



June 15, 2009

## TRANSPORTATION UPDATE

**Recent Developments****APPEALS COURT AFFIRMS STB'S SMALL AND MEDIUM RATE CASE RULES**

On June 10, the United States Court of Appeals for the District of Columbia issued a decision that denied challenges by both railroads and shippers to the small and medium rail rate case rules that the Surface Transportation Board (STB) adopted in September 2007. Absent any further appeals, which seem unlikely, these rules are now firmly entrenched as law.

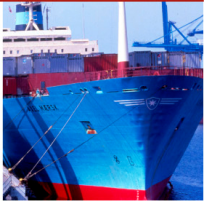
The shippers had challenged two aspects of the STB's new rules. First, they alleged that the relief caps imposed by the STB upon small and medium cases were too low to comply with the STB's statutory mandate to develop simplified and expedited procedures for determining the reasonableness of rail rates. The court labeled this argument as "intriguing but ultimately unavailing." According to the court, the STB did address its statutory mandate, but just not in the way the shippers had urged. Second, the shippers challenged the STB's justification for medium cases as an unjustified reversal from prior decisions. Although the court acknowledged the STB's reversal of position, it concluded that the STB had rationally explained this change.

The railroads engaged in a multi-pronged challenge to the STB's small rate case rules. First, they asserted a procedural challenge that the STB had adopted portions of the small case rules without providing any advance notice. The court rejected that argument because the railroads themselves had not followed proper procedures by first giving the STB the opportunity to address those procedural concerns before coming to the court.

Second, the railroads argued that the time lag in the data used in small rate cases was arbitrary. But the court held that the STB had adopted procedures by which the parties could address that issue in individual small rate cases.

Third, the railroads challenged the STB's decision to forbid movement-specific adjustments to the system average variable costs used in small rate cases. The court held that the STB had made reasonable trade-offs between the accuracy of movement-specific adjustments and the burden of doing so in a "simplified" rate case.

Last, the railroads challenged the STB's refusal to permit evidence of product and geographic competition due to a lack of notice that the STB intended to do so. Because the STB initially had proposed to bar *all* evidence that would disturb the result of the small rate case methodology, the court refused to fault the STB for failing to specifically mention product and geographic competition.



## **STB CONFIRMS HAZMAT COMMON CARRIER OBLIGATION**

On June 11, the STB issued a decision in response to a Petition for Declaratory Order filed by Union Pacific Railroad (UP), in which UP sought to narrow its common carrier obligation to transport certain highly hazardous materials, known as “toxic-inhalation hazards” or “TIH.” UP had refused to provide common carrier rates to a shipper for the transportation of chlorine from Utah to Texas destinations because UP alleged that there were ample sources of chlorine closer to the destinations that would permit shorter, and thus safer, transportation. The STB declined to narrow the common carrier obligation and reconfirmed its precedent that railroads must transport hazardous materials so long as there are comprehensive regulations in place to provide such transportation in a safe and secure manner.

The STB held that UP may not evade its common carrier obligation to transport TIH materials by refusing to quote a rate. Furthermore, the STB concluded that UP had not carried its burden of proof that stricter safety standards than those already imposed by the Department of Transportation (DOT) and the Transportation Security Administration (TSA) are needed. Although UP had made general factual assertions regarding safety, it did not present any support for those assertions. Moreover, the testimony of shippers, TSA and DOT contradicted many of UP’s assertions and demonstrated that chlorine markets are varied, dynamic and complex. Because DOT and TSA testified that their regulations are comprehensive and effectively mitigate the risks identified by UP, the STB concluded that it should not substitute its judgment on safety and security issues.

In sum, the STB concluded that UP had not shown that this particular request for rates, or for service, was unreasonable. Although the STB has not foreclosed future attempts to prove that a specific request for transportation of TIH materials is unreasonable, it has reinforced its guiding principles, which impose a heavy burden upon any railroad that seeks such a determination.

### **FOR MORE INFORMATION**

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