.2(e) (1994).

170. *Id.* at § 1002.2(e)(2).

171. Almost fifty years ago, a federal government study estimated that public tax dollars subsidized the construction of railroad lines to the sum of approximately $1.3 billion dollars. Locklin, *supra* note 22, at 137.

requiring an up front payment; and consider establishing a "loser pays" system.

A. Complaint Fees Should be Imposed on an Actual Cost Basis, as Opposed to a Flat Fee Basis

The STB's 1996 user fee decision based its $233,200 coal rate complaint fee on the agency's estimated cost of adjudicating only two cases.[172] The adoption of this crude basis for cost estimation for all future complaints ignores the fact that costs incurred by the STB vary substantially from case to case. The high fee assumes that every proceeding will be litigated to a final conclusion, and that no cases will settle.

Some other agencies have implemented user fees based on actual hours spent on individual tasks, rather than imposing flat fees. The Nuclear Regulatory Commission (NRC) charges users separately, even for similar services performed, based on the total amount of personnel hours devoted to specific tasks.[173] The STB's 1996 opinion did not reference consideration of this type of fee structure.

B. The STB Should Provide for Payment for Complaints on a Pay-as-You-Go Basis

The Board's complaint filing fees are required to be paid up-front, when in reality, the vast majority of the Board's work on a rate case occurs at the end of the proceeding, after all of the evidence has been submitted by the parties. STB rate cases can also extend several years in length.

If the new increased fees are to be imposed, they should be applied on a pay-as-you-go basis. OMB guidelines for agencies require fee collections to be made "in advance of, or simultaneously with, the rendering of services" rather than for agencies to be reimbursed after a service is performed.[174] Imposing a segmented payment approach, under which fees would be collected as the costs of processing a coal rate complaint

172. *See* STB Ex Parte No. 542, *supra* note 110, at 25. The STB stated that the average number of hours of labor spent by Board employees on these two cases was in excess of 2,700 hours. *Id.*

173. As stated by Professor Hopkins, who completed a comprehensive evaluation of federal user fees for the Administrative Conference of the United States:

> Where the costs incurred by an agency vary substantially each time the task is undertaken . . . fees may better be assessed according to actual time expended. The NRC, for instance, perceives the inspection of each plant as a discrete task. Because of the various structural, engineering, and design differences among nuclear power plants, inspection or licensing approval time may vary significantly from plant to plant. Thus, the NRC requires its employees to keep substantial records. These time records are ultimately calculated into a final bill that is presented to the regulates at the conclusion of the Commission's task. Gillette & Hopkins, *supra* note 84, at 849-50.

174. OMB Circular, *supra* note 76, at § 6a(2)(c).

are accrued, would satisfy the OMB requirements that collections be made "simultaneously" with the rendering of services, and would be less burdensome for the complainants. The NRC bases its fee system on just such a pay-as-you-go approach. Facility applications, permits, licenses, etc. are billed on quarterly or biannual intervals until the service in question is complete, or upon completion of agency review.[175]

The Board in its 1984 user fee proceedings noted that allowing a later collection of a fee was "not possible due to the serious administrative problems it would cause."[176] The Board did not mention the possibility of establishing a segmented collection approach in its 1996 proceeding. It is time for the STB to reevaluate the feasibility of establishing a pay-as-you-go fee system for complaint fees.

C. The Board Should Establish a "Loser Pays" System

In response to the interest expressed by commentors in imposing a "loser pays" system for paying the costs of processing rate complaint proceedings, the Board mentioned in its 1996 decision that the concept "may have merit" and that it would "consider" proposing a future rulemaking on the subject.[177] The STB should develop a loser pays type system for complaint filing fees. Under the "English Rule", attorney fees and court costs are paid by losers after cases are decided.[178] The Supreme Court in *Alyeska Pipeline Service Co. v. Wilderness Society*,[179] has cautioned that in American courts, "the prevailing litigant is ordinarily not entitled to collect a reasonable attorneys" fee from the loser." However, there are exceptions to this restriction. Under the antitrust laws, for example, there exists a fee shifting statute that allows only the plaintiff to recover the costs of litigation.[180] This statute is designed to "encourage the bringing of low-probability cases."[181]

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175. *See* 10 C.F.R. Pt. 170 (1994). The NRC's fee system includes review of applications for permits, licenses, and design approvals; license amendments and dismantling; renewal reviews; applications for spent fuel processing; applications for special projects; and inspection fees. *Id.*

176. Ex Parte No. 246, *supra* note 102, at 90.

177. Ex Parte No. 246 (Sub-No. 2), *supra* note 15, at 199.

178. See Alyeska Pipeline Serv. Co. v. Wilderness Society, 421 U.S. 240, 247 (D.C. Cir. 1975)(noting that "for centuries in England there has been statutory authorization to award costs, including attorneys' fees. Although the matter is in the discretion of the court, counsel fees are regularly allowed to the prevailing party."); Thomas D. Rowe, Jr., *Study on Paths to a "Better Way": Litigation, Alternatives, and Accommodations*, 1989 Duke L.J. 824, 887 (discussing generally the loser pay system and proposals in America to implement such a system); Philip J. Mause, *Winner Takes All: A Re-Examination of the Indemnity System*, 55 Iowa L. R. 26 (1969-70).

179. *Alyeska Pipeline*, 421 U.S. 240 (1975).

180. *See* 42 U.S.C. § 1988; Premier Electrical Const. Co. v. National Electrical Contr. Ass'n, Inc. 814 F.2d 358, 373 (7th Cir. 1987).

181. *Premier Elect. Const.*, 814 F.2d at 373.

The STB should impose filing fees on losers in these proceedings. The Board, might impose upon the loser only the associated complaint filing fee charges rather than attorney's fees and other costs associated with bringing a rate complaint case. This cost allocation would make sense since it would recognize that a shipper is typically forced to file a complaint only after a railroad has abused its monopoly economic status. Therefore, a railroad who is proven to have abused its monopoly power should be required to absorb some or all of such fees.[182] If a complainant lost the case, that party likewise could be held responsible for paying the fee.

V. Conclusion

The implementation of the STB's 1996 user fee program presents an interesting picture of an agency, facing increasingly tight fiscal constraints, attempting to sustain itself by recouping its cost of services. The issue addressed by this paper is whether the increased filing fees at the STB are legally proper, necessary, and/or in the public interest. Put differently, could the Board be pricing its services out of the reach of those whom the Interstate Commerce Act was designed to protect? As bluntly stated by the editor of Traffic World, a weekly trade publication on transportation,

> "[t]o mandate the use of this agency with one hand and to impose exorbitant fees for that use with the other, is characteristic of the worst kind of monopoly. To point to the agency as a forum for relief while denying access to that forum through excessive charges is the height of hypocrisy."[183]

At a minimum, by attempting to recoup the costs of processing rate complaints, the Board is likely alienating the very shipper constituents that it will likely need to sustain itself in the political battles ahead.[184]

182. To ensure that an insolvent loser or a loser who might face financial hardship as a result of such a fee assessment, any change in this area may seek to accommodate through exemption such impoverished losers.

183. Jean V. Murphy, *Absurdity*, Traffic World, Apr. 15, 1996, at 6 (editorial).

184. The STB's current statutory authorization expires September 28, 1998. Pub. L. No. 104-88, § 705, 109 Stat. 803, 934 (1995).