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New STB Rule Settles 100 Years of Industry Disputes and Litigation

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On Friday, April 11, 2014, the Federal Surface Transportation Board (STB) issued a Final Rule requiring all rail carriers to provide rail car receivers with advanced written notice of the rail carrier's penalty fees (known in the industry as "demurrage" liability) for holding on to rail cars for too long. The rule impacts freight railroads and their customers, especially warehouse operators who frequently handle rail cars, but who rarely own the rail cars or the contents of the cars. The rule resolves more than 100 years of industry disputes and litigation that resulted in a federal circuit court split in 2009, a petition to the U.S. Supreme Court for certiorari in 2010, and more than three years of recent rulemaking activity at the STB.

Effective July 15, 2014, Title 49, Chapter X, Subchapter D of the Code of Federal Regulations will be amended. The substantive amended language will read as follows:

Section 1333.3 Who Is Subject to Demurrage
Any person receiving rail cars from a rail carrier for loading or unloading who detains the cars beyond the period of free time set forth in the governing demurrage tariff may be held liable for demurrage if the carrier has provided that person with actual notice of the demurrage tariff providing for such liability prior to the placement of the rail cars. The notice required by this section shall be in written or electronic form.

No longer can a warehouse operator or other receiver of rail cars be assigned demurrage liability because he or she is named as consignee in a bill of lading. Railroads must now communicate directly with warehouse operators and other rail car receivers. This marks a significant change to the commercial relationship between railroads and warehouse operators.

Other key takeaways from the ruling:

The bill of lading and references therein to consignors and consignees no longer is recognized as establishing demurrage liability.

No agency exception. A party cannot escape demurrage liability by informing the railroad that it is only an agent of a principal. A warehouseman who is an agent under state law (and state law always governs the law of agency) is free to pursue agency remedies in state court. Remedies exist at the state level in agency disputes. By eliminating the previously proposed agency exemption, agents and principals will be encouraged to communicate and address the issue of demurrage liability via contract ("commercial arrangement"). This provision will likely result in more state court litigation on the question of whether a rail car receiver's agency status protects the receiver from demurrage liability.

Constructive notice of a demurrage tariff is inadequate to assign demurrage liability. Notice of demurrage terms must be via actual notice and in written or electronic form. Railroads can meet this obligation by directly sending receivers a blanket, one-time notice that includes a link to the full tariff that includes the demurrage provisions. If the railroad makes material changes to the tariff, then a new notice must be sent to receivers in order for demurrage penalties to be enforced.

Short line railroads are not exempt from this rule.

The rule sidesteps the "constructive placement" issue whereby rail carriers can charge demurrage penalties when rail car receivers decline to accept rail cars. The STB's rules state that "demurrage liability does not begin until actual placement or proper notice of constructive placement." The STB declined to explain what would constitute "proper notice of constructive placement." Receivers and warehousemen may file a complaint at the STB if they believe that the collection of demurrage charges resulting from constructive placement or any other railroad practice is an unreasonable practice.

Similarly, “bunching” (rail car deliveries that are not reasonably timed or spaced) and other railroad actions that cause or contribute to demurrage penalties are not addressed in the Final Rule, but can be the basis of a complaint to the STB.

The decision notes that on May 13, 2013, the STB updated its mediation and arbitration procedures. Demurrage disputes are eligible for voluntary binding arbitration (railroad must agree to participate), as well as formal or informal mediation. The STB will likely see an increase in the number of complaints by rail car receivers regarding demurrage disputes that involve “constructive placement” and “bunching.” Most of these complaints should be conducive to resolution via STB informal mediation.

Husch Blackwell Partner Chip Nottingham represented the International Warehouse Logistics Association (IWLA) in this rulemaking and submitted two rounds of comments. IWLA is one of the oldest trade associations in the United States and represents the interests of more than 500 warehouse businesses. Sixteen different trade associations and rail carriers actively participated in the proceeding. Chip formerly served as Chairman of the Surface Transportation Board.

Contact Us

If you have any questions about this rule or would like further information on Husch Blackwell’s Transportation practice, please contact Chip Nottingham.