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Rail Common Carrier Obligation / Contracts

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Overview

- Rail Common Carrier Obligation
  - Basis and Definition
  - Statutory and Regulatory Requirements
  - Application of the Common Carrier Obligation to the transportation of hazardous materials
  - STB proceedings on the common carrier obligation

- Do you have a contract or not? -- STB Rulemaking and Decisions on the Definition of Contracts

Historical Basis for Rail Common Carrier Obligation

- An ancient legal doctrine – some trace it as far back as the Phoenecians !!
- Part of U.S. legal doctrine for well over 100 years
- Part of the “common law” – railroads are “affected with the public interest” and thus have a “duty to provide service”
- *Missouri Pacific Railway Co. v. Larabec Flour Mills Co.*, 211 U.S. 612, 619 (1909) ("No legislative enactment, no special mandate from any commission, or other administrative board was necessary, for the duty arose the fact that it was a common carrier").
- Carriers’ right of way are similar to public highways

Current Basis for Common Carrier Obligation

- The common carrier obligation is now statutory – and even broader than it was at common law
- Part of the rail regulatory statute since 1906
- Continued in Staggers Act
- Continued in ICC Termination Act of 1995 (ICCTA)
- The only real change in 103 years is to eliminate tariff filing at the agency, in favor of requiring tariff rates, terms and conditions to be made available by railroads
- CCO applies to all non-contract, non-exempt traffic – and potentially to these as well

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The Statutory Obligations - STB

- To provide "transportation or service on reasonable request," with "reasonable dispatch"
- To provide "to any person, on request, the carrier's rates and other service terms"
- The response must be made "in writing" and "promptly" -- by regulation within 10 days
- Rail carrier must "provide transportation or service in accordance with" its rates and service terms"
- These carrier service terms must be "reasonable"
- Carriers can't contract away all their capacity

Some Regulatory Gloss on the Statute

- Railroad can’t deny service merely because it is inconvenient or unprofitable to do so. (*GS Roofing* case, 1997)
- The requirement is not absolute – the shipper’s request must be “reasonable,” and an inquiry into the facts and circumstances is necessary in particular cases. (*Granite Slate* case, 2005)
- Railroad can’t refuse to transport a commodity based on its dangerous characteristics. (*Central RR* case, 1914, many others)

Common Carrier Obligation and Hazmats

- This issue of the transportation of TIHs has been "ground zero" for debate on what, if any, restrictions should be permitted on the transportation of TIHs and how, if at all, the common carrier obligation should be restricted
- Railroads have admirable safety record
- BUT – it is generally agreed that railroads cannot purchase enough insurance to cover the amount of all conceivable liabilities if their negligence results in a catastrophic accident involving TIHs.
- Class I carriers have about $1 billion in insurance.
- Some railroads say that they do not want to transport these goods, and would not, if they could

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Other Relevant Statutory Obligations for Transportation of Hazmats

- DOT is authorized to develop a comprehensive regulatory scheme for the transportation of hazmats. Within its sphere, these regs preempt state statute
- 2007 Amendment to Federal Railroad Safety Act – state law negligence claims based on a railroad's failure to comply with federal law, with state regulations not preempted by federal law, or with a railroad's own procedures, are not preempted

Recent Precedent on CCO and Hazmats

- *Radioactive Materials* cases (1978-1981): Carrier requirement for special train service: struck down in 1978 ICC case involving radioactive materials
- *Akron, Canton* case (1979) : Board may not hold that a commodity is too dangerous to transport if DOT regulations have been complied with.
- *Conrail* case (1981): Railroad conditions in addition to DOT rules carry a rebuttable presumption that they are unnecessary and fail to satisfy reasonableness criteria
- *Easterwood* case (1993): Where federal regs apply, compliance with federal regs preempts state tort law

STB Proceedings on CCO and Hazmats

- XP 677, *Common Carrier Obligation of Railroads* (April 08)
  - Effect of capacity constraints; requirements for investments
  - Transportation of Hazmats, especially TIHs
  - Impact of volume requirements or incentives
  - Economically-motivated service reductions
- XP 677 (Sub-No. 1), *Common Carrier Obligation of Railroads–Transportation of Hazardous Materials* (July 08)
  - AAR proposed STB issuance of policy statement that it would be reasonable for railroad to require shippers of TIHs to (1) indemnify railroad for all liability in excess of $500 million, and (2) require shippers to carry insurance at levels required by railroad
- No decision issued in either case

Issues / Arguments in STB Proceedings

- Railroads
  - Board has authority to authorize liability shift
  - Proposal consistent with safety and public policy
  - Unfair for railroads to shoulder burden of liability
  - Railroads are exposed even if they follow DOT regs
- Shippers
  - Congress has recently evinced intent to lodge liability with railroads
  - Requested policy statement would unlawfully preempt state tort law
  - Would be contrary to federal law and precedent
  - Would be inconsistent with FRA rules and regs
  - Would be inconsistent with fundamental legal principles
  - This issue for Congress and private sector discussions

Do You Have a Contract Or Not?

STB Rulemaking and Decisions on Contracts

Defining A "Contract" – The STB's First Attempt

- STB Ex Parte 669, *Interpretation of the Term "Contract" in 49 U.S.C. 10709* (March 2007):

  A "contract" would be defined as "any bilateral agreement" between a carrier and a shipper in which the railroad agrees to a "specific rate for a specific period of time" in exchange for a shipper commitment
- Comments filed: Both shippers and carriers had problems, but shippers liked it more than carriers
- March 2008: STB decides to take a "different course"

Defining A "Contract" – The STB's Second Attempt

- STB Ex Parte 676, *Rail Transportation Contracts Under 49 U.S.C. 10709* (March 2008):
  (a) Full disclosure statement – document is a contract, and shipper has right to a tariff
  (b) Written informed consent statement –shipper acknowledges agreement
- Comments Filed: Both railroads and shippers had greater or less problems

Defining A “Contract” – The STB’s Third Attempt

- STB Ex Parte 676, *Rail Transportation Contracts Under 49 U.S.C. 10709* (January 2008):
  - (a) Disclosure statement – Conclusive presumption that document is a contract if statement is included, regardless of other facts; and rebuttable presumption that document is not a contract if no statement is included
  - (b) No written informed consent statement
- Comments Filed 2/5/09:
  - Some railroads had some problems with proposed rule
  - Shippers completely opposed to proposed rule
- Reply Comments due 3/9/09

Existence of a Contract: *DuPont* Case

- DuPont filed a rate complaint against a CSXT, challenging a CSXT Private Price Quotation ("PPQ")
- CSXT moved to dismiss, arguing that the PPQ could not be a tariff, and had to be a contract
- STB ruled that PPQ was challengeable as a tariff rate:
  - DuPont never agreed to a contract
  - The document indicated that it was not a contract
  - The fact that the document set a private rate for DuPont did not automatically make it a contract
- LESSON: The individual facts must be carefully considered to determine whether a document is a contract or not

Questions?

Thank you.

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