

F&S HIGHLIGHTS

A Periodic Update for the Clients and Business Associates of Fletcher & Sippel LLC

Issue No. 7

www.fletcher-sippel.com

Fall 2007

New Editions to the Firm

We are pleased to announce that [Kristin M. Liddle](#), [Jeremy M. Berman](#) and [Peter C. McLeod](#) have joined the Fletcher & Sippel team. The addition of these attorneys broadens the scope of our expertise and gives us additional depth in our practice areas.

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Rail Line Lease Completed

[William C. Sippel](#) and [T.J. Litwiler](#) recently advised and assisted a new start-up Class III railroad in the negotiation of a lease of a 108-mile rail line in the State of Washington. The transaction involved an unusual three-way deal in which the State first purchased the line from its prior short line owner and then leased the line to the new operator. In order for the new operator to begin providing rail service by the time the current operator was expected to cease service on the line, we obtained an order from the Surface Transportation Board shortening the effective date of the normal 30-day class exemption by 11 days.

This is believed to be the first time that the Board has provided such relief since the effectiveness period for line acquisition class exemptions was extended from seven to thirty days in a Board rulemaking last year.

Claim Dismissed

On September 28, 2007, the United States District Court for the Eastern District of New York granted our client's Motion to Dismiss, or in the Alternative, Transfer the Action to the Western District of Michigan.

[Myles L. Tobin](#) and [James D. Helenhouse](#) represent Marquette Rail, LLC, a shortline that operates in Western Michigan. A New York refuse and recycling company shipped paper products (according to the shipper) or municipal solid waste (our view) to a consignee on Marquette Rail's Western Michigan line. The consignee was not able to process and unload the shipments, and pursuant to the applicable tariff, the cars were interchanged back to the intermediate carrier.

The shipper sued our client in New York under three theories: Carmack Amendment; breach of contract; and state law fraud.

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**SUMMARY JUDGMENT VICTORY
IN COUNTERCLAIM TO FELA ACTION**

Fletcher & Sippel attorneys recently won summary judgment for its railroad client on liability issues on a counterclaim in a FELA suit. In his FELA complaint, the plaintiff alleged that he injured his knee when he slipped on ballast. The railroad's position was that the plaintiff injured himself during an altercation with another employee.

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Claim Dismissed...continued from page 1

Fletcher & Sippel moved to dismiss on the basis of, *inter alia*, improper venue under the Carmack Amendment. We argued that because our client did not operate in New York, and the point of destination was in Michigan, the only appropriate venue under the Carmack Amendment special venue provision is the Western District of Michigan.

The court agreed and, accordingly, transferred the case to the Western District of Michigan, where our client has already filed an action against the shipper for freight and demurrage charges. The court also dismissed plaintiff's breach of contract action as plaintiff eventually conceded that that claim was preempted by the Carmack Amendment.

Please contact [Myles L. Tobin](#) or [James D. Helenhouse](#) for more information about the Carmack Amendment or our arguments in this interesting case.

New Editions...continued from page 1

[Kristin M. Liddle](#), who joined the firm back in April 2007, is an experienced litigator with substantial courtroom experience including arbitrations, mediations, and jury trials. She has an extensive background in warranty litigation and has served as lead counsel in numerous breach of warranty cases. Kristin has also handled appeals, including a landmark case that set forth the statute of limitations for breach of warranty claims in the State of Missouri.

[Jeremy M. Berman](#) joined the firm in September 2007. Jeremy received his law degree from Creighton University School of Law in 2007, *summa cum laude*, and his undergraduate degree from Creighton University in 2003, *summa cum laude*. While in law school, Jeremy worked for the law department of the Union Pacific Railroad and has experience with FELA litigation, freight loss and damage claims, and a variety of other issues.

[Peter C. McLeod](#) joined the firm in October 2007. Peter began his legal career practicing FELA and crossing litigation. For the past five years he practiced general litigation, medical malpractice defense, civil rights, and labor and employment litigation. He possesses extensive trial experience in both state and federal courts and has argued in front of the First District Appellate Court. Additionally, Peter has represented clients in quasi-legal and administrative settings, including grievance arbitrations and disciplinary hearings.



Summary Judgment...*continued from page 2*

In addition to denying liability, the railroad filed a counterclaim against plaintiff, in which it sought to recover medical expenses that it paid for treatment of plaintiff's co-employee who was injured during the altercation with the plaintiff. The parties moved for cross motions for summary judgment on the counterclaim. Plaintiff argued that the statute of limitations had run, that the railroad's claim arose under ERISA, and as such the state court did not have jurisdiction over the claim, and that the railroad's claim was against public policy because it was an assignment of a personal injury claim.

The court found that the plaintiff did commit battery against his co-worker, and rejected each of plaintiff's arguments. The court held that the claim was a state law claim for subrogation, not an assignment of a personal injury action. Because the claim did not require an interpretation of the railroad's ERISA plan, the claim was not preempted by ERISA. Finally, the court held that although the two year statute of limitations on the railroad's claim had run before the counterclaim was filed, plaintiff's filing of his suit within the 3 year FELA statute, revived the railroad's claim pursuant to a state statute.

Please contact **James D. Helenhouse** for more information.

STB "PAPER BARRIERS" DECISION

The STB recently served a decision in the docket entitled STB Ex Parte 575, Rail Access and Competition Issues Renewed Petition of Western Coal Traffic League, the "Paper Barriers" docket. The STB has decided, going forward, to evaluate paper barriers contained in conveyances of rail lines between carriers. In addition, the STB is proposing a mechanism to require rail carriers to disclose paper barriers as part of a transaction and to give shippers an opportunity to view an existing paper barrier so that shippers can consider reopening a prior proceeding. Comments on the proposed disclosure rules are due on January 2, 2008.

Please note that what the STB is seeking comments on are the disclosure procedures. The substantive decision to review paper barriers will govern future STB proceedings in any event.

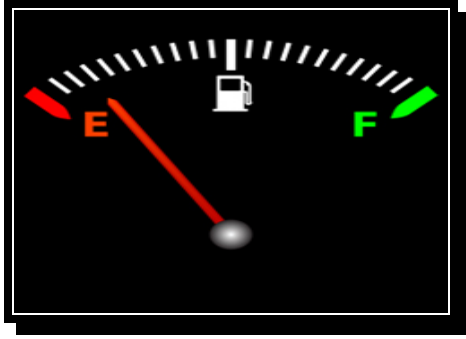
UPCOMING EVENTS

MAY 4-6, 2008

ASLRRRA ANNUAL CONVENTION
*Marriott Rivercenter
San Antonio, Texas*

JULY 22-24, 2008

2008 LIABILITY CONFERENCE
- HOSTED BY WATCO -
*InterContinental Hotel
Kansas City, Missouri*



FUEL SURCHARGE DEBATE MOVES TO ANTITRUST ARENA

One of the most significant decisions issued by the Surface Transportation Board in 2007 has been the ruling in STB Ex Parte No. 661, Rail Fuel Surcharges (served January 26, 2007), in which the STB held that the imposition of rail fuel surcharges constructed as a percentage of a carrier's base rates constitutes an unreasonable practice. The Board provided a 90-day transition period (until April 26, 2007) for carriers to convert fuel surcharges to a formula "based upon the attributes of a movement that directly affect the amount of fuel consumed," in other words, surcharges that have "a reasonable nexus to fuel consumption."¹

While this decision was likely not expected by the Class I carriers, Class I attorneys have focused on the narrow impact of the Board's decision by virtue of the limitations which the Board, itself, placed on that decision. The Board stated that it was not ruling on the reasonableness of the amount that a rail carrier charges through a combination of freight rates and fuel charges, but only on "the manner in which the railroads apply what they label a fuel surcharge."² The Board also determined that its ruling only applied to regulated common carrier traffic, not traffic moving under confidential contracts pursuant to 49 U.S.C. § 10709, and it refused shipper requests to revoke existing class exemptions so as to apply the decision to

exempt traffic.³ Finally, the Board declined to make its findings retroactive so as to enable shippers "to obtain a remedy for what they perceived to be past overcharges."⁴

If any of the major carriers believed that the fuel surcharge debate had been "put to bed" in the absence of the filing of any petitions for judicial review of the Board's decision, they have been sorely disabused of this notion in recent weeks, as the fuel surcharge battleground has moved from the realm of STB regulatory jurisdiction to the antitrust arena. Since May 14, 2007, fifteen separate class action lawsuits have been filed in various federal district courts against five of the Class I rail carriers (UP, BNSF, CSX, NS, and KCS) alleging that, from July, 2003 through the present, those Class I carriers conspired to fix, raise, maintain or stabilize prices of unregulated rail freight transportation services by imposing agreed upon rail fuel surcharges.⁵ The most recently filed class actions add the Association of American Railroads ("AAR") as a party defendant as well. The suits focus on fuel surcharges imposed on contract and exempt traffic, as opposed to traffic moving under tariff rates.

Each suit generally alleges that the defendants maintained uniformity of rail fuel surcharges by agreeing to compute the surcharges as a percentage of the rail freight transport base rate, and by agreeing upon common indices, timing and trigger points for adjusting the percentages. The suits contend that the railroad defendants published the surcharges on their websites to facilitate coordination and the detection of any deviation from collusive pricing. Each of the suits asserts that defendants have violated Section 1 of the Sherman Antitrust Act, 15 U.S.C. § 1, and seeks treble damages pursuant to Sections 4 and

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Fuel Surcharge...continued from previous page

16 of the Clayton Act, 15 U.S.C. §§ 15 and 26.

The class action complaints refer to the lockstep nature by which the Class I defendants adjusted their fuel surcharges as creating an inference of collusive activity. For example, the suits allege that, prior to July of 2003, the UP carload fuel surcharge was adjusted monthly based on the West Texas Intermediate ("WTI") Crude Oil Index, while BNSF carload fuel surcharges were based on the U.S. Department of Energy ("DOE") and On-Highway Diesel Fuel Price Index ("HDF"). However, in or about June of 2003, UP switched to the HDF Index pursuant to an alleged agreement with BNSF, and from then on BNSF and UP allegedly moved in tandem with each other, both charging the exact same rail fuel surcharge. The suits allege that BNSF and UP also agreed to administer the HDF Index in precisely the same way. Whenever the U.S. average price of diesel fuel as measured by the HDF Index equaled or was lower than \$1.35 per gallon, no surcharge was applied. When the HDF Index exceeded \$1.35 per gallon, however, BNSF and UP both applied a surcharge of 0.5% for every five cent increase above \$1.35 per gallon. So, for example, if the HDF Index rose 50 cents to \$1.85 per gallon, BNSF and UP would apply a surcharge of 5%. The surcharge would increase/decrease 10% for every dollar increase/decrease in the HDF Index and corresponding increments thereof.

Similarly, the suits allege that in February of 2004 or earlier defendants CSX and NS agreed to base their fuel surcharge programs on the average monthly price of WTI Crude Oil as published in the Wall Street Journal. Specifically, after an initial period in which their selected WTI trigger price differed, CSX and NS allegedly agreed to apply a fuel surcharge whenever

the monthly average WTI price exceeded \$23 per barrel. When that happened, defendants' rates were increased 0.4 percent for every \$1 dollar that the price of WTI oil exceeded \$23 per barrel. So, for example, if the price of WTI oil was \$28 per barrel, the fuel surcharge percentage would be 2%. The rail fuel surcharge would be adjusted upward/downward by 2% for every \$5 increase/decrease in the WTI average price.

CSX and NS also allegedly coordinated when they would change their fuel surcharge—two calendar months after the WTI index had adjusted, thereby using the fuel surcharge price timing used by BNSF and UP. For example, if the WTI average price exceeded \$23 per barrel in January, the CSX and NS would assess the applicable fuel surcharge percentage to all bills of lading dated in the month of March. In this way, according to the lawsuits, CSX and NS could apply exactly the same fuel surcharge percentage month after month. CSX and NS published their monthly fuel surcharge percentages on their websites, making any deviation from cartel pricing easily detectable.

Some legal scholars have suggested that the allegations of inferential conduct contained in these complaints will not withstand judicial scrutiny. Soon after the first of these complaints was filed, the United States Supreme Court issued its latest pronouncement on the allegations and extent of proof necessary to sustain an antitrust conspiracy claim in Bell Atlantic, et al. v. Twombly, et al., 127 S.Ct. 1955 (May 21, 2007). In reversing a decision of the 2nd Circuit Court of Appeals, the Supreme Court held in Bell Atlantic that an allegation of parallel business conduct and the bare assertion of conspiracy will not alone suffice to state a claim under the Sherman Act. The Court stated that conscious parallelism with respect to

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Fuel Surcharge...continued from previous page

business behavior, a common reaction of firms in a concentrated market that recognize their shared economic interests and their interdependence with respect to price and output decisions, is not in itself unlawful under the Sherman Act.

Thus, the Bell Atlantic case may leave serious doubt as to whether the assertions in the first eight of the antitrust class action lawsuits, which essentially assert only purported agreements based on conscious parallelism, will survive judicial scrutiny. It may be that one of the battlegrounds in these complaints (in addition to the class certification hurdles normally attendant to class action lawsuits) will be whether the plaintiffs can survive motions to dismiss long enough to seek discovery from the Class I's as to possible facts supporting agreements to conspire.

The most recent seven class action lawsuits, all filed in June of 2007, subsequent to the Bell Atlantic case, go a bit further than their predecessors in alleging specific events wherein agreements between the Class I's purportedly occurred. For example, they allege that, in March of 2003, top executives of the five Class I railroad defendants attended the Spring 2003 National Freight Transportation Association ("NFTA") meeting at the Greenbriar Resort, and this NFTA 2003 meeting allegedly allowed defendants' top executives "ample cover to meet and conspire at meals, on the golf course, and at all other resort facilities." Similarly, the recent complaints infer that the regular AAR Board meetings offered the opportunity for communication between the Class I's, as well as facilitation of the transfer of pricing and fuel surcharge information.

Whether the additional allegations contained in the most recent suits, and/or the discovery which will undoubtedly be sought in all of these cases, will lead to establishment of a conspiracy to violate the antitrust laws by the defendants remains to be seen. However, it is clear that the fuel surcharge debate remains on the "front burner" of the litigation forum, and scrutiny of the Class I fuel surcharges will continue for some time. Please contact [Myles L. Tobin](#) for more information.

¹ STB Ex Parte 661 at 9.

² Id. at 7.

³ Id. at 12-13.

⁴ Id. at 10.

⁵ U.S. District Court, District of New Jersey: Case Nos. 07-CV-2251, Dust Pro, Inc. v. CSX Transportation, Inc. et al., 07-CV-2289, Issac Industries, Inc. v. CSX Transportation, Inc., et al., 07-CV-3006, Carter Distributing Company v. CSX Transportation, Inc., et al., 07-CV-2832, United Co-Operative Farmers, Inc. v. CSX Transportation, Inc., et al. and 07-CV-2769, Bar-Ale, Inc. v. CSX Transportation, Inc., et al.; U.S. District Court, Northern District of Illinois: Case Nos. 07-CV-2954, Dad's Products Company, Inc. v. BNSF Railway Company, et al. and 07-CV-3274, Zinifex Taylor Chemicals, Inc. v. CSX Transportation, Inc., et al.; U.S. District Court, District of Columbia, Case Nos. 07-CV-1101, McIntyre Group, Ltd. v. Association of American Railroads, et al., 07-CV-1127, Strates Shows, Inc. v. Association of American Railroads, et al., 07-CV-1078, Dakota Granite Company v. Association of American Railroads, et al., 07-CV-1126, Sublette Cooperative, Inc. v. Association of American Railroads, et al., 07-CV-1119, GVL Pipe & Demolition, Inc. v. Association of American Railroads, et al. and 07-CV-1121, Ferraro Foods of North Carolina, LLC v. Association of American Railroads, et al.; U.S. District Court, Middle District of Florida, Case No. 07-CV-0557, Cedar Farms Co., Inc. v. CSX Transportation, Inc., et al.; U.S. District Court, Eastern District of Pennsylvania: Case No. 07-CV-2657, Quality Refractories Installation, Inc. v. Association of American Railroads, et al.

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ALL OF OUR CLIENTS A HAPPY AND
PROSPEROUS HOLIDAY SEASON.
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SERVE YOU AND LOOK FORWARD TO
CONTINUING TO SERVE YOU IN THE FUTURE.**

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