

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. NOR 42120

CARGILL, INCORPORATED v. BNSF RAILWAY COMPANY

Digest:¹ BNSF Railway Company (BNSF) imposes a fuel surcharge on the rates it charges one of its customers, Cargill, Inc. Cargill has filed a three-part complaint against BNSF, alleging that it has violated the Board’s fuel surcharge rules. This decision grants BNSF’s motion to dismiss Cargill’s claim that BNSF is double recovering revenue from the surcharge, but denies BNSF’s motion to dismiss Cargill’s claim that BNSF is earning excessive profits from the surcharge.

Decided: January 3, 2011

On April 19, 2010, Cargill, Incorporated (Cargill), filed a complaint under 49 U.S.C. § 11701(b), challenging fuel surcharges collected by BNSF Railway Company (BNSF) as an unreasonable practice under 49 U.S.C. § 10702(2). Cargill requests that the Board: (1) find the surcharge practices to be unreasonable and order BNSF to cease and desist from such practices; (2) prescribe reasonable fuel surcharge practices; and (3) under 49 U.S.C. § 11704(b), award monetary damages with interest for all unlawful fuel surcharge payments made. In this decision, we are granting in part and denying in part BNSF’s motion to dismiss portions of the complaint and issuing a procedural schedule.

BACKGROUND

In Rail Fuel Surcharges (Fuel Surcharges), EP 661 (STB served Jan. 26, 2007), the Board adopted its earlier proposals to prohibit both rate-based fuel surcharges and “double-dipping.” These guidelines arose out of a proceeding that the Board commenced in 2006 to examine rail practices related to fuel surcharges. In Fuel Surcharges Proposed, EP 661 (STB served Aug. 3, 2006), the Board sought comment on specific proposals to require that rail fuel surcharges “be tied not to the level of the base rate but to those attributes of a movement that directly affect the amount of fuel consumed,” such as mileage or mileage and weight. Id., slip op. at 5. The Board also addressed “double dipping,” described as “charging for the same increases in fuel costs for the same shipment both through a fuel surcharge and through application of a rate escalator that is based on an index such as the Board’s Railroad Cost Adjustment Factor (RCAF) without first subtracting out any fuel cost component from that index.” Id. at 1.

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 in Decisions, EP 696 (STB served Sept. 2, 2010).

In the January 26, 2007 decision, the Board explained that, consistent with the rail transportation policy “to encourage honest and efficient management of railroads,” 49 U.S.C. § 10101(9), its new rules were “only addressing the manner in which railroads apply what they label a fuel surcharge.” Fuel Surcharges at 7. The Board reemphasized that it was not limiting the total rate a carrier could charge, and that, if the carriers wished to raise their rates, they were free to do so, subject to the statutory rate reasonableness standard, but that they could not impose rate increases on the basis of a misrepresentation. Id.

The Board’s new fuel surcharge rules were designed to conform to the holding in Union Pacific Railroad v. ICC (Union Pacific), 867 F.2d 646 (D.C. Cir. 1989). There the government and utility shippers complained before our predecessor, the Interstate Commerce Commission (ICC), that certain railroads were charging excessive rates for the transportation of spent nuclear fuel and other radioactive waste. Although the parties had argued the matter as a rate case, the railroads had justified the high rates for the transportation of these materials by citing the extra costs they necessarily incurred due to special government regulations and the inherent risks associated with carrying those dangerous commodities. Finding most of the railroads’ asserted justifications for the higher rates unwarranted, the ICC addressed the matter under the statutory provision requiring that rail carrier “practices” be reasonable and concluded that charging elevated rates for these materials was an unreasonable practice in violation of 49 U.S.C. § 10701(a). See Union Pacific, 867 F.2d at 649.

On appeal, the D.C. Circuit concluded that the ICC had impermissibly crossed the line into rate regulation. Id. at 649-50. Recognizing that there can be “a conceptual overlap between railroads’ ‘practices’ and their ‘rates,’” and that some lines would inevitably have to be drawn, the court nevertheless determined that, in the case before it, the ICC had in fact engaged in rate regulation because “the so-called ‘practice’ is manifested exclusively in the level of rates that customers are charged.” Id. In accordance with Union Pacific, the Board made clear in Fuel Surcharges Proposed, slip op. at 4, that it was not proposing new limits to the total amount that railroads can charge through a combination of base rates and fuel surcharges, and that it was addressing only the truthfulness of the label given to the surcharge.

The first application of the Board’s fuel surcharge rules occurred in Dairyland Power Coop. v. Union Pac. R.R. (Dairyland), NOR 42105 (STB served July 29, 2008). Dairyland Power Cooperative (Dairyland) had alleged that the fuel surcharges collected by Union Pacific Railroad Company (UP) under a mileage-based fuel surcharge program exceeded the incremental fuel cost increases UP had incurred in handling, and were extracting substantial profits on, Dairyland’s traffic. In denying a motion to dismiss, the Board explained that Dairyland’s allegations, while not enough by themselves to establish a violation, provided sufficient basis for further investigation. The Board clarified that to establish an unreasonable practice, a complainant must show that “the general formula used to calculate fuel surcharges

bears no reasonable nexus to the fuel consumption for the traffic to which the surcharge is applied.” Dairyland, slip op. at 6.²

Cargill has now brought the second complaint challenging a specific rail fuel surcharge program under the Board’s fuel surcharge rules. Cargill is an international producer and marketer of food, agricultural, financial, and industrial products and services. It ships various agricultural and other commodities over BNSF in common carrier service under a number of BNSF pricing authorities. In addition to the assessed linehaul rate, BNSF charged, and Cargill paid, a fuel surcharge under BNSF Rules Book 6100-A, Item 3375L, Section B, which is incorporated by reference in BNSF’s common carrier pricing authorities applicable to Cargill’s traffic. The challenged fuel surcharge is “calculated by multiplying the applicable fuel surcharge per mile times the number of miles per shipment.” Complaint, Exhibit A at 41, BNSF Rules Book 6100-A, Item 3375L, Section B. The amount of the fuel surcharge per mile varies monthly. It is determined based upon a fuel index, the U.S. Average Price of Retail On-Highway Diesel Fuel (HDF), which is published by the U.S. Department of Energy. The surcharge per mile to be applied in any given month is based on the average monthly HDF published 2 months prior to the month of assessment. According to BNSF, this time lag is the minimum necessary to permit publication of an entire month’s worth of HDF figures. Average HDF prices for the immediately preceding month cannot be assessed because they would not be published in time.³

Cargill claims the surcharge is an unreasonable practice because: (1) the general formula “bears no reasonable nexus to, and overstates, the fuel consumption” for the relevant traffic; (2) BNSF uses the surcharge to “extract substantial profits over and above its incremental fuel costs for the BNSF system traffic to which the surcharge is applied;” and (3) BNSF is “double recovering the same incremental fuel cost increases BNSF has incurred in providing service to Cargill by (i) setting its base rates on Cargill traffic to include recovery of fuel prices higher than the BNSF fuel strike price of \$0.73 per gallon implicit in the [fuel surcharge]⁴ and (ii) by increasing the Cargill base rates (including the fuel component in the base rates) [while] requiring Cargill to pay . . . the fuel surcharge.” We refer to the second and third claims as the “Profit Center” claim and the “Double Recovery” claim, respectively.

² Dairyland ultimately reached a settlement with UP, and the Board at Dairyland’s request dismissed the complaint with prejudice in a decision served on December 12, 2008.

³ The fuel surcharge table in Item 3375L, Section B, of the BNSF Rules Book 6100-A shows the applicable surcharge rate per mile based on the appropriate time period average price of HDF.

⁴ In the Fuel Surcharges proceeding, BNSF identified the “strike price” as the “entry point” for its fuel surcharge, BNSF Comments at 16, which we take to mean the fuel price level at which the fuel surcharge begins to accrue.

BNSF filed a motion to dismiss the complaint, in part, on May 28, 2010, arguing that, under the principles established in Union Pacific, Fuel Surcharges, and Dairyland, the Board should dismiss Cargill's Profit Center and Double Recovery claims and its request for damages with interest on all 3 claims. Cargill filed a reply on June 17, 2010.⁵

DISCUSSION AND CONCLUSIONS

Motions to dismiss are disfavored and rarely granted.⁶ Under 49 U.S.C. § 11701(b), the Board may dismiss a complaint that “does not state reasonable grounds for investigation and action.” In ruling on motions to dismiss, the Board assumes that all factors be viewed in the light most favorable to the complainant, including all factual allegations. AEP Texas North Co. v. Burlington Northern and Santa Fe Ry., NOR 41191 (Sub-No. 1), slip op. at 2 (STB served Mar. 19, 2004).

We find that Cargill's Profit Center claim offers a reasonable basis for further Board consideration, and we will therefore deny BNSF's request to dismiss it. We will also deny as premature BNSF's motion to dismiss Cargill's request for damages with interest. We will, however, grant BNSF's motion to dismiss Cargill's Double Recovery claim.

The Profit Center Claim. BNSF argues that Cargill's challenge to the fuel surcharge rests on a claim that the surcharge exceeds the incremental fuel costs incurred by BNSF in handling Cargill's traffic. This, BNSF says, directly conflicts with the limits set out in Dairyland, and therefore amounts to a prohibited challenge to the reasonableness of the railroad's rates under Union Pacific. We disagree.

In Dairyland, the Board clarified the types of claims that properly could be brought under Fuel Surcharges. The Board explained that Dairyland could not base its case only on the level of the fuel surcharge as applied to Dairyland. Dairyland, slip op. at 5. First, it would be unreasonable to require railroads to incorporate every factor that affects fuel costs into their fuel surcharge formulas, and thus, for practical reasons, the Board cannot expect a precise match between fuel surcharge revenues and increased fuel costs for any one shipper. Id. Second, to find a violation “only because the fuel surcharge payments collected from Dairyland exceeded the carrier's incremental fuel costs in handling Dairyland's traffic would . . . impermissibly regulate rate levels, contrary to Union Pacific.” Id. The Board explained that, instead of

⁵ The Board at Cargill's request issued a protective order in a decision served on May 26, 2010, which was corrected on June 24, 2010.

⁶ Entergy Ark., Inc. v. Union Pac. R.R., NOR 42104, slip op. at 3 (STB served Dec. 30, 2009); Garden Spot & N. Ltd. P'ship & Ind. Hi-Rail Corp.—Purchase & Operate—Ind. R.R. Line Between Newton & Browns, Ill., FD 31593, slip op. at 2 (ICC served Jan. 5, 1993).

focusing on how the surcharge applied to a complainant alone, a complainant challenging the reasonableness of a rail carrier's fuel surcharge program "must show that the general formula used to calculate fuel surcharges bears no reasonable nexus to the fuel consumption for the traffic to which the surcharge is applied." Id. at 6. One way to do this is to show that the "the general formula produces fuel surcharges that do not reasonably track changes in aggregate fuel costs incurred." Id.

Cargill's Profit Center claim is not inconsistent with our guidance in Dairyland. Cargill does not allege that BNSF uses the challenged fuel surcharge to over-recover its fuel costs incurred in handling Cargill's traffic. Instead, Cargill claims that BNSF uses this fuel surcharge "to extract substantial profits over and above its incremental fuel costs for the BNSF system traffic to which the surcharge is applied." Complaint at 3 (emphasis added). In other words, Cargill appropriately focuses on how the fuel surcharge operates in the aggregate and not solely on how it operates with respect to Cargill.

Consistent with Dairyland, Cargill may present evidence to demonstrate that design elements in the challenged fuel surcharge allow BNSF to recover substantially in excess of the actual incremental cost of fuel incurred in providing the rail services to the entire traffic group to which the surcharge applies. Accordingly, we will deny BNSF's motion to dismiss Cargill's Profit Center claim.

The Double Recovery Claim. BNSF argues that the Double Recovery claim must be dismissed for 3 reasons. First, BNSF claims that Cargill's Double Recovery claim is a rate challenge couched in terms of an unreasonable practice claim, and thus violates the principles set out in Union Pacific. Motion to Dismiss at 8. Second, and related to its first argument, BNSF argues that the Double Recovery claim should be dismissed under Dairyland because a fuel surcharge may not be challenged on grounds that the assessed charges exceed the carrier's incremental fuel costs incurred in handling the shipper's traffic. Id. at 9. Third, BNSF contends that the Double Recovery claim cannot survive even if it is understood to be relying on the prohibition in Fuel Surcharges I against double dipping, because there the Board envisioned an explicit rate adjustment mechanism that recovered fuel costs, which is not present here. Id.

The Board finds that Cargill's Double Recovery count fails to state a claim and that its approach contravenes the D.C. Circuit's ruling in Union Pacific. The Board's finding in Fuel Surcharges, that double-dipping is unreasonable pertained to a specific type of double recovery that involved making inherently inconsistent representations: imposing a surcharge ostensibly as a way to recover the increased cost of fuel while at the same time justifying an increase in the base rate by referring to an index that explicitly accounted for the same increased cost of fuel. In contrast, when a railroad imposes a fuel surcharge and also increases its base rate, but without express reference to an index that includes a fuel cost component, that railroad is not making inconsistent representations. Here, Cargill has pointed to no use by BNSF of any form of fuel escalator, index, or other cost adjustment mechanism in its base tariff that contains a fuel cost

component. Rather, BNSF states, to the contrary, that “[n]ew rates are set from time to time by BNSF without express reference to costs.” Motion at 9.

Absent any allegations of misleading or inconsistent representations to shippers, an investigation based on Cargill’s Double Recovery claim would necessarily focus on whether the level of the rate is justified, contrary to Union Pacific. The crux of Cargill’s claim is that “BNSF is double recovering the same incremental fuel cost increases BNSF has incurred in providing common carrier service to Cargill.” Complaint at 4. But the challenged “practice”—allegedly recovering fuel costs in both base rates and fuel surcharges—is manifested exclusively in the level of rates that Cargill is charged, and thus may only be challenged as an unreasonable rate after a finding of market dominance.

We also have practical concerns about trying to deconstruct a base rate. Costs—including fuel costs—can be among the factors that carriers consider in setting their base rates. But there are many other factors as well—such as general market conditions, carrier-specific financial condition, product demand and the competitive options available to particular shippers—all of which could influence how a carrier structures its pricing. The Board does not attempt to attribute values to each component of rail pricing actions or rule on a carrier’s rate on a component-by-component basis.

Accordingly, Cargill has not shown reasonable grounds for further Board investigation and action respecting its Double Recovery claim.

Damages. BNSF also argues that Cargill cannot recover damages under any of its 3 claims because any alleged injury would amount to a claim that the fuel surcharges resulted in rates that were too high. At this early stage in the proceeding, before any finding of unlawful conduct and before any evidence has been presented, it would be premature for us to rule on this aspect of the motion to dismiss. Therefore, we will not rule on this request at this time.

Procedural schedule. Cargill, in its report on the parties’ conference, pursuant to 49 C.F.R. § 1111.10(a), proposes a procedural schedule that would allow 120 days to complete discovery, 90 days for it to file its opening statement, 60 days for BNSF to file its reply, and 45 days for Cargill to file its rebuttal. Cargill also requests that we incorporate into the proposed procedural schedule the expedited discovery dispute resolution procedures set forth in 49 C.F.R. § 1114.31(a)(1)-(4) that apply in stand-alone cost and simplified standard rate cases. BNSF objects to Cargill’s proposed procedural schedule, arguing that it should be given at least 90 days to file a reply, if Cargill is given 90 days from the completion of discovery to file its opening statement.

Because we are now ruling on BNSF’s motion to dismiss in part, we will adopt a procedural schedule. The discovery period will commence on the service date of this decision and terminate 90 days thereafter; Cargill’s opening statement will be due 60 days thereafter;

BNSF's reply will be due 60 days thereafter; and Cargill's rebuttal statement will be due 30 days thereafter. We will also grant Cargill's unopposed request to incorporate into the procedural schedule the expedited discovery dispute resolution procedures set forth in 49 C.F.R. § 1114.31(a)(1)-(4).

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 dismiss in part is granted in part, and denied in part as discussed above.
2. The procedural schedule set forth above and the procedures set forth in 49 C.F.R. § 1114.31(a)(1)-(4) are adopted. The discovery period will commence on the service date of this decision and terminate on April 4, 2011; Cargill's opening statement will be due on June 3, 2011; BNSF's reply will be due on August 2, 2011; and Cargill's rebuttal statement will be due on September 1, 2011.
3. This decision is effective on the service date.

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