Transportation Update

March 2020

STB Addresses Application of Demurrage Regulation to Rail Transportation of Exempt Commodities and Boxcar Shipments

On February 28, 2020, the Surface Transportation Board (STB or Board) adopted a final rule (Final Rule) in EP 760 – *Exclusion of Demurrage Regulation from Class Exemptions,* which clarifies that class exemptions for rail transportation of miscellaneous commodities and rail shipments transported in boxcars do not apply to the regulation of demurrage. The Final Rule also partially revokes the exemptions for rail transportation of certain agricultural commodities for the purpose of applying demurrage regulation to these commodities and treating them the same as other non-intermodal exempt traffic. In other words, those who ship and receive most exempt commodities and those who use boxcars for rail shipments are currently not required to first petition to revoke the exemption in order to challenge unreasonable railroad demurrage practices before the Board. This will also be the case for the agricultural commodities whose exemptions are partially revoked in the STB's decision as of April 3, 2020, the Final Rule's effective date.

The Final Rule follows the Board's oversight hearing on demurrage and accessorial charges held on May 22 and 23, 2019, at which many rail shippers and receivers of commodities exempt from most regulation complained about railroad demurrage practices, including substantially rising charges, reduced free time and unfair processes for disputing charges. In the Final Rule, the Board noted that "the class exemptions for miscellaneous commodities and boxcar transportation already effectively exclude the regulation of demurrage," whereas the existing agricultural commodities exemption does not provide such a carve-out.

As to the miscellaneous commodities and boxcar transportation, the Board noted that due to confusion amongst rail stakeholders over whether the exemptions encompass demurrage, the amendments are aimed "only to clarify and ensure that the regulations are consistent with court and agency precedent, not to make a substantive change." Although the Board declined requests to state in the rule that these exemptions would also not apply to challenges to all railroad accessorial charges, it noted that "to the extent specific accessorial charges relate to categories that are already carved out (e.g., car hire, car supply, car service, and the use of equipment), they are already excluded from the … exemptions."

In connection with the exemptions for agricultural commodities, the Board partially revoked the exemption as to demurrage "to ensure that the regulatory relief available to agricultural shippers is on par with relief available to other non-intermodal rail transportation shippers and receivers." In its holding, the Board found that partial revocation of the agricultural exemptions "is necessary to carry out the [Rail Transportation Policy]." The Board also set forth a detailed analysis of market power and Rail Transportation Policy arguments related to exemption revocation, and ultimately denied certain railroads' arguments opposing the partial revocation of the agricultural exemptions.

As part of this proceeding, Thompson Hine assisted rail shippers and receivers of commodities affected by the current exemptions.

FOR MORE INFORMATION

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