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Federal Update
February 10, 2009

Since Railroads have "strong-armed" shippers to change Tariff rates to a contract rates, ARC has joined with 15 other groups to file Comments in ***Ex Parte No. 676*** –see copy attached.

The importance of this proceeding – is that if a rate structure is interpreted as a Transportation Contract and not a Tariff – then the STB has no regulatory oversight and the rate or surrounding factors of transportation cannot be challenged under rate reasonableness standards.

The problem has come about – where some shippers have complained that the carriers are offering tariff rates but mandating that the shipper sign a disclosure statement or some document surrounding the movement – this effectively makes a tariff rate a contract. Basically, the carriers were beginning to force shippers to sign "contracts" that bore all the earmarks of tariffs, i.e. a unilateral offering with terms and conditions set out without negotiation or bilateral agreement – effectively attempting to immunize the carriers activities from Board jurisdiction.

Background

In March, 2008 the Board decided to institute a rulemaking proceeding to consider imposing two requirements for contracts – namely a "full disclosure statement" advising a shipper that carriers' intends this to be a rail transportation contract and the shipper has the right to request a common carrier rate, and secondly a "written informed consent" requirement that would require the shipper to acknowledge its willingness to forgo its regulatory options – with the Board asking what language should be included.

On January 6, 2009, the Board basically ignored all the comments in the record and instead decided to propose a "somewhat different rule". In reality the Board was now proposing yet another new approach – revising the wording and radically altering the effect of the "full disclosure statement" requirement and dropping altogether the "informed consent" requirement!

The Interested Parities in its filing pointed out to the Board that the Board has no jurisdiction over whether a movement is a transportation contract – that is clearly for the courts to decide. The

Board's proposal is inconsistent with Congressional intent – because it would conclusively deem a document to be a contract in the absence of shipper negotiation and assent.

The idea behind the development of transportation contracts in the Staggers Rail Act of 1980 was that shippers and carriers would freely negotiate and agree upon customized arrangements for their mutual benefit. But, contracts would NOT to be required or forced upon shippers but rather encouraged.

The Parties also pointed out to the Board that things have changed since Staggers Rail Act was passed. With the rise of market dominance carriers, the carriers can now force shippers to sign contracts. The Board needs to terminate this proceeding until policy makers have a chance to evaluate the proposal in light of the current economic and administrative situation.

Mini Rail Shipper Day – National Association of Wheat Growers

The National Association of Wheat Growers has convened in Washington DC over the weekend and is meeting with Congressional folks today and tomorrow pushing for support for Rail Competition bill to be introduced by Chairman Oberstar and Chairman Rockefeller in the 111th Congress. The body supports the provisions of the rail competition bill including terminal access, the lifting of paper barriers, rate quotes of segments, final offer arbitration and redirecting the STB to focus on rail competition. ARC continues to receive advice and counsel from NAWG and its many Agricultural Alliance members and Wayne Hurst from Idaho who is the Treasurer at NAWG serves on the ARC E-Board as its Treasurer.

ARC anticipates a number of groups will be conducting their own Rail shipper days during the next few months to coincide with their DC meetings.