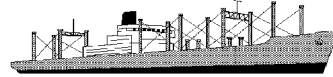
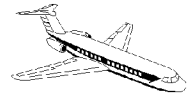




# Rollin' On <sup>®</sup>



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## **SURFACE TRANSPORTATION BOARD, DEMURRAGE CHARGES AND THE FORGOTTEN ICC**

The seasoned among you will remember well the good old days when the Interstate Commerce Commission ruled the world of interstate commerce. It's already been more than 15 years since that entity was sunsetted at the end of 1995. In its place is the Surface Transportation Board which assumed the role of the ICC.

Lest it be assumed by motor carriers that the STB exists only on paper, since motor carriers deal primarily with the Federal Motor Carrier Safety Administration and in many instances have not even heard of the STB, I can confirm that the STB is indeed a functioning governmental agency. Rail carriers and shippers are more familiar with the STB.

For the past few years I have represented a motor carrier, which has a spur which connects to a short line railroad, in a case which involved a dispute with a railroad. An issue arose regarding demurrage charges, which are a form of storage charges. Specifically, the shortline's tariff allowed shippers 48 hours from the time the railcar was spotted to get the railcar unloaded so that the short line could get the car back.

Sometimes the railcar was "constructively placed", meaning that the clock was ticking once the railroad gave the motor carrier notice that the railcar was in town. There would be various reasons why a railcar would get cp status. For example, if the spur was full, there would be no room to place, or spot, the railcar. So the railroad

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would give notice that the railcar was in town, and start its clock. The motor carrier, which in this case was acting more as a consignee than as a motor carrier, then had to scramble to get unload not only the cars already on the spur, but also needed to call in to have those railcars removed so that the cp'd cars could get unloaded, all within the 48 hour window.

In our particular situation, the dispute was that the railroad claimed that my client exceeded the 48 hours window on numerous occasions. That assertion was disputed, for various reasons.

First and foremost, the commodities in the cars were the same and not subject to deterioration, so the consignee did not care which car was delivered. Due to space constraints, some cars would get buried by the shortline on some distant spur or storage area. The crew would then pull out a newly arrived, unburied car for delivery, everyone was happy, everyone except the upstream chiefs who were removed from operations.

Another problem was that sometimes the Class 1 railroad would build a train at a distant location, and then deliver all of the railcars at once to the short line, which in turn would give cp notice to the consignee that numerous cars needed to be delivered and unloaded, all at the same time which was physically not possible.

An irony was that the consignee's spur was under-utilized by more than 50 %. But there was no way it could accommodate so many cars at one time.

The shortline admitted that it gave preferential treatment to larger shippers, claiming that this practice made its operations more efficient.

Finally, cars might be spotted or cp'd late at night, or around the weekend, and the clock would start ticking. To make matters worse, the consignee might have a crew on hand to unload, having been given assurance that railcars were being delivered at a certain time, only to have no-shows which cost the shipper.

The short line filed a lawsuit in the local circuit court, then sought and obtained a court order sending the case to the STB for review and resolution, on the basis that the STB had primary jurisdiction due to its expertise in transportation matters.

It is not intuitive to send a case from the west coast to the east coast when all of the witnesses are located just a few miles from the courthouse, and where the issue was primarily a service issue. But off it went to the east coast anyway.

After the passage of several months, the STB issued a ruling in favor of the motor carrier/consignee. I will admit that I was dubious about having the regulator be the judge, jury and executioner in a case involving the regulated (short line), since sometimes the regulators get too close to the regulated (Wall Street comes to mind). But to its credit, that did not occur in our case.

That's it for now. Until next time, keep the cargo *rollin'*!

### **The Obligatory Disclaimer**

This newsletter is for informational purposes, does not provide legal advice and does not create an attorney-client relationship

### **Short Bio**

Admitted to the state bars of Oregon, Alaska, Florida and Massachusetts. Practicing law for over 30 years and emphasizing transportation law, business law and related litigation