

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. NOR 42118<sup>1</sup>

BRAMPTON ENTERPRISES, LLC D/B/A SAVANNAH RE-LOAD v. NORFOLK  
SOUTHERN RAILWAY COMPANY

Digest:<sup>2</sup> In this decision, the Board denies a motion to dismiss a warehouseman's complaint that a railroad charged security deposits on rail cars for which the warehouseman was not liable and directs the parties to establish a schedule for discovery so that the Board can resolve the complaint.

Decided: March 14, 2011

Brampton Enterprises, LLC, d/b/a Savannah Re-Load (Brampton or complainant) filed a complaint alleging that the demurrage deposit requirement imposed by Norfolk Southern Railway Company (NSR) is unreasonable, in violation of 49 U.S.C. § 10702(2). NSR filed a motion to dismiss the complaint. For the reasons discussed below, NSR's motion will be denied, and the parties are ordered to discuss discovery and procedural matters and to submit a joint procedural schedule to the Board.

BACKGROUND

Brampton is a warehouseman whose business consists, in part, of unloading freight delivered to its facility and reloading it for export to foreign countries through the Georgia Ports Authority. Some of this freight is delivered by NSR, the only rail carrier that serves complainant's facility. Pursuant to NSR's Tariff NS 6004-B, rail cars that are not returned to NSR within 2 days of delivery are subject to demurrage fees. Demurrage fees, common in the railroad industry, compensate carriers for the expenses incurred when rail cars are held by consignors or consignees beyond a reasonable free period and promote better use of rail cars.

Beginning in February 2007, and continuing through August 2007, NSR submitted monthly invoices to Brampton for demurrage. Complainant did not pay the assessed charges,

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<sup>1</sup> The proceeding was originally docketed as Docket No. FD 35349, but because the matter constitutes a complaint, it has been re-docketed as Docket No. NOR 42118.

<sup>2</sup> 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).

claiming that it was not a consignee and thus was not liable for demurrage. On July 31, 2007, NSR notified Brampton that Brampton would be required to pay a demurrage security deposit of \$1,200 per car on rail cars that Brampton accepted for unloading. Pursuant to NSR's Tariff NS 8002-A, the deposit was non-transferrable and required complainant to pay a new deposit for each car that complainant accepted. Complainant paid no demurrage deposits until October 22, 2008, and in total, paid only 3 demurrage deposits to NSR.

On October 11, 2007, NSR filed suit in the United States District Court for the Southern District of Georgia (the district court), demanding payment for the unpaid demurrage charges (which prompted the imposition of the demurrage deposit requirement). On September 15, 2008, the district court granted Brampton's motion for summary judgment, holding that Brampton was not a consignee and therefore was not liable for demurrage.<sup>3</sup> The district court considered bills of lading—which document receipt by the carrier of the goods to be transported, as well as the consignor and consignee of those goods, and which provide for the goods' movement—to be contracts for the movement of those goods. The district court found that, because Brampton did not receive notice that it was listed as a consignee on the bills of lading, it could not be made a consignee by the unilateral action of a third party. In doing so, the district court read 49 U.S.C. § 10743—which states that all consignees are liable for demurrage unless they act only as an agent for another party and notify the delivering carrier of their agency status—as only applying to entities that assent to, or at least are made aware of, their consignee status.

NSR lifted its demurrage deposit requirement when the parties entered into a contingent settlement agreement on December 12, 2008, but re-imposed it on March 4, 2009, after the contingency failed. NSR lifted the deposit requirement again when the district court ordered it to do so on March 20, 2009.

On November 2, 2009, the U.S. Court of Appeals for the Eleventh Circuit (appellate court) affirmed the district court's holding that only a party to a rail transportation contract or a consignee may be liable for demurrage and that, by accepting goods for delivery, a consignee takes on a quasi-contractual relationship with a carrier delivering goods to it. Because NSR presented no evidence that Brampton had been informed of its designation as consignee on bills of lading, the appellate court affirmed there was no meeting of the minds regarding whether Brampton was a consignee. Therefore, the appellate court agreed that Brampton could not be made a party to shipping contracts, was not a consignee, and was not liable for demurrage.

On March 29, 2010, Brampton filed a complaint at the Board alleging that NSR failed to establish reasonable rules and practices regarding demurrage in violation of 49 U.S.C. § 10702(2). Brampton asserts that it was unlawful for NSR to require a demurrage security deposit based upon charges for which Brampton was not liable (and that in any event were not

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<sup>3</sup> Norfolk S. Ry. v. Brampton Enters. d/b/a Savannah Re-Load, 2008 U.S. Dist. LEXIS 83286 (S.D. Ga. 2008), aff'd sub nom. Norfolk S. Ry. v. Groves, 586 F.3d 1273 (11th Cir. 2009); cert. denied, 2011 U.S. LEXIS 636 (U.S. Jan. 18, 2011) (No. 09-1212).

properly calculated)<sup>4</sup> and to use the demurrage deposit requirement to coerce Brampton to pay demurrage charges that Brampton did not owe. The complaint also avers that this deposit requirement prevented complainant from receiving shipments, imposed an undue financial burden on complainant, and caused Galaxy Forwarding (Galaxy), a freight forwarder that sent complainant goods via NSR, to sever its business relationship with complainant, which resulted in complainant sustaining damages of \$249,000 in lost profits.

After receiving an extension of time to answer the complaint, NSR filed an answer and a motion to dismiss. In its answer, NSR denies Brampton's allegations that the deposit requirement presents an unreasonable rule or practice. In the motion to dismiss, NSR claims that Brampton's complaint was filed beyond the statute of limitations period prescribed in 49 U.S.C. § 11705(c) and that it does not state reasonable grounds for investigation and action under 49 U.S.C. § 11701(b).

In its answer to the motion to dismiss, Brampton states that NSR's arguments concerning Brampton's status as a consignee and liability for demurrage are barred by res judicata and collateral estoppel, arguing that the question of Brampton's consignee status has been adjudicated in the district court and affirmed by the appellate court. For the reasons explained below, we will deny NSR's motion to dismiss.

#### DISCUSSION AND CONCLUSIONS

The Board may dismiss a complaint if it does not state reasonable grounds for investigation and action. 49 U.S.C. § 11701(b). In considering NSR's motion to dismiss, we construe the factual allegations in a light most favorable to the complainant. See Sierra Pac. Power Co. v. Union Pac. R.R., NOR 42012 (STB served Jan. 26, 1998). The party seeking dismissal bears the burden of proof. We will dismiss a complaint only when we find that there is no basis on which we could grant the relief sought.

Statute of Limitations. A rail carrier is liable for damages sustained by a person as a result of "an act or omission in violation of" the Interstate Commerce Act. 49 U.S.C. § 11704(b). Under 49 U.S.C. § 11704(c)(1), a party may file a complaint with the Board under 49 U.S.C. § 11701(b) to enforce such liability against the carrier, but under the provisions of 49 U.S.C. § 11705(c), a complaint to recover damages must be filed within 2 years after the claim accrues. A party therefore may not recover damages resulting from claims that accrued more than 2 years before the complaint was filed. Thus, the threshold question in this case is whether (or to what extent) the request for damages here is time-barred because it was filed more than 2 years after the claim(s) accrued.

NSR asserts, in its motion to dismiss, that Brampton's damages claims are barred in their entirety by 49 U.S.C. § 11705(c), because all of Brampton's claims accrued in 2007, when NSR first imposed the demurrage deposit requirement, and more than 2 years before Brampton filed

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<sup>4</sup> The demurrage deposit amount is based on the maximum amount of demurrage charges accrued by Brampton on any one rail car during the preceding 12-month period.

its complaint. In its answer to the motion to dismiss, Brampton avers that the statute of limitations could not have expired because Brampton could not file a claim for damages until it sustained damages, and that it sustained those damages every day that NSR charged it with demurrage deposits, which took place throughout 2008.

A statute of limitations starts to run when a claim accrues. Under 49 U.S.C. § 11705(g), “accrual” of a claim generally is the result of an affirmative act: “delivery or tender of delivery by the rail carrier.” That statutory definition makes it relatively easy in many rail cases to determine whether a complaint is timely. In a rail rate reasonableness case, for example, if a carrier makes repeated shipments to a customer, each shipment effectively constitutes a new claim, even though the conduct—charging the challenged rate—is the same each time the carrier makes a delivery. Thus, to determine timeliness for statute of limitations purposes in such cases, the Board counts back 2 years from the date of the complaint to set a cutoff point for relief. If a shipper files a complaint about a particular rate level charged over a period of time, it generally may recover only as to shipments that moved within 2 years of the filing of the complaint. See Aluminum Co. of America v. United States, 867 F.2d 1448, 1452 (D.C. Cir. 1989).

Here, the complaint is based on the imposition of a demurrage deposit requirement, which is conduct that continued from the first time NSR imposed the deposit requirement on Brampton until the district court ordered NSR to stop collecting demurrage deposits from Brampton. Just as a railroad’s continuing shipments under a challenged rate can effectively constitute a new claim for purposes of the statute of limitations, every day that NSR imposed a demurrage deposit on Brampton was a new “act or omission” that can serve as the basis for a new claim. See Groome & Assoc., Inc. v. Greenville Cnty. Econ. Dev. Corp., NOR 42087, slip op. at 8 (STB served July 27, 2005) (Groome).

That does not mean, however, that damages are available for NSR’s conduct during the entire period since 2007. Rather, as noted, a party typically may only recover damages for violations that occurred less than 2 years before it filed its complaint. See Atchison, Topeka & Santa Fe Ry. v. ICC, 851 F.2d 1432 (D.C. Cir. 1988) (Atchison). Thus, we will only look back 2 years prior to the submission of the complaint—i.e., to February 1, 2008—should we find damages appropriate.<sup>5</sup> Because the alleged facts here show that NSR continued to impose the demurrage deposit after February 1, 2008, we will not dismiss the complaint on statute of limitations grounds.

Reasonable Grounds for Investigation and Action. If the Board finds that a complaint states reasonable grounds for investigation and action, it has a duty to investigate the complaint. 49 U.S.C. § 11701; see Lewis-Simas-Jones Co. v. So. Pac. Co., 283 U.S. 654, 662 (1931).

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<sup>5</sup> Brampton initially filed its complaint on February 1, 2010, along with a request to waive or reduce the filing fee. The complaint was formally filed on March 29, 2010, after the request to waive the filing fee was granted. However, for statute of limitations purposes, we will consider the claim to have begun to accrue on February 1, 2008. Brampton started the process when it made its February 1, 2008, filing accompanied by the fee waiver request, and we will not penalize it because we did not rule on the waiver request immediately. See Groome at 9.

The practice of imposing security deposits to guarantee the payment of demurrage charges has not been found to be per se unreasonable under 49 U.S.C. §10702(2). See Rail General Exemption Auth.—Misc. Agric. Commodities—Petition of G&T Terminal Packaging to Revoke Conrail Exemption, EP 346 (Sub-No. 14A) (ICC served June 13, 1989). Whether a demurrage deposit constitutes an unreasonable rule or practice under 49 U.S.C. § 10702 depends on the terms and conditions of any particular tariff imposing such a deposit. Ill. Cent. Gulf R.R.—Security Deposits—Payment of Demurrage Charges, 358 I.C.C. 312, 317-18 (1978).

In this case, according to Brampton, NSR has engaged in several practices that this agency has stated may be unreasonable under certain circumstances. These include basing per car demurrage deposits and the maximum amount required to be deposited on erroneous charges, returning deposits in an untimely manner, imposing an undue financial burden, and using the deposit requirement to coerce receivers of rail cars into paying disputed demurrage charges. See id. at 318-20. Viewing these allegations in the light most favorable to the complainant, we find that NSR has not met its burden of showing that complainant failed to raise issues that merit further investigation and action. Accordingly, we will permit the complaint to go forward.<sup>6</sup> Pursuant to the Board's General Rules of Practice at 49 C.F.R. § 1111.10, the parties are directed to discuss discovery and procedural matters and file a proposed joint procedural schedule.

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

It is ordered:

1. NSR's motion to dismiss is denied. The parties are to discuss discovery and procedural matters by March 28, 2011, and propose a joint procedural schedule by April 4, 2011.
2. This decision is effective on March 16, 2011.

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

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<sup>6</sup> Here, the district court and the Eleventh Circuit considered whether Brampton was liable for demurrage. The lawsuit brought by NSR in the district court involved the same transactions, parties, and issues as the complaint in this case. Accordingly, because NSR's claims regarding Brampton's consignee status and liability for demurrage were litigated and denied by the district court and the Eleventh Circuit, whose decisions have not been overturned, NSR is barred from relitigating them before the Board. See Norfolk & W. Ry.—Merger, Etc., FD 21510 (Sub-No. 6), slip op. at 5 (STB served Dec. 3, 1996).