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SERVICE DATE - NOVEMBER 18, 1999

SURFACE TRANSPORTATION BOARD

DECISION

STB Docket No. 41997

NSL, INC., v. OWEN EUGENE WHITLOCK, et al.

STB Docket No. 41998¹

GRANITE CITY STEEL DIVISION OF
NATIONAL STEEL CORPORATION v.
OWEN EUGENE WHITLOCK, et al.

Decided: November 12, 1999

These proceedings were initiated by separate petitions filed by NSL, Inc. (NSL), and Granite City Steel Division of National Steel Corporation (GCS) (GCS and its affiliate NSL will sometimes be referred to collectively as “the Steel Company”). The Steel Company is seeking a declaratory order that would, largely on regulatory grounds, block claims involving detention charges sought to be collected by certain motor carriers and equipment owners and operators (sometimes collectively referred to as “the truck drivers”), which have sued the Steel Company in a federal court action.² The court in its May 13, 1997 order referred to the Board issues about the reasonableness and applicability of interstate detention charges.³ Although we cannot practicably rule, for every individual movement at issue, whether the sought detention charges apply under principles that are essentially those of contract law, as to the referred reasonableness issues we find that the regulatory defenses raised by the Steel Company concerning the timeliness of the claims of the truck drivers for

¹ Because these cases contain similar factual and legal issues, the two proceedings are being consolidated.

² The plaintiffs in the court action, which are respondents in this proceeding, are identified in the court’s referral order as Owen Eugene Whitlock, Owen Eugene Whitlock d/b/a G & K Trucking, G & K Trucking, Inc., Michael J. Lamere, Michael L. Lamere, William Mitchell Vaughn, Sherman Lamere, Sr., and Lee’s Dock Service, Inc. See the referral order, dated March 13, 1997, of the United States District Court for the Southern District of Illinois, in No. 93-CV-0516-PER.

³ The court stated (at 2) that “[u]nder 49 U.S.C. 13710(a), Congress vested the STB with the exclusive jurisdiction to determine whether detention rates and related provisions claimed by motor carriers are reasonable or applicable.” The court (at 6) asked the Board to “determine the reasonableness and applicability of the [claimed] charges, rates, and related detention provisions . . . arising out of interstate hauls.”

detention charges are not valid.

BACKGROUND

The truck drivers filed their suit on June 3, 1993, seeking recovery for allegedly unpaid detention charges on shipments moving on and after June 3, 1990.⁴ Detention charges are charges that accrue, under either the governing tariffs or under contracts that apply to particular services, when trucks and drivers are detained beyond a period of “free time” set in the tariff or contract. Although detention charges are usually paid to the account of the trucking company providing the service, rather than the individual driver, they are often passed through in large measure to the drivers themselves. GCS, a steel mill in Granite City, IL, pays the freight charges, including the detention charges, of the carriers that perform shipping services for it.

In this case, some of the claims involve detention charges alleged to be payable to independent trucking companies, which, as noted, presumably would pass some or all of the charges through to their drivers. Other claims relate to detention charges that, according to the truck drivers, should have been paid to NSL, a motor carrier that is wholly owned by National Steel Corporation (of which GCS is a division). NSL leases trucks and drivers from equipment owners, but runs the vehicles under its own authority and contracts and, according to the truck drivers, pays all of the detention charges it collects (when it does collect them) over to the drivers. The claims before the court allege that the truck drivers have sometimes been delayed beyond the free time period while hauling freight out of the GCS plant since June 3, 1990, but that they have been improperly denied detention payments according to the terms of their contracts or tariffs, either because GCS has refused to pay the charges to the independent trucking companies,⁵ or because NSL has refused to claim them from its affiliate GCS on behalf of the drivers it has used.

After the Steel Company sought its declaratory order, the Director of the Office of Proceedings issued a decision seeking further information from the parties about the factual basis of the controversy, and about our jurisdiction, so that we could determine how best to assist the court in resolving the issues before it. Responding to that decision, NSL and GCS each filed “supplemental petitions for declaratory order,” arguing that we should institute a declaratory order proceeding and find that the claims of the truck drivers are invalid, principally because they are barred by various threshold regulatory defenses related to timeliness. The truck drivers argued in reply that the Board

⁴ The suit was initially begun as a state court class action. In its March 13, 1997 order, the court indicated that the case was removed to it on July 26, 1993. We understand that it was continued as a Federal court class action.

⁵ The truck drivers also allege (response dated October 27, 1997) “that GCS has discouraged carriers from filing detention claims . . . by threatening to blackball carriers from [GCS] runs or by otherwise refusing to pay the same.”

should decline to hear the case and should instead send the matter back to court, where they say it belongs, for resolution.

SUMMARY

We have concluded that the regulatory defenses of the Steel Company, which relate largely to rate reasonableness, or, more precisely, to unreasonable practices, are without merit. We also agree with the truck drivers that it would not be productive, or ultimately helpful to the court, for us to rule on what could amount to thousands of individual claims involving specific movements. Although some of the movements involved may well fall within our “jurisdiction,” others undoubtedly do not. And given our finding that the time-related regulatory defenses asserted by the Steel Company are not valid, the only issue remaining as to each contested shipment is applicability: whether, under what are essentially rules governing contract law,⁶ the truck drivers ought to be paid.

We recognize that, at least in theory, we could review the circumstances surrounding each contested movement to determine those as to which we technically do have “jurisdiction.” We then could determine whether, under the governing tariff or contract, a particular charge should or should not have applied. However, given that the reasonableness of individual rates, over which we do have primary jurisdiction and substantial expertise, is not being raised as a defense, we do not believe it would ultimately be helpful to the court — which has the authority over, and undoubtedly far more experience than we do, with contract-type issues — if we sought to rule on individual claims in this manner. Such action could provide an initial decision as to some of the claims before the court, but in the end, we could not come close to providing a complete resolution of the matters before the court. Indeed, our decision — including any determinations we might reach on the difficult question of which movements are technically subject to our jurisdiction — would surely be appealed back to the referring court. The court would then have to review our decision as to our jurisdiction over specific movements, and our contract law-grounded rulings on whether charges are due for movements over which we found jurisdiction. Finally, if we were to make rulings on those specific claims that we found to be jurisdictional, after completing its appellate review, the court would still have to decide de novo whether the detention charges should be paid for those individual claims over which we would find no jurisdiction and thus would not specifically rule. Such an approach would be quite cumbersome for the court and for the parties, and would delay the resolution of the proceeding unnecessarily.

For that reason, and because this case seems to require the types of procedures that are appropriate for class actions — procedures that are more amenable to the judicial process than to

⁶ Some of the movements are alleged to have moved under tariff, while others may have moved under contract, but the tariff law principles that developed over time are essentially grounded in contract law. See Milne Truck Lines v. Makita U.S.A., 970 F.2d 564, 567 (9th Cir. 1992).

our administrative processes⁷ — we believe that we can best assist the court by explaining why the Steel Company’s regulatory defenses are not valid, and by then addressing, to the extent we can, the tariff/contract questions about particular claims that have been submitted to us, so that the court can rule on the basis of tariff/contract law whether the individual claims before it are valid.

DISCUSSION

1. Jurisdiction. The court’s referral order was directed to movements within our jurisdiction.⁸ What might and might not be within our jurisdiction is not a simple matter. Historically, the jurisdiction of the Board’s predecessor, the Interstate Commerce Commission (ICC), extended to the “reasonableness” of common carrier rates and the “applicability” of common carrier tariffs, but only for interstate movements that were not in a commercial zone or terminal area. Although the Board retained authority to determine “applicability” (whether a rate should apply under the terms of the governing tariff or contract), the requirement that common carriers file tariffs, and the Board’s jurisdiction over the reasonableness of motor carrier rates and practices, were curtailed in the Transportation Industry Regulatory Reform Act of 1994, Pub. L. No. 103-311 (TIRRA), and the ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (ICCTA). And in a case filed with the Board after the passage of ICCTA, there are questions about which claims arising before 1996 are protected by the “savings” provisions of section 204 of ICCTA, 49 U.S.C. 701 note, and which might be beyond the Board’s authority.

Thus, our ability to review individual claims might differ depending on whether the claims arose before TIRRA, after TIRRA but before ICCTA, or after ICCTA. We might also have to decide whether a particular movement was in interstate rather than intrastate commerce, whether it was entirely within the St. Louis commercial zone or the GCS terminal area and thus outside of the

⁷ This class action suit involves 50 to 100 carriers and thousands of shipments, and the truck drivers argue (response at 8) that “[i]t would be impossible to provide the Board with all the tariffs involved in this case and even more impossible to provide the Board with copies of all the contracts between the parties adopting these tariffs with this submission.” Noting that courts have developed procedures to process cases involving large classes of litigants, they assert, and we do not disagree, that the Board’s undertaking such an enterprise, sorting through thousands of shipments, “would be highly inefficient. . . .”

⁸ In our proceeding, the Steel Company argued that many of the movements at issue were within our jurisdiction, and that we should find that relief as to all of them should be barred by regulatory defenses. The truck drivers argued that most of the movements were not within our jurisdiction, and that in any event, the regulatory defenses asserted by the Steel Company were not valid.

ICC's and the Board's regulatory jurisdiction,⁹ and, if it was a pre-ICCTA movement, whether it was in common carriage (over which the ICC had regulatory jurisdiction) or contract carriage (over which the ICC had limited regulatory jurisdiction).¹⁰

It is evident that at least some of the claims may have involved intrastate movements, or commercial zone/terminal area services, or services performed under contract. Hence, many of the movements may technically be outside of our "jurisdiction." Additionally, under the provisions of 49 U.S.C. 13710, the Board may rule on applicability, or on the reasonableness of certain tariff rates, only when the charges of a motor carrier are challenged by a person paying the freight charges. In the case of NSL, however, there is no dispute between the person paying the charges (GCS) and the person that would be assessing the charges (NSL); rather, the dispute is between NSL (which is not assessing charges) and its contracting providers of service (who think it should be assessing charges). These are not the types of disputes over which the Board has (and the ICC had) jurisdiction. See Central Forwarding, Inc. v. ICC, 698 F.2d 1266 (5th Cir. 1983). Thus, even apart from the interstate/intrastate issue, the commercial zone/terminal area issue, and the common/contract issue, for many of the movements there are serious questions about the Board's "jurisdiction" to decide whether specific claims are valid.

2. Regulatory Defenses. As noted, historically, motor carriers either filed tariffs with the ICC, or had their service responsibilities set out in contracts. Tariff rates were subject to close ICC scrutiny, although contract rates were not. This regulatory framework was changed by TIRRA and ICCTA. TIRRA and ICCTA substantially reduced the categories of movements for which tariff filing was required, and over which the ICC/Board had rate reasonableness jurisdiction, and they imposed certain procedural requirements on parties seeking relief. However, while TIRRA and ICCTA arguably could affect the forum before which a particular claim might be heard (by removing certain issues from Board jurisdiction while perhaps giving the Board jurisdiction over others),¹¹ in this case we do not believe that they should affect the recovery that ought to be had for any particular claim involved, because we conclude that none of the Steel Company's regulatory defenses is valid and thus the only question as to any of the claims is whether detention charges are

⁹ Neither the Board nor the ICC could exercise jurisdiction over intrastate movements or commercial zone or terminal area operations, and so a determination as to these issues would identify claims over which the Board technically lacks "jurisdiction."

¹⁰ There is no longer a statutory distinction between common and contract carriers, but under 49 U.S.C. 13710(b), the Board may resolve disputes as to whether transportation performed by an authorized carrier prior to January 1, 1996, was provided in its common carrier or contract carrier capacity.

¹¹ In particular, for many movements, TIRRA and ICCTA ousted jurisdiction over the reasonableness of rates and practices, while at the same time ICCTA seems to have given the Board authority that the ICC lacked to determine the applicability of rates in contracts.

due under the governing tariff or contract.

The Steel Company contends that three groups of undercharge claims are involved: those involving shipments transported before the effective date of TIRRA; those involving shipments transported post-TIRRA but pre-ICCTA; and those involving shipments transported post-ICCTA. Concerning the pre-TIRRA movements, the Steel Company argues that it is an unreasonable practice, under former 49 U.S.C. 10701(a), to attempt to collect undercharges never billed, some of which are 7 years old. For post-TIRRA but pre-ICCTA movements, the Steel Company contends that, while the filing of tariffs was largely abolished by TIRRA,¹² the 180-day billing requirement of former 49 U.S.C. 10762(a)(3) [now 49 U.S.C. 13710(a)(3)(A)] applies to tariff based and non-tariff based billings and bars recovery. Finally, for post-ICCTA movements, the Steel Company argues that, under section 13710(a)(3), the Board may bar detention claims not billed within 180 days.

We do not agree with any of these arguments. Regardless of whether the Board or the court rules on the “merits” of a particular claim, in our view, the claims for detention charges are not invalid on the ground that they were untimely.

The 180-day Provision. TIRRA enacted a provision that carriers must rebill within 180 days of the original bill in order to preserve the right to collect additional charges. See former 49 U.S.C. 10762(a)(3). This provision was reenacted by ICCTA. 49 U.S.C. 13710(a)(3)(A). See Carolina Traffic Services of Gastonia, Inc. - Petition for Declaratory Order, STB Docket No. 41789 (STB served June 7, 1996) and National Association of Freight Transportation Consultants, Inc. - Petition for Declaratory Order, STB Docket No. 41826 (STB served Apr. 21, 1997) (NAFTC). The Steel Company argues that, in many cases, the detention was not billed at all, let alone rebilled, within 180 days. However, we find that, under the circumstances of this case, the truck drivers have complied with the 180-day rule. The purpose of the 180-day rule, which was enacted in 1994, was to ensure that a shipper had notice that issues were outstanding regarding its charges or payments. See NAFTC at 6, 7 (statute “does not specify the manner of notification,” so long as the other party is notified of a billing dispute within 180 days). Here, the suit was commenced on June 3, 1993, before the effective date of TIRRA, and it was directed at both past and future movements. Accordingly, we believe that, since the time the 180-day rule was first enacted, GCS and NSL were on notice that the truck drivers were seeking charges in addition to those originally billed or collected.

Reasonableness. The court asked the Board whether the detention charges sought by the truck drivers are reasonable. We have adopted procedures for determining whether a particular rate is reasonable, under which a carrier may show that its rate is within a range or cluster of rates

¹² The truck drivers contend that, after TIRRA ended the tariff-filing requirement, GCS entered into a standard contract with most of its carriers, simply adopting the tariffs that had been in effect.

charged by other carriers for comparable shipments.¹³ In this case, however, no party really argues that the level of any detention charge sought is unreasonable. Rather, in an argument related to but somewhat different from its 180-day rule argument, the Steel Company alleges that, for pre-ICCTA shipments,¹⁴ it is an unreasonable practice for the truck drivers to seek detention charges so long after the movements at issue were completed.¹⁵

We disagree. The truck drivers did not commit an unreasonable practice by not asserting their claims sooner. The provisions of 49 U.S.C. 11706(a) that were in effect when the lawsuit was first filed established a 3-year statute of limitations period for actions to collect charges, and none of the claims at issue appears to have accrued more than 3 years before the lawsuit was filed. We are aware of no instance in which a party that raised a claim within the limitations period has been found to have committed an unreasonable practice for being dilatory in seeking recovery. Indeed, under the filed rate doctrine, for movements that are covered by tariffs, carriers are required by law to collect the filed rate. See Maislin Indus. v. Primary Steel, 497 U.S. 116 (1990) (Maislin).¹⁶

Thus, the Steel Company's basic regulatory defense — that relief is generally not appropriate because the truck drivers committed an unreasonable practice by delaying in asserting their claims — is simply without merit.

¹³ See Georgia-Pacific Corp.--Pet. For Declaratory Order, 9 I.C.C.2d 103 (1993), 9 I.C.C.2d 1052 (1993), aff'd sub nom. Oneida Motor Freight, Inc. v. ICC, 45 F.3d 503 (D.C. Cir. 1995).

¹⁴ NSL concedes that for “those shipments which were transported after January 1, 1996, the STB would not have jurisdiction with regard to the reasonableness issue.” NSL supplemental petition at 10.

¹⁵ The truck drivers, for their part, claim that there is no reasonableness issue here because the rates had been accepted and unchallenged from the beginning of the suit in June 1993, until the Steel Company raised objections in its petition for declaratory order.

¹⁶ GCS briefly cites several cases in support of its unreasonable practice argument, but some are pre-Maislin and all are inapposite. Buckeye Cellulose Corp. v. L & N R.R. Co., 1 I.C.C.2d 767, 773 (1985) (pre-Maislin), involved a rate misquotation; Ottawa, Strong, & Strong v. Tobler, No. MC-C-30076 (ICC served Mar. 7, 1989) (pre-Maislin), involved a negotiated, but unfiled rate. Western Transportation Company v. Wilson, 682 F.2d 1227, 1231-32 (7th Cir. 1982), concerned, inter alia, whether a tariff provision was reasonable. And Clark Distribution Systems, Inc., and Magazine Shippers Association Inc.--Petition for Declaratory Order--Certain Rates and Practices of Cal/Coast Trucking, Inc., and Periodical Distributors, Inc., Docket No. 41074 (STB served Dec. 13, 1996), contained language pertaining to applying the pre-ICCTA law to a proceeding pending before the ICC prior to January 1, 1996, but substantively has nothing to do with this proceeding.

3. Applicability of the Detention Charges Sought. The only remaining question, then, is whether the specific detention charges sought are applicable under the governing tariff, or due under the terms of the governing contract. We have no particular expertise in contract interpretation, and indeed the courts have always been free to interpret tariffs even in cases that could have been brought to the ICC/Board. See Louisiana & Arkansas Ry. Co. v. Export Drum Co., 359 F.2d 311 (5th Cir. 1966). For that reason, and because we believe it would complicate rather than simplify matters if we sought to separate out and then rule as to those movements that we found to be jurisdictional, we will not rule on individual claims. We will attempt to answer the various questions that the Steel Company has asked concerning specific detention issues that might arise in adjudicating particular claims.

First, the Steel Company acknowledges that detention can be claimed if the scaling in and out of the truck takes more than 2 hours, but it asks how detention should be calculated if the truck arrives late or early. In some cases the tariff explicitly covers that situation and, accordingly that provision governs.¹⁷ If the tariff is silent or ambiguous on this issue, then, given the general rule that an ambiguous tariff is to be construed against the maker, absent extraordinary circumstances, the detention clock should begin to run from the time loading begins.¹⁸

The Steel Company states that there are disputes as to provisions in tariffs concerning the cause of delays, with some tariffs stating that for detention to apply, the delay must be the shipper's fault or not due to the carrier's negligence. NSL questions whether such provisions are applicable. The answer is that, if such provisions exist, they must be enforced. NSL also asks which party has the burden of proof in such cases. The answer, in our view, depends on the language of the particular provision: when a provision states that detention can be collected only when the "delay or detention is attributable to consignor," in our view the carrier (or truck driver) has the burden of showing that the shipper caused the delay; when, by contrast, a tariff states that detention may be collected "only when such delay or detention is not attributable to the carrier," then in our view once the carrier makes a prima facie case that it was not the cause of delay, the shipper has the burden of

¹⁷ For example, GCS submitted the tariff of Compass Transportation, Inc., which provides that if the carrier makes a prearranged vehicle arrival schedule and is more than 30 minutes late, the time shall begin to run from the commencement of loading and not from the time of arrival of the vehicle; if the carriers' vehicle arrives prior to schedule time, the time shall begin to run from the scheduled time or actual time loading commences, whichever is earlier.

¹⁸ Another of the tariffs that the Steel Company submitted provides that the shipper has the right to specify when the carrier is to arrive to load or unload, and that free time starts when the carrier's driver reports to the place of loading. Although that tariff does not explicitly refer to early or late arrival, we would construe it to mean that if the driver arrives earlier than the time specified by the shipper, the detention clock would begin to run either when loading begins, or the time that the shipper specified, whichever is earlier.

showing that the carrier was at fault.¹⁹

NSL notes that an issue has arisen as to the documentation the carriers must furnish to claim detention. Documentation requirements are sometimes provided in the tariff. Where they are not, it is clear that some method is needed for verifying the time it takes to load or unload a vehicle for detention purposes. We note, however, that the truck drivers allege that GCS has, at least in some cases, refused to provide the necessary documentation.²⁰ In such situations, where drivers have been denied documentation by GCS, we believe that they should be able to support their detention claims through testimony or statements.

GCS claims it is the position of the truck drivers that only the free time and detention rate provisions are applicable; GCS avers that all detention language is applicable. We do not know the context of this dispute, but, as a general proposition, all provisions of the tariff (or contract) must be adhered to.

Finally, NSL asserts that the truck drivers are claiming that “industry custom” would apply in the absence of a tariff or schedule providing for detention. Although there may in some circles be some custom relating to detention, we are not aware of it, as the cases that came to the ICC were based on filed tariff provisions, not custom. And clearly, as to tariff provisions, it is well settled that the tariff must have a detention provision or make some reference to the application of detention for the carrier to be able to collect those charges. In the case of contracts, whether the truck drivers could show some form of implied contractual arrangement based on custom would be a matter of proof in an individual case.

CONCLUSION

Although we have not gone through each of the individual claims before the court, we

¹⁹ NSL’s tariff indicates that there will be no charge “because of error, disability, fault, or negligence of the carrier or carrier’s employees, or because of accident or breakdown of its equipment.” In our view, this provision requires the shipper, in order to avoid detention charges, to make a showing that the delay was the result of one of those causes. The carrier could then respond to the shipper’s showing with rebuttal evidence.

²⁰ The truck drivers submit that, upon entering the GCS plant, the motor carrier crosses a scale house where it receives a scale ticket with a weight, time, and date. After it is loaded, the truck again crosses the scale house and the scale ticket will be clocked out. According to the truck drivers, contrary to the practices at other National Steel plants, GCS refuses to give drivers a carbon or copy of the scale ticket, as a result of which drivers lack identification of their time in and out of the plant.

believe that we have answered all of the questions brought before us in a manner that will permit the court most efficiently to resolve the matter before it.

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

It is ordered:

1. This proceeding is discontinued.
2. This decision is effective on its service date.
3. A copy of this decision will be served on:

United States District Court for the Southern District
of Illinois
(Attn: District Judge Paul E. Riley)
(RE: No. 93-CV-0516-PER)
U.S. Courthouse
750 Missouri Avenue
East St. Louis, IL 62201.

By the Board, Chairman Morgan, Vice Chairman Clyburn, and Commissioner Burkes.

Vernon A. Williams
Secretary