



June 2010

## TRANSPORTATION UPDATE

**STB Now Involved in Rail Fuel Surcharge Antitrust Litigation****OVERVIEW**

The fuel surcharge antitrust class action litigation against the Class I railroads continues to progress. The parties have been engaged in discovery since August 2009 and the Surface Transportation Board (STB) recently was pulled into the discovery disputes. The overall case is moving toward a key decision on class certification, which is expected at the end of 2010 or early 2011. We will provide additional information on the class certification and opt-out processes in the near future. The hearing date on the class certification issue, at the U.S. District Court for the District of Columbia, is currently scheduled for October 6 and 7, 2010.

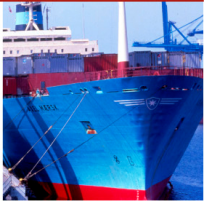
The class as currently defined is:

All entities or persons that at any time from July 1, 2003 until at least June 30, 2007 (the "Class Period") purchased rate-unregulated rail freight transportation services directly from one or more of the Defendants, as to which Defendants assessed a stand-alone freight fuel surcharge applied as a percentage of the base rate for the freight transport )or where some or all of the fuel surcharge was included in the base rate through a method referred to as "rebasing") ("Fuel Surcharge").

Excluded from the class definition are the defendants, any subsidiaries or affiliates of the defendants, any of the defendants' co-conspirators, whether or not named as a defendant in the complaint, and all federal governmental entities; and all entities or persons that paid a fuel surcharge directly to any of the defendants solely pursuant to a railroad-shipper contract that was entered before July 1, 2003 and provided for a stand-alone fuel surcharge to be paid under a predetermined formula specifically set forth in the contract.

**STB BECOMES INVOLVED**

As part of the discovery process, the interim class counsel for the plaintiffs has sought access to the confidential carload waybill data for the years 1985 through 2008 from the STB. The plaintiffs asserted that the "data would be used by plaintiffs in connection with the instant litigation"; and the data would be used to "assess issues pertaining to the impact on rail freight customers of the rail freight fuel surcharge conspiracy alleged in the Litigation, particularly: (a) the pricing behavior of non-defendant railroads in response to the defendants' alleged coordinated pricing; and (b) the historical relationship between fuel costs and freight rates, and the extent to which the defendants' alleged coordinated fuel surcharge behavior resulted in fuel surcharges that were inconsistent with



that historical relationship.” The plaintiffs’ counsel initially sought the disclosure through the STB’s standard regulatory procedures for obtaining this data. Four of the Class I railroads objected to the STB’s disclosure of the data to the plaintiffs’ counsel and the STB denied the request.

The plaintiffs’ counsel then served the STB with a subpoena duces tecum under the Federal Rules of Civil Procedure. In response, the STB entered an appearance in the fuel surcharge antitrust case and filed a motion to quash the subpoena. The plaintiffs’ counsel has filed a response to the STB’s motion. Based on the substance of these filings, we believe it is likely that the court will order the STB to produce the confidential carload waybill data, but will likely limit the disclosure time period to 2000 to 2008.

Upcoming dates in the case include:

- **July 1, 2010:** Deadline for railroad defendants’ response to the motion for class certification
- **August 12, 2010:** Deadline for plaintiffs’ reply on class certification
- **October 6-7, 2010:** Hearing on class certification

#### **FOR MORE INFORMATION**

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