

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 35324

TECK METALS LTD. – PETITION FOR DECLARATORY ORDER – PRACTICES OF
WHEELING & LAKE ERIE RAILWAY COMPANY

Decided: January 22, 2010

By petition filed on November 17, 2009, Teck Metals Ltd. (Teck) seeks a declaratory order to resolve a dispute over demurrage charges assessed by the Wheeling & Lake Erie Railway Company (W&LE). Teck submitted a proposed procedural schedule under the Board's modified procedure provisions at 49 CFR part 1112. By a letter filed on December 4, 2009, W&LE concurred in the procedural schedule proposed by Teck.

This matter was referred by the United States District Court for the Northern District of Ohio, on October 29, 2009, in Wheeling & Lake Erie Ry. v. Teck Cominco Metals, Ltd., No. 5:09-CV-1184. W&LE initiated the court proceeding to collect from Teck \$369,960.00 in demurrage charges, which allegedly accrued between June 2006 and December 2007, plus interest and costs. The court stayed the case before it, granting Teck's motion to refer to the Board the issue of whether W&LE's assessment of certain demurrage charges upon Teck constituted an unreasonable practice.

Under 5 U.S.C. 554(e), the Board has discretionary authority to issue a declaratory order to terminate a controversy or remove uncertainty. The Board and its predecessor, the Interstate Commerce Commission (ICC), have exercised broad authority in handling such requests, considering a number of factors, including the significance to the industry and the ripeness of the controversy. See Delegation of Authority-Declaratory Order Proceedings, 5 I.C.C.2d 675, 676 (1989). There, the ICC noted that petitions for issuance of a declaratory order premised on a court referral are routinely accepted and treated procedurally in the same manner as a complaint. It then delegated the responsibility for taking initial action in disposing of such matters to the Director of the Office of Proceedings. See 49 CFR 1011.7(b)(6).

Pursuant to the Board's authority under 5 U.S.C. 554(e) and 49 U.S.C. 721, a proceeding will be instituted to resolve the controversies at issue here. This matter has been referred by a court of competent jurisdiction and otherwise appears to be within the Board's primary jurisdiction. The Board will consider this matter under the modified procedure rules at 49 CFR part 1112.

Because the procedural schedule submitted by Teck is similar to those adopted by the Board in other petitions for declaratory order concerning demurrage charges, and because

W&LE concurred in the procedural schedule, Teck's proposed procedural schedule will be adopted.

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

It is ordered:

1. The request for institution of a declaratory order proceeding is granted.
2. This proceeding will be handled under the modified procedure on the basis of written statements submitted by the parties. The parties must comply with the Rules of Practice at 49 CFR subchapter B, including 49 CFR parts 1112 and 1114.
3. Discovery will be completed by April 22, 2010.
4. Teck's opening statement is due by May 24, 2010.
5. W&LE's reply statement is due by June 21, 2010.
6. Teck's rebuttal statement is due by July 12, 2010.
7. This decision is effective on its service date.
8. Copies of this decision will be mailed to:

The Honorable John R. Adams
United States District Court for the Northern District of Ohio
Eastern Division
510 United States Courthouse
Two South Main Street
Akron, Ohio 44308-1813

RE: No. 5:09-CV-1184

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