How Railroads Dodged A Bullet in Fuel Surcharge Case

By Sandra Brown

Law360 (September 4, 2019) On Aug. 16, the U.S. Court of Appeals for the D.C. Circuit issued a decision affirming the U.S. District Court for the District of Columbia's 2017 denial of class certification in a case alleging that the four largest U.S. railroads — BNSF Railway Company, Union Pacific Railroad Company, CSX Transportation Inc. and Norfolk Southern Railway Company — conspired to set fuel surcharges in violation of the Sherman Antitrust Act.

The appeals court's decision has two key consequences. First, it reinforces for the Class I railroad defendants that they are no longer facing a class action lawsuit, which is notable especially because the size of the potential class was said to be over 16,000 shippers. Second, the decision means that the clock starts ticking again on the statute of limitations, further diminishing the limited time left for shippers to bring individual claims against the railroads for their alleged violation of antitrust laws.

The appeals court's decision focused on whether the district court abused its discretion in denying class certification on the basis that common issues do not predominate as required by Rule 23 of the Federal Rules of Civil Procedure. The appeals court agreed with U.S. District Judge Paul Friedman that the regression analysis underlying the damages model the plaintiffs' antitrust expert relied on precluded class certification because it showed that 2,037 class members were not injured.

The district court had concluded that there were three shortcomings in the model: one related to intermodal shippers, a second related to legacy shippers and a third that showed negative damages — no injury — for some shippers. The appeals court focused on the negative damages issue and its impact on the plaintiffs' ability to show causation, injury and damages on a class-wide basis. Finding, as Friedman did, that the class damages model would require thousands of individual damages determinations, the appeals court affirmed the district court's decision to not permit the case to proceed as a class action.

This litigation began over 12 years ago, after multiple cases were consolidated and transferred to the D.C. district court in a multidistrict litigation before Friedman. Since then, the MDL proceedings have focused on whether a class can be certified against the four major U.S. railroads.

In June 2012, Friedman issued a detailed 148-page decision certifying the class. The railroads sought an interlocutory appeal, and in August 2013, the D.C. Circuit vacated the district court's class certification

decision and remanded the case to Friedman to consider the U.S. Supreme Court's decision in Comcast Corp. v. Behrend on the impact of class certification.

On remand, the district court denied class certification, in another detailed 207-page decision issued on Oct. 10, 2017. Friedman considered Supreme Court precedent in Comcast and the subsequent Tyson Foods Inc. v. Bouaphakeo decision in determining that the plaintiffs had failed to establish the requirements to prosecute the case as a class action. While not a ruling on the merits of the claims against the railroads, Friedman's 2017 opinion declared that "the documentary evidence is strong evidence of conspiracy."

Of note to potential claimants, after the district court issued its 2017 decision denying class certification and the plaintiffs initiated their appeal, Friedman issued a decision on Jan. 8, 2018, stating that the "Plaintiffs need not renew their request for tolling at this time because the Defendants have agreed, for claims previously tolled by the pendency of the class action, to exclude from future statute of limitations calculations the time between (i) the date of the court's order denying class certification and (ii) the date that the Court of Appeals issues its merits-panel decision on Plaintiffs' appeal, for actions that are filed after the date in clause (ii)."

In addition, in an order issued Sept. 17, 2018, Friedman determined that the MDL would be stayed "until forty-five (45) days after the D.C. Circuit's ruling on the pending appeal of this Court's Order denying class certification." That order also required the parties to submit a status report and recommendations concerning further proceedings upon expiration of the stay, which must be filed on or before Sept. 30, 2019.

At this point, it is unknown what the parties will recommend to Friedman. If the plaintiffs want to continue their effort to overturn the denial of class certification, they could request a panel rehearing or a rehearing en banc at the Court of Appeals within 30 days from the entry of judgment, which falls on Sept. 15. Alternatively, the parties have 90 days from the entry of judgment in which to file a petition for certiorari in the Supreme Court. Neither of those actions would automatically stay the MDL or toll the statute of limitations.

The appeals court's August 2019 decision is a pivotal point in this long-standing challenge to the railroad fuel surcharges. Specifically, the decision is significant for any company that shipped large volumes of goods by rail and paid fuel surcharges directly to one or more of the defendant railroads during the class period of July 1, 2003, through Dec. 31, 2008. The decision restarts the running of the statute of limitations, which in most cases will require potential plaintiffs to assert their individual claims in a matter of weeks.

The key takeaway from the decision is that affected rail shippers will have to quickly act to preserve their claims. To have a claim, a shipper must fall within the district court's class definition:

> All entities or persons that at any time from July 1, 2003 until December 31, 2008 ("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 rail 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").
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> Excluded from this Class definition are (a) Defendants, any subsidiaries or affiliates of Defendants, any of the Defendants' co-conspirators, whether or not named as a Defendant in the Complaint, and all federal governmental entities, and (b) all entities or persons that paid a Fuel Surcharge directly to any of the Defendants solely pursuant to a railroad-shipper contract that was (i) entered into before July 1, 2003, and (ii) provided for a stand-alone Fuel Surcharge to be paid under a predetermined formula specifically set forth in the contract.

Another takeaway is in the redactions shown in the decision. The parties recently notified the Court of Appeals that the redactions can be made public, but they are only a small fragment of the information in the case that has been held under seal. While some information has been held under seal because it is confidential business or shipper-specific information, there appears to be another trove of evidence that has not been revealed to the public.

Based on comments Friedman made in the 2017 decision, there are likely communications between the railroads that they claimed to be inadmissible on the basis of the interline communications exemption, which provides immunity for certain communications between railroads related to sharing traffic between carriers, or "interlining." While the railroads argued for a broad application of the interline communications exemption, such exemptions are narrowly construed by courts.

Friedman found compelling evidence of a conspiracy without relying on interline-related communications for class certification or any other purpose, but he did not rule on the scope of the exemption for purposes of the case on the merits. It remains to be seen what additional evidence of the conspiracy has not yet been revealed in public filings. Given the number of affected shippers and the amount of potential damages, there will surely be additional litigation that will look at these issues and more.

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