

SURFACE TRANSPORTATION BOARD

Docket No. NOR 42120

CARGILL, INCORPORATED v. BNSF RAILWAY COMPANY

Decided: March 24, 2011

In a complaint filed under 49 U.S.C. § 11701(b), Cargill, Incorporated (Cargill), challenged the lawfulness of the fuel surcharges collected by BNSF Railway Company (BNSF) under BNSF Rules Book 6100-A, Item 3375L Section B, and its predecessor and successor iterations. Cargill contends that BNSF's fuel surcharge constitutes an unreasonable practice under 49 U.S.C. § 10702(2). BNSF filed an answer to the complaint and a motion to dismiss it in part. In a decision served on January 4, 2011, the Board: (1) denied the motion to dismiss Cargill's second claim (the "Profit Center" claim); (2) granted the motion to dismiss Cargill's third claim (the "Double Recovery" claim); (3) found it premature to rule on the damages issue; and (4) adopted a procedural schedule that included a 90-day discovery period and incorporated the expedited discovery dispute resolution procedures set forth in 49 C.F.R. § 1114.31(a)(1)-(4).¹

On March 3, 2011, BNSF filed a motion to compel discovery regarding the injury Cargill claims to have suffered and the nature of the damages Cargill seeks to recover to compensate for the alleged injury. Specifically, BNSF seeks to compel discovery on: (1) Cargill's competitive transportation alternatives and how they may have affected its rail transportation costs and purchasing decisions; (2) whether Cargill passed the impact of the fuel surcharge through to other parties; and (3) whether Cargill used hedging strategies to mitigate the effects of the fuel surcharge. In a reply filed on March 14, 2011, Cargill argues that these discovery requests are neither relevant nor calculated to lead to the discovery of admissible evidence and that they are "impossibly burdensome." Reply at 14. In a letter filed on March 16, 2011, BNSF requests that a discovery conference be scheduled within 5 days of Cargill's March 14, 2011 reply to the motion to compel under the expedited discovery dispute resolution procedures incorporated into this proceeding. Cargill in a letter reply filed on March 17, 2011, contends that BNSF's letter is an improper reply to Cargill's March 14, 2011 reply and should be rejected under 49 C.F.R. § 1104.13(c).

¹ On January 24, 2011, Cargill petitioned for reconsideration of the part of the January 4, 2011 decision that dismissed its Double Recovery claim. BNSF replied to the petition, which is currently pending before the Board.

A number of the issues raised in BNSF's motion to compel are novel and complex. While 49 C.F.R. § 1114.31(a)(3) requires the Director of the Office of Proceedings to issue a summary ruling on motions to compel within 10 days after the filing of a reply, this motion to compel will be ruled upon instead by the entire Board. The Board will issue a decision on the motion as soon as practicable, and, if necessary, will issue a revised procedural schedule at that time. BNSF's request for a discovery conference is denied.

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

It is ordered:

1. BNSF's motion to compel will be ruled upon by the entire Board.
2. Cargill's request to reject BNSF's letter filed on March 16, 2011, is denied.
3. BNSF's request for a discovery conference is denied.
4. This decision is effective on the service date.

By the Board, Rachel D. Campbell, Director of Proceedings.