

STB EX PARTE NO. 334 (SUB-NO. 8)¹JOINT PETITION FOR RULEMAKING ON
RAILROAD CAR HIRE COMPENSATION

Decided April 9, 1997

The Board reopens these proceedings and grant petitioners' joint request for clarification. The Board finds that the Arbitration Rule may be amended without its prior approval, but that any amendment is subject to the Board's scrutiny, on petition or on the Board's own initiative, for consistency with the principles of the ICC's car hire deprecation decisions.

BY THE BOARD:²

Petitioners, the Association of American Railroads (AAR) and the American Short Line Railroad Association, jointly request clarification as to whether Rule 25, Car Hire Arbitration (Arbitration Rule) of the AAR's Code of Car Hire Rules and Interpretations--Freight (Car Hire Code), can be amended without our prior approval. A reply was filed by The Greenbrier Companies (Greenbrier),³ and AAR responded. We will reopen these proceedings and grant petitioners' request for clarification.

¹ This decision embraces and primarily concerns *Joint Petition for Exemption of Arbitration Rule from Application of 49 U.S.C. 10706 and Motion to Dismiss*, Ex Parte No. 334 (Sub-No. 8A).

² The *ICC Termination Act of 1995*, Pub. L. No. 104-88, 109 Stat. 803 (*ICCTA*), which was enacted on December 29, 1995, and took effect on January 1, 1996, abolished the Interstate Commerce Commission (ICC) and transferred certain functions and proceedings to the Surface Transportation Board (Board). The functions to which these petitions are addressed were continued by the *ICCTA* and are subject to Board jurisdiction under 49 U.S.C. 11122.

³ Greenbrier seeks leave to file a late reply, explaining that it was not served with a copy and submitted its reply upon becoming aware of the petition. It states that it previously participated in these proceedings, independently and as a member of the Coalition of Rail Carriers and Leasing Companies, and retains a continuing interest in ensuring that the car hire system is properly and fairly administered by the AAR. Greenbrier expresses qualified support for petitioners' request for clarification. Greenbrier will be granted leave to reply, and its reply will be accepted into the record.

BACKGROUND

Car hire (or per diem) charges are assessed by railroads that own or control rail freight cars when their cars carry revenue-producing traffic over the lines of other railroads. Since the early 1960's, car hire charges were set using an ICC-prescribed formula. However, the method for setting these charges changed when car hire rates were deprecised. Final rules implementing the deprecisation were adopted in earlier decisions in this proceeding⁴ and were codified at 49 CFR parts 1033 and 1039. The final rules basically froze car hire rates at the prescribed December 31, 1990 level and permitted the railroads to deprecise up to 10% of their car fleets each year for 10 years beginning on January 1, 1994. At the end of the 10-year period, car hire will be fully deprecised, and negotiated, market-set rates will apply to virtually all cars.

The Arbitration Rule is an integral part of the car hire deprecisation. Essentially, it is an agreement among the subscribing railroads that governs the negotiations of car hire rates on deprecised cars and the arbitration of related disputes. It embodies a bid and offer process for negotiating charges; clarifies how negotiations proceed and, if necessary, how disputes are arbitrated; and determines the applicable ("default") car hire charges pending the adoption of new negotiated or arbitrated charges. At the same time the final rules deprecising car hire were adopted, the Arbitration Rule was approved under 49 U.S.C. 10706. Unlike the rules implementing the car hire deprecisation, the Arbitration Rule was not codified. Instead, it was published in the Car Hire Code, which is a comprehensive set of AAR procedures governing car hire.

DISCUSSION AND CONCLUSION

The AAR's rate bureau agreements have governed the car hire area, and they have been approved and immunized from the antitrust laws since 1950. See, *Association of American Railroads--Agreement*, 277 I.C.C. 413 (1950); and *Railroads Per Diem, Mileage, Demurrage--Agreement*, 1 I.C.C.2d 924 (1985). The Car Hire Code was adopted under the authority of AAR's approved rate bureau agreement and (with the exception of Appendix R, the ICC-prescribed

⁴ *Railroad Car Hire Compensation -- Rulemaking*, 9 I.C.C.2d 80 (1992), 9 I.C.C.2d 582 (1993), and 9 I.C.C.2d 1090 (1993) (*Car Hire*), appeal dismissed, *Southern Pac. Transp. Co. v. ICC*, 69 F.3d 583 (D.C. Cir. 1995).

Hourly and Mileage Car Hire Rate Table) was revised over the years without prior ICC approval. Because the Arbitration Rule, unlike the balance of the rules in the Car Hire Code, was specifically approved by the ICC, petitioners seek assurance that our prior approval is not required to amend any of its provisions.

Greenbrier generally supports the clarification request but contends that the power to amend the Arbitration Rule should not be unlimited. Referring to the bid and offer process and the mechanism for setting default rates, Greenbrier asserts that it would be a waste of industry and Board resources to require our prior approval for technical corrections and routine amendments to the arbitration process.⁵ On the other hand, observing that car hire was deprescribed, not deregulated, it contends that even a unanimous rail industry vote should not suffice to implement fundamental changes to the system. Greenbrier notes that the ICC already rejected an amendment adopted without prior approval,⁶ and submits that Board prior approval should be required for any amendment that is inconsistent with precedent or that fundamentally alters the overall process.

While prescribed rates, classifications, rules, or practices have the force and effect of law and may not be changed without prior approval,⁷ the ICC's approval of the Arbitration Rule was not a prescription within the meaning of the statute. Nor did the ICC, in *Car Hire*, view it as a substantive term of a rate bureau agreement, which requires prior approval both to implement and amend.

We agree with Greenbrier, to the extent it acknowledges that both " * * * the industry and the ICC clearly contemplated an amending process that does not require governmental pre-approval." The Arbitration Rule was not intended to be prescribed or codified, and, as a consequence, there were no references to a prior-approval requirement in any ICC decision. Such a requirement would have been inconsistent with the amendment procedure, contained in part D of the Arbitration Rule, which gives subscribers specific authority to make and

⁵ Greenbrier expresses concern about the potential for abuse in the amendment process. It fears erratic changes that affect compensation levels and argues that any change in procedure, even if characterized as routine or technical, that effectively sets surrogate market rates, *e.g.*, by changing the default rate, potentially crosses the line between permissible industry rule change and impermissible collective ratemaking.

⁶ *Car Hire*, 9 I.C.C.2d at 1105-07, in which the ICC required modification of a proposal setting default rates..

⁷ 49 U.S.C. 10704(a)(1).

implement amendments, subject only to the safeguards designed to protect the Class III subscribers.⁸ Our involvement in car hire disputes is limited to instances where the arbitration process is abused, 49 CFR 1033.1(c)(2)(ii), or a party has not subscribed to the Car Hire Code, 49 CFR 1033.1(c)(2)(iii).

We recognize Greenbrier's concerns about potential abuse, but we agree with petitioners that adequate safeguards exist to protect those who oppose specific amendments to the Arbitration Rule. Petitioners note that the amendment process is open and that part D of the Arbitration Rule gives Class III subscribers an active role in the process and power to block changes. Similarly, they observe that representatives from many interested parties typically attend meetings and may voice their opinions and concerns. They note that general notice is given whenever changes are made in the car hire rules and assert that notice will also be given in the case of changes in the Arbitration Rule.

We view the Arbitration Rule as part of a dynamic body of industry rules and protections concerning car hire. As a consequence, we believe that the Arbitration Rule can be changed without our prior approval, because the part D procedures that protect Class III subscribers are also accompanied by our continuing jurisdiction to review any changes that are adopted.

Greenbrier suggests a distinction between routine amendments (permissible without prior approval) and fundamental changes (which would require prior approval). But even if we were inclined to circumscribe the authority of the subscribers to amend the Arbitration Rule, as Greenbrier suggests, we question whether realistic standards could be developed to distinguish readily between those routine amendments and corrections that would be permissible and those amendments that arguably would exceed the scope of the Arbitration Rule. Thus, we will rely on the complaint process and our own initiative to investigate any allegation or action in the car hire area to ensure consistency with the principles embodied in the ICC's approval of the Arbitration Rule and the rules governing car hire deprecation.

Accordingly, we find that the Arbitration Rule may be amended without our prior approval, but that any amendment is subject to our scrutiny, on petition or

⁸ The only significant modification the ICC made to the Arbitration Rule, in its decision deprecating car hire, concerned the proposed amendment process. It required a 67% majority (based on car ownership) to modify the Arbitration Rule rather than the 80% majority contained in the original proposal. *Car Hire*, 9 I.C.C.2d at 88-89. The reason for lowering the percentage was to eliminate the possibility that as few as two major car-owning carriers could block changes.

on our own initiative, for consistency with the principles of the ICC's car hire depreciation decisions.

This decision will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. The request by Greenbrier for leave to late-file a reply is granted, and the reply is accepted into the record.
2. These proceedings are reopened and clarified, as specified above.
3. This decision is effective on April 22, 1997.

By the Board, Chairman Morgan and Vice Chairman Owen.