



January 2009

TRANSPORTATION UPDATE

STB Proposes Use of Rail Contract Disclosure Statements

On January 6, 2009, the Surface Transportation Board (STB) issued a Notice of Proposed Rulemaking in Ex Parte No. 676, *Rail Transportation Contracts Under 49 U.S.C. § 10709*. The Notice seeks comment on a proposed rule to more clearly distinguish between tariffs, over which the STB has jurisdiction, and contracts, over which it does not. The STB expresses concern with what it perceives to be a lack of clear distinction between contract and common carriage rates applicable to rail transportation. It also believes that the increased use of hybrid pricing may lead to anticompetitive pricing activities.

The STB proposes that where an agreement contains a prescribed disclosure statement, the STB will treat the agreement as a rail transportation contract; and that where an agreement does not contain this disclosure statement, the STB will treat the agreement as a tariff, unless there is clear and convincing evidence that the parties intended to enter into a contract and the shipper was made aware that it could request service per common carrier tariff subject to STB jurisdiction.

The Notice follows the STB's Advanced Notice of Proposed Rulemaking in Ex Parte No. 669 served on March 29, 2007, which proposed that the STB interpret the term "contract" in 49 U.S.C. § 10709 as "any bilateral agreement between a carrier and a shipper for rail transportation in which the railroad agrees to a specific rate for a specific period of time in exchange for consideration from the shipper such as a commitment to tender a specific amount of freight during a specific period or to make specific investments in rail facilities." The STB terminated that approach due to shipper and carrier objections.

The proposed rule will have a significant impact on a shipper's ability to negotiate the use of common carrier tariffs versus rail contracts, as railroads will be able to unilaterally establish a contract by adding a disclosure statement to a tariff. Thus, a contract may be created without a bilateral agreement between the shipper and carrier. Further, the proposed rule does not allow a shipper to challenge the establishment of a contract based on the existence of a disclosure statement even if the shipper did not agree to enter into a rail transportation contract. As a result, the proposed rule would allow railroads to avoid STB jurisdiction based on the establishment of unilateral contracts that include the disclosure statement proposed by the STB.

The Notice directs interested parties to submit comments to the STB by February 5, 2009.

FOR MORE INFORMATION

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