

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 35517

CF INDUSTRIES, INC. v. INDIANA & OHIO RAILWAY, POINT COMFORT AND
NORTHERN RAILWAY, AND THE MICHIGAN SHORE RAILROAD—
PETITION FOR DECLARATORY ORDER

Digest:¹ In this decision, the Board finds reasonable a practice of operating trains at an appropriate speed for safe operations based on current conditions, but the Board also directs the railroads not to enforce a blanket lower speed limit, specific to certain hazardous commodities, that applies at all times and in all locations. In addition, the Board requests input from the Federal Railroad Administration, the Pipeline and Hazardous Materials Safety Administration, and the Transportation Security Administration with regard to the effects on safety and security of two other railroad practices.

Decided: November 26, 2012

In this case, several chemical shippers and trade associations request that the Board declare invalid and unenforceable certain requirements promulgated by RailAmerica, Inc., and several of its railroad subsidiaries regarding rail transportation of Toxic-by-Inhalation Hazardous materials and Poison-by-Inhalation Hazardous materials (TIH/PIH).² This decision finds reasonable a practice of operating trains at an appropriate speed for safe operations based on current conditions, but the Board directs respondents not to enforce a blanket lower speed limit, specific to TIH/PIH, that applies at all times and in all locations. The Board also requests input

¹ The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. Policy Statement on Plain Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

² The shippers allege unreasonable practices in (1) tariffs issued by individual railroad subsidiaries of RailAmerica, Inc., and (2) a document described as a “standard operating procedure” (SOP) created by RailAmerica, Inc., itself. For convenience, we will refer to RailAmerica, Inc., and its subsidiary railroads, as RailAmerica or respondents. The railroads named as respondents are Indiana & Ohio Railway Company (IORY), Point Comfort and Northern Railway Company (PCN), Michigan Shore Railroad (MSR), and Alabama & Gulf Coast Railway LLC (AGR). RailAmerica states that MSR is an unincorporated division of Mid-Michigan Railroad, Inc. (RailAmerica Reply 3 n.1 (Apr. 16, 2012).)

from the Federal Railroad Administration (FRA), the Pipeline and Hazardous Materials Safety Administration (PHMSA), and the Transportation Security Administration (TSA) with respect to the effects on safety and security of two other railroad practices. Those practices are priority train service³ and a limitation of three TIH/PIH cars per train.

BACKGROUND

On April 15, 2011, the American Chemistry Council, The Chlorine Institute, Inc., The Fertilizer Institute, and PPG Industries, Inc. (complainants), filed a complaint in Docket No. NOR 42129 against AGR and RailAmerica. Complainants request a determination by the Board that the SOP, as well as a “special train service” allegedly required by AGR, is an unreasonable practice under 49 U.S.C. § 10702 and a violation of the common carrier obligation under 49 U.S.C. § 11101, and they ask that the Board enjoin those practices. Complainants also filed a motion pursuant to 49 U.S.C. § 721(b)(4) asking that the Board enjoin the challenged practices while the proceeding is pending.

On May 17, 2011, CF Industries, Inc. (CF) filed a petition for declaratory order in Docket No. FD 35517, requesting that the Board declare invalid and unenforceable certain tariffs addressing the movement of TIH/PIH materials issued by IORY, PCN, and MSR, as well as any associated implementation procedures under the SOP. These tariffs are identical to the tariff at issue in Docket No. NOR 42129, other than the actual rates charged.

In a decision served on September 30, 2011, the Board instituted a declaratory order proceeding in Docket No. FD 35517 to develop a single record on all the substantive issues presented in these cases, other than complainants’ injunction request. By decision served on May 4, 2012, the Board denied complainants’ request for preliminary injunctive relief and held Docket No. NOR 42129 in abeyance pending issuance of a final decision in Docket No. FD 35517.

In Docket No. FD 35517, the parties filed opening evidence and argument on January 13, 2012, replies on February 27, 2012, and rebuttal on March 13, 2012.⁴

³ Respondents’ tariffs state that a priority train immediately delivers the car or cars to the receiver, without starting and stopping at different shipper locations along the route to the receiver.

⁴ CF filed a motion for an expedited decision, which will be denied. As discussed below, the parties’ arguments have shown that the Board will be better equipped to resolve the dispute in this case if it obtains further information.

DISCUSSION AND CONCLUSIONS

Under 5 U.S.C. § 554(e) and 49 U.S.C. § 721, we have discretion to issue a declaratory order to terminate a controversy or remove uncertainty in a matter related to our subject matter jurisdiction. In this proceeding, we are called upon to resolve a dispute regarding the legality of four practices adopted by respondents: a notification requirement, speed limit, priority train service, and a limit of three TIH/PIH cars per train. CF argues that these requirements constitute unreasonable practices in violation of 49 U.S.C. § 10702, violate respondents' common carrier obligation under 49 U.S.C. § 11101, and contravene the national transportation policy by decreasing safety and efficiency on the RailAmerica system.⁵ Our analysis of the reasonableness of the challenged practices is set forth in three sections: (I) notification requirement; (II) speed limit; and (III) priority train service and three-car limit.

I. Notification Requirement

The challenged tariffs include a notification form that requires TIH/PIH shippers to state, among other information, the "date [railroad] is requested to take possession."⁶ The shippers point out that they tender cars to another carrier (typically a Class I railroad) for delivery to a RailAmerica subsidiary railroad, and they have little or no ability to predict the date on which the other carrier will deliver the cars to the RailAmerica railroad at interchange.⁷ Respondents have offered to remove this information requirement from the notification form, recognizing the difficulty shippers would have in complying.⁸ In reliance on this representation and on the fact that it appears that respondents have removed this information requirement from the notification form in their tariffs,⁹ we consider this issue moot.

II. Speed Limits

Prior versions of the challenged tariffs included a speed limit of 10 miles per hour for all trains carrying TIH/PIH.¹⁰ The revised tariffs,¹¹ however, do not contain a specific speed limit,

⁵ CF Reply 1.

⁶ See, e.g., RailAmerica Opening, Ex. A, AGR Tariff 0900-1, App. A.

⁷ See, e.g., CF Opening 8.

⁸ See RailAmerica Opening 20-21; RailAmerica Rebuttal 7.

⁹ We take official notice of the currently posted tariffs. See, e.g., AGR Tariff 0900-7, <http://www.railamerica.com/Files/AGR/AGR%20TARIFF%200900-7.pdf>.

¹⁰ See RailAmerica Rebuttal 18.

¹¹ AGR states that it adopted its revised tariff, AGR Tariff 0900-1, on April 29, 2011, and the other respondent railroads have made corresponding revisions to their tariffs.

and instead they state that “[t]he train will travel at the appropriate speed for safe operation based on the conditions of the rail line, time of year, weather, and any other relevant factors deemed relevant by [railroad] operating and/or safety personnel.”¹² RailAmerica asserts that, “assuming there are not additional track issues or other conditions, like standing water or ice, for example, a train delivering TIH/PIH can move at FRA designated speeds for that track.”¹³ We interpret this to mean that, according to RailAmerica, the revised tariffs contain no TIH/PIH-specific speed limit, and TIH/PIH trains are allowed to travel at the same speed as non-TIH/PIH trains over the same track.

The Board finds that the revised tariff language is reasonable. Shippers do not appear to take issue with the practice of operating all trains, whether or not they are carrying TIH/PIH, at an appropriate speed for safe operations based on current conditions. However, we note that the record contains several statements by RailAmerica personnel and in RailAmerica pleadings implying that respondents may, in fact, have been enforcing an across-the-board lower speed limit on trains carrying TIH/PIH than on trains without TIH/PIH, despite the language of the revised tariffs.¹⁴ For this reason, the Board will direct respondents not to enforce a blanket lower speed limit, specific to TIH/PIH, that applies at all times and in all locations. This is consistent with the language of the revised tariffs and respondents’ representations to the Board in this proceeding, as respondents insist they are not attempting to enforce such a TIH/PIH speed restriction. Shippers may return to the Board for further relief, to the extent appropriate, if respondents implement a practice contrary to these representations.

III. Priority Train Service and Three-Car Limit

The challenged tariffs require TIH/PIH to travel in priority train service with no more than three TIH/PIH cars per train. The issues surrounding these requirements, as developed by the parties in their evidence and argument, raise questions regarding the actual effect of the requirements on safety and security.

In 49 U.S.C. § 10702, Congress did not limit the Board to a single test or standard for determining whether a rule or practice is reasonable. Instead, it gave the Board “broad discretion to conduct case-by-case fact-specific inquiries to give meaning to these terms, which are not self-

¹² See, e.g., RailAmerica Opening, Ex. A, AGR Tariff 0900-1.

¹³ RailAmerica Opening 18; RailAmerica Reply 8.

¹⁴ See, e.g., CF Opening, App. A, Doc 1 (July 28, 2011 email stating, “[w]e also run [TIH/PIH trains] at very restricted speeds”); RailAmerica Reply, Wolf V.S. (comparing simulated puncture performance of a chlorine tank car in 10 mph and 25 mph impacts; report concludes that “moving TIH cars in a priority train of 3 cars and at a speed of 10 MPH will virtually eliminate the risk of derailment and the release of TIH product should a derailment occur.”) (emphasis added).

defining, in the wide variety of factual circumstances encountered.”¹⁵ Among other factors, the Board may consider, in an appropriate case, the relative benefits and burdens of a practice.

Here, nearly all of the benefits alleged by respondents in their evidence and argument are benefits to safety and security,¹⁶ and some of the burdens described by shippers in their pleadings are risks to safety and security that the practices allegedly pose.¹⁷ Generally, evaluating whether and how a practice actually affects safety and security, as a factual matter, lies primarily within the expertise of other agencies.¹⁸ Occasionally, however, the Board may be called upon to adjudicate cases where there is overlap between safety and the reasonableness of a particular practice, bearing in mind our statutory responsibility “to promote a safe and efficient rail transportation system by allowing rail carriers to earn adequate revenues, as determined by the Board” (49 U.S.C. § 10101(3)) and to ensure that “a rail carrier providing transportation or service subject to the jurisdiction of the Board . . . shall establish reasonable . . . rules and practices on matters related to that transportation or service” (49 U.S.C. § 10702).

In Consolidated Rail Corp. v. ICC (Conrail), 646 F.2d 642 (D.C. Cir. 1981), our predecessor, the Interstate Commerce Commission (ICC), concluded that a “special train service” for spent nuclear fuel was improper because it went beyond the safety requirements established by the relevant safety regulatory agencies, the Nuclear Regulatory Commission

¹⁵ Granite State Concrete Co. v. STB, 417 F.3d 85, 92 (1st Cir. 2005); see also N. Am. Freight Car Ass’n v. BNSF Ry., NOR 42060 (Sub-No. 1), slip op. at 8 (STB served Jan. 26, 2007); Ark. Elec. Coop. Corp.—Pet. for Declaratory Order (Coal Dust), FD 35305, slip op. at 5 (STB served Mar. 3, 2011) (“Whether a particular practice is unreasonable depends upon the facts and circumstances of the case.”).

¹⁶ As an example, with its rebuttal, RailAmerica provides the verified statement of Todd Bjornstad, who was the General Manager of AGR at the time AGR adopted its challenged tariff. Bjornstad compares the steps taken in moving a train in regular service on AGR with the steps taken in priority train service, asserting that priority train service requires fewer moves within the AGR yard and eliminates stops along the way, substantially reducing handling of TIH/PIH cars. (See also RailAmerica Opening 22; RailAmerica Rebuttal 11-14.)

¹⁷ For instance, Dow Chemical Company (Dow) asserts that, for shipments of anhydrous hydrogen chloride (AHCl), if the transit time is too long, there is a risk that the car will become over-pressurized. (See Dow Opening 19-20.) Prohibiting more than three TIH/PIH cars per train, according to Dow, could force shippers or interchanging railroads to hold AHCl cars for a longer period of time, at locations with no capability to vent the car, which is a safety concern. (See id.; see also CF Opening 11-12; Complainants Reply 5 & Shah V.S.)

¹⁸ See, e.g., Granite State Concrete Co. v. Bos. & Me. Corp., NOR 42083, slip op. at 3 n.5 (STB served Sept. 15, 2003); Tyrrell v. Norfolk S. Ry., 248 F.3d 517, 523 (6th Cir. 2001); see also 49 U.S.C. § 20111 (FRA has jurisdiction over violations of railroad safety regulations).

(NRC) and the U.S. Department of Transportation (DOT). The ICC did not refer that matter to the NRC or the DOT, because there, as the reviewing court in Conrail pointed out, the railroads had previously urged the NRC to consider “this very STS [Special Train Service] package for the transportation of nuclear wastes. Their suggestion was considered and squarely rejected by the [NRC].”¹⁹

Here, no party has entered any record evidence to demonstrate that the types of priority train service and three-car limit in respondents’ tariffs have been considered by FRA, PHMSA, or TSA. Unlike Conrail, where the safety regulatory agencies had already made their views known on the specific carrier practice at issue, the safety and security regulatory agencies in this instance do not appear to have evaluated the challenged practices publicly and specifically.

Accordingly, the Board will request comments from FRA, PHMSA, and TSA on the safety and security ramifications of the priority train service and three-car limit requirements for the movement of TIH/PIH materials.²⁰ More specifically, the Board will request comments from FRA, PHMSA, and TSA addressing the following questions:

1. Does the priority train service adopted by respondents for TIH/PIH transportation by rail result in a net benefit or a net detriment to safety and/or security?
2. Does the three-car limit adopted by respondents for TIH/PIH transportation by rail result in a net benefit or a net detriment to safety and/or security?
3. Are the priority train service and the three-car limit adopted by respondents consistent with your agency’s safety and/or security regulations regarding TIH/PIH transportation by rail?

The Board will request that FRA, PHMSA, and TSA provide any comments in response to these questions by January 28, 2012. FRA, PHMSA, and TSA are requested to advise the Board if this time period is not practicable.

With input from FRA, PHMSA, and TSA, the Board will be better equipped to issue a decision on the question before it—the reasonableness of these two practices under 49 U.S.C. § 10702—while having the benefit of the other agencies’ views on the factual issues of safety and security that bear on that question.

¹⁹ Conrail, 646 F.2d at 652.

²⁰ As additional context, we note that DOT recently commented in Union Pacific Railroad—Petition for Declaratory Order, Docket No. FD 35504 (dealing with indemnification provisions for TIH transportation), expressing concern about carrier practices potentially causing diversion of TIH traffic from railroads to highways.

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

It is ordered:

1. CF's petition for a declaratory order is granted in part. We find that respondents' tariff provision establishing that "[t]he train will travel at the appropriate speed for safe operation based on the conditions of the rail line, time of year, weather, and any other relevant factors deemed relevant by [railroad] operating and/or safety personnel" is a reasonable practice under 49 U.S.C. § 10702.

2. Respondents are directed not to enforce a blanket speed limit, specific to TIH/PIH and lower than speed limits applicable to other commodities, that applies at all times and in all locations.

3. FRA, PHMSA, and TSA are requested to provide comments responding to the questions set forth above, by January 28, 2012.

4. CF's motion for expedited decision is denied.

5. This decision is effective on its service date.

By the Board, Chairman Elliott, Vice Chairman Mulvey, and Commissioner Begeman.