

STB EX PARTE NO. MC-220

THE MUNICIPALITY OF ANCHORAGE, AK--NOTICES FOR
RATE INCREASES FOR ALASKA INTERMODAL
MOTOR/WATER TRAFFIC--PETITION FOR RULEMAKING

Decided May 29, 1996

The Board adopts a modification to the regulations governing the notification period for rate modifications pursuant to 49 CFR 1312.6(b).

BY THE BOARD:¹

BACKGROUND

By petition filed May 25, 1994, the Municipality of Anchorage, AK (Anchorage or petitioner) asked the Interstate Commerce Commission (ICC or Commission) to amend its tariff regulations at 49 CFR 1312. Those regulations, as relevant here, concern the filing and dissemination of tariff publications which modify joint intermodal rates for motor/water transportation to and from Alaska. The regulations permit carriers in the Alaska trade to increase their intermodal rates within 7-working days (usually 9 calendar days)

¹ The ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (the ICCTA), which was enacted on December 29, 1995, and took effect on January 1, 1996, abolished the Interstate Commerce Commission (ICC or Commission) and transferred certain functions and proceedings to the Surface Transportation Board (Board). While section 204(b)(1) of the ICCTA provides, in general, that proceedings pending before the ICC on the effective date of that legislation shall be decided under the law in effect prior to January 1, 1996, insofar as they involve functions retained by the ICCTA, the action at issue here, the adoption of new rules with application to future transportation and future tariff filings, necessitates analysis under the new law, and, therefore, this decision applies the law in effect after enactment of the ICCTA. Citations are to the current sections of the statute, unless otherwise indicated. This decision relates to a proceeding that was pending with the ICC prior to January 1, 1996, and to functions that are subject to Board jurisdiction pursuant to 49 U.S.C. 13701-02 and 13521.

1 S.T.B.

after the increases are filed. Totem Ocean Trailer Express, Inc. (TOTE) filed a response to Anchorage's petition.

Petitioner states that it typically receives notice of rate increases only after the rates have become effective. Pursuant to Board regulation, notice of "short notice publications" (publications that become effective on less than 10 days' notice) must be sent to subscribers by the fifth day after they are sent to the Board.² This notice period allows 3 days for mail delivery, analysis by petitioner, drafting a protest, and transmitting the protest to the Board for decision by the ninth day.³ Petitioner says that frequently subscribers do not receive notice of the tariff until after the 7-working day period has passed, thus effectively eliminating the petitioner's ability to protest the tariff changes. Petitioner states that its notification problems involve both notice to Alaskan subscribers and notice to petitioner's counsel in Arlington, VA.

Anchorage requested that the Commission [now the Board]: (1) provide a longer notice period, perhaps by reinstating the statutory 30-day notice period under former 49 U.S.C. 10762; and (2) require rate increase publications for intermodal motor/water service to and from Alaska to be sent to subscribers on the day the publications are issued. By decision served August 1, 1995, the ICC denied the petition to the extent that a longer notice period was sought. Instead, the ICC instituted a rulemaking proceeding proposing that carriers transmit tariff changes to subscribers on the date the tariffs are sent to the agency. The ICC also proposed extending this rule to all short notice publications governed by section 1312.6(b)(2).

Only two parties responded to the Commission's notice of proposed rulemaking: The American Automobile Manufacturers Association and TOTE. Both favor the proposed rule. TOTE expresses its understanding

² See 49 CFR 1312.6(b)(2).

³ As noted in the Commission's decision instituting the rulemaking, implicit in, and central to, the petition is the burden of proof issue. Historically, if a shipper protested a rate increase and the Commission voted either to investigate or to suspend and investigate, the burden of proof to justify a tariff change would rest with the carrier(s) proposing the increase. See former 49 U.S.C. 10708(c). Otherwise, the shipper was required to file a complaint; there, the burden of proof would rest with the shipper to show that the rates violate provisions of the former Interstate Commerce Act.

that, under the proposed rule, it could offer subscribers two options: "same day" service for one price and service within 5-working days for a lower price. TOTE says that this approach would allow a carrier to recover any additional costs associated with "same day" service.

DISCUSSION AND CONCLUSIONS

After review of the record, we have decided to adopt the proposal to modify the regulations governing the notification period for rate modifications pursuant to 49 CFR 1312.6(b).⁴ The new rule would require carriers utilizing short notice publications to send copies of all changes to their tariffs to subscribers not later than the time the copies for filing are sent to the Board. This requirement would not apply if the subscriber has agreed in advance, in writing, that the changes may be sent to it within 5-working days of the time the changes are sent to the Board.

The ICCTA did not explicitly carry forward the suspension remedy with respect to noncontiguous domestic trade tariffs, but it did provide the Board with authority to issue injunctions "when necessary to prevent irreparable harm." 49 U.S.C. 721(b)(4). The revised rule will give tariff subscribers 5 additional days in which to seek such injunctive relief, without increasing the lead time for implementing rate changes. The modification will not impose an undue burden on carriers. Indeed, the only carrier filing comments supports the proposed rule. The new rule applies to all carriers in the noncontiguous domestic trade continuing to file tariffs under the ICCTA and utilizing the short notice provisions, not only to those participating in the intermodal Alaska trade. Also, the new rule applies to both rate increases and decreases, as the previous rule did. This approach will help provide consistency throughout the industry, cause no hardships, and protect subscribers' rights to file protests. The revised rule is contained in the Appendix to this decision.

⁴ We note that the regulations at 49 CFR 1312 contain some requirements that are no longer applicable in light of the ICCTA, and we will undertake to modify the regulations in the near future. We anticipate that the notice issue involved here will continue to be relevant, even after we amend the regulations, to the tariffs that continue to be required.

REGULATORY FLEXIBILITY ANALYSIS

We conclude that the regulation will not have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act (5 U.S.C. 601, *et seq.*) because the proposed rule affects only the mailing date for notification.

ENVIRONMENTAL AND ENERGY CONSIDERATIONS

The rule will not significantly affect either the quality of the human environment or the conservation of energy resources. An environmental assessment is not necessary under our regulations because the proposed action would not result in changes in carrier operations that exceed the thresholds established in our regulations. *See* 49 CFR 1105.6(c)(2).

It is ordered:

1. 49 CFR 1312.6(b) is modified as set forth in the attached Appendix.
2. Notice will be published in the *Federal Register* on June 14, 1996.
3. This proceeding is discontinued.
4. This decision is effective on July 14, 1996.

By the Board, Chairman Morgan, Vice Chairman Simmons, and Commissioner Owen.

APPENDIX

List of Subjects

49 CFR part 1312

Household goods freight forwarders, Motor carriers, Moving of household goods, Pipelines, Tariffs, Water carriers.

PART 1312 - REGULATIONS FOR THE PUBLICATION, POSTING AND FILING OF TARIFFS, SCHEDULES AND RELATED DOCUMENTS OF MOTOR, PIPELINE AND WATER CARRIERS, AND HOUSEHOLD GOODS FREIGHT FORWARDERS

1. The authority citation for part 1312 is revised to read as follows:

Authority: 5 U.S.C. 553; 49 U.S.C. 721, 13701, 13702, and 13521.

2. Section 1312.6, paragraph (b)(2) is revised to read as follows:

§ 1312.6 *Furnishing copies of tariff publications.*

* * * * *

(b) * * *

(2) Newly-issued tariffs, supplements, or loose-leaf pages, including short notice publications, shall be sent to each subscriber not later than the time the copies for official filing are sent to the Board, except that with the advance, written permission of the subscriber, any publication may be sent not later than 5-working days after the time the copies are sent to the Board.

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