

SERVICE DATE – MAY 4, 2012

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. NOR 42129

AMERICAN CHEMISTRY COUNCIL, THE CHLORINE INSTITUTE, INC., THE
FERTILIZER INSTITUTE, AND PPG INDUSTRIES, INC. v. ALABAMA GULF COAST
RAILWAY AND RAILAMERICA, INC.

Digest:¹ In this case, shippers have asked the Board to declare unreasonable certain requirements promulgated by RailAmerica, Inc. and its railroad subsidiaries regarding rail transportation of specified chemical cargo. The shippers also have asked the Board to prevent RailAmerica and its subsidiaries from carrying out these requirements while the case is pending. In this decision, the Board denies the request for interim relief. This decision also postpones resolution of the merits of shippers' complaint pending issuance of the Board's final decision in a related proceeding.

Decided: May 3, 2012

American Chemistry Council, The Chlorine Institute, Inc., The Fertilizer Institute, and PPG Industries, Inc. (PPG) (collectively, complainants) request that the Board enjoin certain requirements for rail transportation of Toxic-by-Inhalation Hazardous materials and Poison-by-Inhalation Hazardous materials (TIH/PIH) promulgated by RailAmerica, Inc. (RailAmerica) and its subsidiaries, including Alabama Gulf Coast Railway (AGR) (RailAmerica and AGR are collectively referred to as defendants). For the reasons discussed below, complainants' motion for injunctive relief will be denied. As we stated in our September 30, 2011 decision, this proceeding will now be held in abeyance until the issuance of a final decision in our related declaratory order proceeding in Docket No. FD 35517, which raises similar issues, and where an extensive record has been developed regarding the issues raised in both dockets.

BACKGROUND

Complainants filed their complaint in this proceeding on April 15, 2011, requesting a determination by the Board that a RailAmerica Standard Operating Practice (SOP) for handling TIH/PIH materials, 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

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).

under 49 U.S.C. § 11101. In addition to challenging the SOP, the complainants challenged requirements set forth in a tariff issued by AGR effective March 11, 2011. 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.

In response to the complaint, defendants filed an answer and a motion to dismiss, stating that the AGR tariff referred to in the complaint and in the motion for injunctive relief was canceled in April 2011 and was replaced with a new tariff that defendants believe substantially modifies the canceled tariff. Further, defendants contend that the SOP is not binding or enforceable as a tariff, and that it is intended simply to open a dialogue with shippers of TIH/PIH materials. In a reply to defendants' motion to dismiss, complainants state that they do not seek to enjoin the actions of AGR alone, or a specific tariff or items issued by AGR alone, but instead seek more broadly to enjoin, as an unreasonable practice, the SOP and "special train service" required by RailAmerica and its subsidiaries, including AGR.

While this case was pending, CF Industries, Inc. 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, as well as any associated implementation procedures under the SOP. Like AGR, the defendant railroads in that case are RailAmerica subsidiaries. The challenged tariffs are identical to the replacement tariff in this proceeding, 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. The Board did so because the two cases address substantially the same controversies and issues, and it made sense to allow for broader public input because the issues presented may ultimately affect not only the parties to the two proceedings before the Board, but others within the industry that transport, handle, receive, or ship TIH/PIH.² The Board stated that, after it rules on the motion for injunctive relief, it would hold Docket No. NOR 42129 in abeyance pending issuance of a final decision in Docket No. FD 35517.³ The September 30 decision also directed complainants to file supplemental information, in light of AGR's tariff revision, clarifying what specific practices complainants are challenging and seeking to enjoin.

In response to the Board's decision, complainants submitted a supplemental filing on October 17, 2011. They renewed their request for the Board to enjoin defendants and all RailAmerica subsidiaries,⁴ during the pendency of this proceeding, from requiring that TIH/PIH

² 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.

³ For this reason, the Board also stated that defendants' motion to dismiss would be addressed in a later decision.

⁴ As a preliminary matter, defendants take issue with complainants' inclusion in the requested injunctive relief of six RailAmerica railroads that are not defendants in this proceeding, stating that complainants have not complied with the requirements of due process or
(continued . . .)

material be moved in dedicated special or priority trains⁵ and imposing any restrictions on the movement of TIH/PIH materials, “other than those contained in valid and applicable federal regulations.” Complainants state that they are asking the Board to enjoin these actions whether set forth in a tariff, the SOP, or otherwise.

Describing the challenged actions, complainants reiterate their previous concerns that RailAmerica and its subsidiaries, including AGR, will move TIH/PIH materials: (1) only in dedicated trains for TIH/PIH materials consisting of no more than three cars; (2) at reduced speeds; (3) with special notification requirements; and (4) at substantial charges. With respect to the dedicated train service, complainants contend that the RailAmerica subsidiary railroads have sole discretion as to how to make up the dedicated trains and could group cars in ways that vastly increase the cost to shippers. Complainants also argue that imposing reduced speeds will require additional cars in service, contributing to delays in transit and delivery. Further, they claim that a notification provision in seven RailAmerica subsidiary tariffs (attached to the supplemental pleading), which requires a notice form to be filled out with the date that the RailAmerica subsidiary is to take possession of the car(s), is impossible for shippers to satisfy, as shippers do not know when the line-haul carrier will tender a TIH/PIH car to the RailAmerica subsidiary. Complainants contend that the challenged requirements have not been shown to contribute in any meaningful way to rail safety or security.

On October 31, 2011, defendants filed a reply to complainants’ supplemental pleading. Defendants argue that complainants, in objecting to any restrictions on the movement of TIH/PIH materials “other than those contained in valid and applicable federal regulations,” fail to cite specific practices they are challenging and seeking to enjoin, as specifically required by the Board’s September 30 decision. Defendants argue that pulling out cars containing TIH/PIH and assigning them to a priority train enables AGR to expedite delivery of TIH/PIH, consistent with the regulations of the Federal Railroad Administration (FRA) at 49 C.F.R. § 174.14(a). They claim that limiting TIH/PIH trains to three cars corresponds to the existing practices of AGR, which transports an average of one to three TIH/PIH cars per train, but contend that AGR would be willing to modify this number consistent with PPG’s needs and AGR’s operational limitations. With respect to complainants’ assertions concerning the reduced train speeds, defendants claim that track conditions will not permit AGR to exceed 10 miles per hour and still comply with FRA standards at 49 C.F.R. § 213.9(a). AGR offers to delete the request in its notice form for the date on which AGR is to take possession of the car(s), stating that the primary intent of the request for information is to be alerted when a TIH/PIH shipment is tendered to a carrier where AGR will be the delivering railroad.

(. . . continued)

the rules in 49 C.F.R. pt. 1111. Complainants have not amended their complaint to add these railroads as defendants, but may request leave to do so, if and when this complaint proceeding is reactivated.

⁵ AGR Tariff 0900-1 states 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.

PRELIMINARY MATTERS

On February 13, 2012, complainants submitted a letter requesting that the Board act on their motion for injunctive relief and making additional arguments in support of that motion. On February 17, 2012, defendants submitted a letter requesting that the Board strike complainants' additional arguments as untimely and responding to those arguments. In the interest of compiling a more complete record, we will accept both letters.

DISCUSSION AND CONCLUSIONS

In a preliminary injunction request, the requesting party must show: (1) there is a likelihood that it will prevail on the merits of any challenge to the action sought to be enjoined; (2) it will suffer irreparable harm in the absence of an injunction; (3) other interested parties will not be substantially harmed by an injunction; and (4) the public interest supports the granting of the injunction.⁶ Further, under 49 U.S.C. § 721(b)(4), the Board may grant injunctive relief “when necessary to prevent irreparable harm.” An injunction is an extraordinary remedy and will generally not be granted unless the requesting party can show that it faces unredressable actual and imminent harm that would be prevented by an injunction.⁷

Irreparable Harm. Complainants have failed to demonstrate that they will be irreparably harmed if the challenged requirements are not enjoined pending the Board’s final decision on the merits. It is well settled that when adequate compensatory or other corrective relief will be available at a later date, it weighs heavily against a claim of irreparable harm.⁸ Injuries in terms of money, time, and energy necessarily expended in the absence of an injunction are not sufficient to satisfy this element.

Here, complainants allege that, without an injunction, they will suffer additional costs and some disruption of their business operations while the case is pending. See Motion at 5-6 & Verified Statement of Frank Reiner. In particular, complainants allege that the challenged notification requirement would result in serious logistics disruptions, and that priority train service and slower train speeds will require additional cars in service, which would lead to car shortages. However, these allegations of injury are economic in nature, requiring, for example,

⁶ Washington Metro. Area Transit Comm’n v. Holiday Tours, Inc., 559 F.2d 841, 843 (D.C. Cir. 1977); Va. Petroleum Jobbers Ass’n v. Fed. Power Comm’n, 259 F.2d 921, 925 (D.C. Cir. 1958).

⁷ See Eighteen Thirty Group, LLC—Acquis. Exemption—in Allegany Cnty., Md., FD 35438, slip op. at 3 (STB served Nov. 17, 2010).

⁸ Va. Petroleum Jobbers Ass’n, 259 F.2d at 925; see also Wis. Gas Co. v. FERC, 758 F.2d 669, 674 (D.C. Cir. 1985) (recoverable monetary loss may constitute irreparable harm only where the loss threatens the very existence of the movant’s business); cf. Foodcomm Int’l v. Barry, 328 F.3d 300, 304-05 (7th Cir. 2003) (damage to customer relationship constituted irreparable harm; also, defendants had no significant assets in the United States from which monetary relief could be granted).

expenditures to lease additional cars.⁹ In short, although AGR's tariff has been effective for nearly a year, complainants have failed to provide any specific evidence of irreparable harm.¹⁰ Complainants have not shown that denial of the injunction would lead, for example, to an irretrievable loss of business, breach of contract, severe impact on employees, or, the most drastic result, a shipper having to go out of business.¹¹

Complainants allege that defendants' actions threaten irreparable harm by creating security risks from the storage of TIH/PIH cars while preparing for dedicated train service and then slow movement of TIH/PIH cars over unsecured routes. Defendants, however, respond that the requirements set forth in AGR Tariff 0900-1 result in safer transportation than the railroad could provide without these requirements. For example, AGR argues that, because a priority train will not stop to make pickups or deliveries of other cars at other shippers' locations, it will reduce handling and delay, thus minimizing exposure of TIH/PIH shipments to accidents and tampering. These issues will be addressed further in Docket No. FD 35517, but complainants have failed to show that a pre-decisional injunction is warranted. In short, complainants have failed to demonstrate unredressable actual and imminent harm that would be prevented by an injunction.

Likelihood of Success on the Merits, Harm to Other Parties, and Public Interest Considerations. Complainants have raised a number of questions regarding the reasonableness of the challenged actions, and these issues will be a part of the Board's analysis in the Docket No. FD 35517 declaratory order proceeding. Substantial arguments on the merits on both sides, relying on an extensive record, are before the Board in that proceeding and will be fully considered there. Complainants and defendants have filed evidence and argument in Docket No. FD 35517. Because complainants have failed to satisfy the requirement that they demonstrate irreparable harm, however, we need not address those arguments here.¹²

⁹ See n.8, supra.

¹⁰ In a letter submitted on February 13, 2012, complainants claim that defendants, in Docket No. FD 35517, have argued that complainants must file a rate reasonableness complaint to the extent that they object to the rate levels charged for special trains. Thus, complainants contend, if the Board agrees with defendants, complainants would be unable to recover their overpayments, resulting in irreparable harm. This argument is not persuasive. Even if the Board were to hold that complainants must file a rate reasonableness complaint to secure monetary relief for charges associated with priority train service—an issue that we do not address in this decision—monetary relief would nonetheless be available. See 49 U.S.C. § 11705(c) (statute of limitations runs two years from when the claim accrues; challenged tariffs first became effective March 11, 2011).

¹¹ See, e.g., Stagecoach Group PLC—Acquis. of Control—Twin Am., LLC, MC-F-21035, slip op. at 2 (STB served Mar. 9, 2011); R.R. Salvage & Restoration, Inc.—Pet. for Investigation & for Emergency Relief Under 49 U.S.C. 721(b)(4)—Sec. Deposit for Demurrage Charges, Mo. & N. Ark. R.R., NOR 42107, slip op. at 4 (STB served June 30, 2008).

¹² See 49 U.S.C. § 721(b)(4); Effingham R.R.—Operation Exemption—Line Owned by Total Quality Warehouse, FD 33528, slip op. at 2 (STB served Dec. 16, 1997).

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

It is ordered:

1. Complainants' motion for injunctive relief is denied.
2. The proceeding in Docket No. NOR 42129 is held in abeyance until the issuance of a final decision in Docket No. FD 35517.
3. Complainants' February 13, 2012 filing and defendants' February 17, 2012 filing are accepted.
4. This decision is effective on its service date.

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