



RAIL POLICY REGULATORY DEVELOPMENTS – A SHIPPER’S PERSPECTIVE

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OVERVIEW

- STB Hearings/Rulemakings
- STB Adjudications
- Other/Misc.

STB Railroad Competition Hearings (EP 705)

- Hearings (not surprisingly) produced diametrically opposing viewpoints from railroads/shippers
- General shipper positions:
 - For railroads, Staggers Act goals have been fully fulfilled (“railroad renaissance”)
 - For shippers, Staggers Act competitive and rate protection goals remain unfulfilled
 - Over time, tilted playing field has developed that needs to be balanced
- Shipper requests:
 - Revisit “some old”: e.g., reciprocal switching (*Midtec*)/*Bottleneck* decisions
 - Consider “some new”: e.g., grant alternative competitive service through the alternative through route provisions of §10705
 - Where competition fails, clarify that dually served shippers can have access to regulatory rate relief

STB Railroad Competition Hearing (EP 705)

- E.g., consider the need to revisit the Agency’s “Public Interest” test in reciprocal switching (§ 11102(c)) cases:

COMPARE:

“**Additional rail competition is a clear public benefit** from [reciprocal switching], one which is endorsed by rail transportation policy announced in the Staggers Act [A]nd the **proponent bears a light burden on this issue.**”

(Delaware & Hudson Ry. v. Conrail, 367 I.C.C. 718, 723 (1983)) (emphasis added)

WITH:

“the existence of competition, or the lack of it in any given area, is not dispositive of this case [Although] this Commission stands ready to grant relief on an expedited basis **if necessary to remedy anticompetitive conduct** by this railroad in the future. **We conclude that complainants have not meet their burden of proof.**”

(Midtec II, 3 I.C.C.2d 171, 184-85 (1986)) (emphasis added)

- Question: Have standards implemented in a different era of railroading unfairly blocked shipper relief?

STB Class Exemption Hearing (EP 704)

- Exempt shipper concerns raised in hearings:
 - For shippers of exempt traffic that have no effective competition, the railroads operate essentially as a deregulated monopoly
- Railroads claim “no harm, no foul,” since the Board already allows shippers to seek a revocation in individual cases
 - (But railroads suggest a revocation standard akin to *Midtec* anticompetitive abuse test)
- Shipper perspective: revoking exemptions wholesale or on a case-by-case basis is reasonable and overdue
 - Onerous tariff and contract filing requirements are no longer present
 - Even where there is revocation:
 - carriers would retain their ability to initiate rates
 - the STB would only have the ability to regulate rates on complaint, with the traditional market dominance test in place

STB Arbitration/Mediation NPRM (EP 699)

- General shipper positions:
 - Faster/easier/less expensive forms of ADR have appeal
 - Shippers have some concerns that ADR might be viewed by some as a “catch-all” cure to resolving shipper complaints or the underlying substantive problems facing shippers in obtaining agency relief
 - Shippers generally oppose any efforts to add new processes that could unduly harm or prejudice the rights of shippers to seek statutory relief from the Board, delay proceedings, or add expenses
 - Shippers generally supportive of STB’s March 28, 2012 NPRM

Maximum Rate Reasonableness Cases

- Several coal (SAC) rate cases have been adjudicated/filed:
 - *AEPCO v. BNSF and UP* (No. 42113) (STB served Nov. 22, 2011)
 - *IPA v. UP* (Nos. 42127 and 42136)
 - *TMPA v. BNSF*, (No. 42056)
- Now – chemical rate cases:
 - *TPI v. CSXT* (No. 42121)
 - *M&G Polymers v. CSXT* (No. 42123)
 - *DuPont v. NS* (No. 42125)
 - *SunBelt v. NS & UP* (No. 42130)
 - *Canexus v. BNSF Chemical* (Three-Benchmark) (No. 42132) (held in abeyance)
- SAC chemical rate case issues – enormous complexity/costs
 - Multiple Commodities
 - Multiple Origins/Destinations
 - Massive Stand Alone Railroad systems
 - Massive burdens/expenses to litigate

Unreasonable Practice Cases

- ***BNSF Fuel Surcharges (Docket No. 42120)***
 - Background
 - Ex Parte No. 661, *Rail Fuel Surcharges*, STB bans percent-of-price fuel surcharges on regulated traffic as of April 25, 2007; states that if any shipper wants further relief, it can file an unreasonable practice complaint
 - 2 cases brought, *Dairyland* (settled 2008) and *Cargill v. BNSF* (No. 42120)
 - Shipper challenges BNSF's mileage-based fuel surcharges on its ag. traffic as unreasonable practice; seeks damages, prescription of reasonable fuel surcharges
 - Shipper is asking STB to:
 - Prescribe rates that more closely match railroad's actual fuel costs
 - Find that shipper was overcharged by \$27 million during relevant time period
 - Issues
 - Where there is demonstrated FSC over recovery, should it be enough that a carrier had "good intentions" when a FSC program was designed?

Unreasonable Practice Cases

- ***BNSF Fuel Surcharges (Docket No. 42120) (cont'd.)***
 - Consider:

“The **Board will aggressively use the authority granted us by statute to stop unreasonable [fuel surcharge] practices. . . . We will remain vigilant on this issue and will expeditiously review any formal complaints related to fuel surcharges.**” (STB Chairman Nottingham, Sept. 25, 2007) (emphasis added)
 - Consider further:

“[T]he [RCAF] procedures established in this decision will permit railroads to recover fuel cost increases along with other cost increases on a quarterly basis. Regulatory lag will be minimal under the proposed forecasting method. **Maintaining a separate surcharge mechanism for fuel would, in our view, serve no useful purpose.**” (ICC, 1981) (emphasis added)

STB Other/Misc.

- **TIH Proceedings: FD 35504 (TIH indemnity/liability practices), FDs 42129/35517 (TIH handling practices) FD 35534 (TIH routing)**
 - These cases involve initiatives by railroads to:
 - unilaterally impose on TIH shippers new indemnity/liability shifting requirements
 - revise TIH car handling practices (e.g., use of dedicated TIH trains, special notification requirements, reduced train speeds)
 - “short haul” themselves on TIH joint-line movements
 - Many interested stakeholders and their trade associations are participating
 - From the perspective of many TIH shippers, these initiatives are improper carrier attempts to undermine/“chip away” at their common carrier obligation to move essential commodities, and at least increase shippers’ costs/drive TIH off of the railroads, etc.

STB Other/Misc.

- ***BNSF/Berkshire Acquisition Premium (FD 35506)***
 - Shippers are asking the Board to:
 - Exclude the write-up in BNSF's investment base
 - Parties agree that:
 - The matter involves a regulatory acquisition premium of \$8.1 billion
 - One or more captive shippers with STB prescribed rates will be adversely impacted, requiring administrative redress
 - Shipper arguments included:
 - No other federal agency allows pass-through of acquisition premiums to ratepayers under similar circumstances
 - Acquisition did not involve the merger of two railroads; did not result in increased operating efficiencies
 - Adherence to established standards and GAAP do not mandate allowing the premium pass-through in the unique circumstances of this case

STB Other/Misc.

- ***Coal Dust II (FD 35557)***

- March 2011, STB finds BNSF's PRB railcar "coal dust" emission's tariff is an unreasonable practice
- In summer 2011 BNSF files revised Tariff; shippers have sought STB review of this new tariff
- Coal shippers continue to be concerned about the reasonableness of this tariff, the science of coal dust testing, lack of cost sharing, shipper liability associated with use of carrier-approved topper agents, etc.

Thank You

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