

28870
EB

SERVICE DATE - DECEMBER 8, 1999

SURFACE TRANSPORTATION BOARD

DECISION

STB Docket No. 41687

GRAIN LAND COOP v. CANADIAN PACIFIC LIMITED AND
SOO LINE RAILROAD COMPANY D/B/A CP RAIL SYSTEM

Decided: December 6, 1999

BACKGROUND

This proceeding was instituted by a complaint that was filed on April 5, 1996, by Grain Land Coop (Grain Land) against the Canadian Pacific Limited and Soo Line Railroad Company (collectively, CP). Grain Land is a farmers' cooperative that stores, handles, markets, and transports grain on behalf of its farmer-owners. In the complaint, Grain Land is seeking damages for the alleged failure of CP to provide transportation services at grain elevators in Wells, Minnesota Lake, Easton, Delavan and Winnebago, MN, on CP's "Corn Lines," which are located in northern Iowa and southern Minnesota.

The complaint avers that, during the 1995-1996 shipping season, CP: (1) breached its common carrier obligation to provide transportation or service on reasonable request under 49 U.S.C. 11101, and failed to provide adequate car service under 49 U.S.C. 11121 (Count 1); and (2) engaged in unreasonable practices in violation of 49 U.S.C. 10702 by misleading the shipper as to the availability of cars (Count 2). Subsequently, with the concurrence of CP, Grain Land amended its complaint to include claims of discriminatory and unreasonable rates (alleging that surcharges published by CP for shipments beyond Kansas City and Chicago were unreasonably high), in violation of 49 U.S.C. 10741 and 10702, respectively (Count 3). Grain Land sought damages of at least \$1.5 million and lost opportunity costs of \$75,200. It also sought an order requiring that CP cease and desist from those practices and prescribing just and reasonable rates.¹

In a decision served on December 1, 1997, the Board denied CP's motion to dismiss Counts 2 and 3 and ordered Grain Land to file an amended complaint to provide required rate reasonableness information to support Count 3. In response, Grain Land filed an amended complaint, which CP answered. CP then filed new motions to dismiss Counts 2 and 3, to which Grain Land replied.²

¹ Grain Land, in its reply to Defendant's motion to dismiss Count 3, indicates that it no longer seeks prescription of a rate for future application because it no longer is a shipper on the lines and CP no longer owns the Corn Lines.

² Grain Land also moved to unseal a copy of an internal CP memorandum, marked "HIGHLY CONFIDENTIAL," which was submitted as Exhibit 3 to a verified statement of Steven
(continued...)

Subsequently, Grain Land obtained Board permission to file a second amended complaint to include additional facts which, it contends, were uncovered during discovery. The second amended complaint, filed July 31, 1998, includes new factual allegations to support Grain Land's existing claims and a new Count 4, in which Grain Land claims that the actions of CP amounted to unlawful discrimination in violation of 49 U.S.C. 10741 and 10709(g) (Count 4). Grain Land also increased its damages claim to \$3.275 million plus lost opportunity costs of \$75,200. Grain Land contends that the second amended complaint should be considered because it raises no new causes of action, citing Rule 15 of the Federal Rules of Civil Procedure.

CP opposes Grain Land's second amended complaint, contending that the new allegations and the new Count 4 are time-barred by 49 U.S.C. 11705(c), which provides that a complaint for damages must be filed within two years after the cause of action accrues, and by 49 CFR 1111.2, which permits an amended complaint only if it "stat[es] a cause of action alleged to have accrued within the statutory period immediately preceding the date of such tender. . . ." Because all of the events covered by Grain Land's second amended complaint occurred before July 31, 1996, CP argues that the new complaint is untimely.³

DISCUSSION AND CONCLUSIONS

In considering CP's motion to dismiss, we construe the factual allegations in a light most favorable to the complainant. See Sierra Pacific Power Co. and Idaho Power Co. v. Union Pac. R.R., STB Docket No. 42101 (STB served Jan. 26, 1998). A decision on a motion to dismiss is not an indication of how the case will ultimately be decided on the merits, after all of the evidence is submitted. Rather, it is simply a determination of whether the factual allegations, when considered

²(...continued)

R. Hendrickson. Grain Land asserts that release of the document is necessary to show the thinking of CP officials concerning competition. CP opposes releasing the document, which is available to the Board and its staff under a Stipulated Protective Order. We see no need to unseal this document at this time. Grain Land submitted under seal other internal CP memoranda marked 'HIGHLY CONFIDENTIAL' with its reply to CP's motion to dismiss Count 2. Grain Land has not explained why the memorandum it wants to unseal should be treated differently from other internal CP memoranda that were submitted under seal. Accordingly, we will deny the motion. We note that Grain Land and CP are no longer using the CP rail service discussed in the complaint. Thus, many of the documents submitted under seal may no longer warrant protection under the protective order. The parties should resolve questions of confidentiality of materials to be submitted into the record.

³ Citing South-West Railroad Car Parts Co. v. Missouri Pac. R.R., No. 40073 (ICC served Dec. 1, 1988), CP argues that Grain Land cannot rely on Rule 15 to sanction the filing of the second amended complaint, because the conduct of which Grain Land complains in Count 4 occurred more than two years before the second amended complaint was filed on July 31, 1998.

in a light most favorable to the complainant, would provide a basis for relief. We dismiss complaints only when we find that there is no basis on which we could grant the relief sought.

The gist of the complaint is that CP violated the law in the way in which it carried out its car service obligations. Clearly, we have jurisdiction over those sorts of claims, whether they are couched in terms of common carrier obligation or car service (Count 1, as to which no motion to dismiss has been filed); unreasonable practices in connection with car availability (Count 2, as to which dismissal is sought); or unlawful discrimination (Count 4, as to which dismissal is sought). Therefore, we will deny the motions to dismiss Counts 2 and 4. However, we will dismiss Count 3 of Grain Land's complaint, which questions the reasonableness of rate surcharges, as Grain Land never paid the rates at issue, is not seeking reparations or a prescription of future rates, and indeed does not challenge any origin-to-destination rates as required by the law.

Count 2. In Count 2, Grain Land alleges that CP engaged in an unreasonable practice in violation of 49 U.S.C. 10702 by misrepresenting that it would provide railroad-owned cars for Grain Land shipments. According to Grain Land, on several occasions in 1995 and 1996, CP concealed material facts and misled Grain Land about when empty cars would be available for loading; CP shifted cars, locomotives, and crews to other parts of its system, causing an operational failure on the Corn Lines; Grain Land relied upon CP's representations that cars would be available and continued to buy and sell corn and soybeans; and, due to CP's misrepresentations, Grain Land was unable to complete those transactions because it did not receive cars in the manner and time represented.

CP has moved to dismiss Count 2 on the ground that the alleged misrepresentations about the expected timing of car service were not unreasonable practices under section 10702. According to CP, the "unreasonable practices" provision of section 10702 is limited to rate and tariff practices related to tangible aspects of train operations and does not extend to the issues of "fraud and misrepresentation" alleged by Grain Land. CP argues further that "unreasonable practices" within the purview of section 10702 are limited to customs or systematic conduct and are not addressed to isolated acts such as Grain Land has alleged; that oral promises about supplying cars for loading are not enforceable; and that Item 230 of Tariff 4004-A, under which Grain Land placed its car orders, expressly provided that CP "will not guarantee cars for specific 'want dates.'"

Grain Land responds that allegations of fraud and misrepresentation have been considered as unreasonable practices in several proceedings, citing Shippers Committee v. Ann Arbor R.R., 5 I.C.C.2d 856, 868 (1989), aff'd sub nom. Shippers Committee, OT-5 v. ICC, 968 F.2d 75 (D.C. Cir. 1992) (Shippers Committee) (allegation that carriers induced shippers to purchase cars with the false representation about the manner in which the cars would be used); and Buckeye Cellulose Corp. v. L&N R.R., 1 I.C.C.2d 767, 773 (1985), aff'd sub nom. Seaboard System R.R. v ICC, 794 F.2d 635, 638 (11th Cir. 1986) (collection of undercharge determined to be an unreasonable practice where shipper relied on carrier's misquotation of applicable rate in deciding to use carrier for transportation service). Grain Land argues that these decisions provide ample precedent for the Board to consider its misrepresentation claims in this proceeding.

Grain Land disputes CP's assertion that "practices" are limited to rates, tariffs and tangible aspects of train operations, arguing that the term "practices" has been given a broad definition. Grain Land notes that several proceedings have considered whether car allocation policies of carriers constituted unreasonable practices, e.g., Shippers Committee, 5 I.C.C.2d at 861, and Allied Corp. v. Union Pac. R.R., 1 I.C.C.2d 480, 489-490, aff'd sub nom. Allied Corp. v. ICC, 779 F.2d 41 (3d Cir. 1985) (Allied).

Finally, Grain Land disputes CP's contention that the claimed misrepresentations were isolated, noting that the second amended complaint includes copies of internal CP documents that allegedly refer to CP's policies for car allocation, distribution, and priority. According to Grain Land, the documents, which assertedly were false, indicate when Grain Land would receive cars and show that the alleged misrepresentations were continuous.

We will deny the motion to dismiss Count 2. Carriers' car allocation practices, including those published in tariffs, can be found to be unreasonable car service practices under several statutory provisions, including section 10702. See, e.g., Shippers Committee; Allied; Milmine Grain Co. v. Norfolk & W. Ry., 352 I.C.C. 575 (1976); and National Grain & Feed Assoc. v. BN RR. Co., et al., 8 I.C.C.2d 421 (1992), aff'd in part, remanded in part on other grounds, National Grain & Feed Ass'n. v. ICC, 5 F.3d 306 (8th Cir. 1993). The factual allegations in Count 2, when considered in a light most favorable to Grain Land, could show that CP engaged in an unreasonable practice in its car allocation policies and its alleged misrepresentations as to when cars were to be delivered. Therefore, we must give Grain Land the opportunity to make its case as to the issues raised in Count 2.

Count 4. CP moves to dismiss Count 4 of the Second Amended Complaint on the ground that it raises new legal claims that are time-barred because they are supported by facts that occurred outside of the statute of limitations period. We do not agree. The provisions of 49 U.S.C. 11705(c) bar complaints for damages that are filed more than two years after accrual of the claim that is the basis for the complaint. If, as CP argues, the new allegations in Grain Land's second amended complaint reflected new claims that accrued more than two years earlier, they would be time-barred. If, however, a timely-filed complaint is simply augmented by the presentation of relevant, newly-discovered facts, then the new evidence is not time-barred.

Although the exact legal theories that Grain Land intends to pursue have not always been crystallized in Grain Land's various complaints, the shipper did raise the discrimination issue in Count 3 of its first amended complaint. At page 9, par. 39, Grain Land states that under the law, "[CP] is prohibited from engaging in predatory pricing and practices and unlawful discrimination. . . ." Later, at pages 12 - 13, pars. 50 and 51, Grain Land complains that other shippers were favored, to its detriment, with respect to car supply and rates. In short, while it was presented in an awkward fashion, Grain Land did timely raise the issue of unlawful discrimination, and the statute of limitations was met. Because we find that the second amended complaint is simply a clarification of the earlier-filed complaints and does not raise any new violations of the law that could not have been considered under the earlier complaints, we find that the statute of limitations is not a bar to the Count 4 claims occurring before July 31, 1996.

Count 3. In Count 3, Grain Land challenges the reasonableness of surcharges in effect “from approximately August 1995 into July of 1996.” Allegedly, the surcharges would have applied to Grain Land’s shipments of corn and soybeans that would have been moved, under proportional rates published in CP tariffs ICC CPRS 4004-A, ICC SOO 4004-A, ICC CPRS 4444 and ICC CPRS 4444-A, by CP from Grain Land elevators in Minnesota to Chicago and Kansas City for movements beyond by other carriers. Grain Land claims that the surcharges were unreasonably high and that both the surcharges and the failure to receive cars amounted to an unlawful embargo of the line that precluded Grain Land from shipping grain to markets beyond Chicago and Kansas City.⁴

CP argues that the Board should dismiss Count 3 on the grounds that: (1) Grain Land lacks standing because it did not pay the alleged unreasonable rates and is no longer a shipper at the origins identified in the amended complaint; (2) Grain Land’s claim for a rate prescription is moot because the allegedly unreasonable rates have expired or been superseded and CP has sold the Corn Lines; (3) Count 3 fails to state a claim upon which relief can be granted because Grain Land did not identify specific destinations or origin-destination pairs and is challenging only proportional tariff rates;⁵ and (4) the STB lacks jurisdiction to review the rate levels because CP does not have market dominance over this traffic.⁶

CP is correct that Grain Land’s unreasonable rate claims are improper, because Grain Land never paid the rates at issue, is not seeking reparations or a prescription of future rates, and indeed does not challenge any origin-to-destination rates as required by the law, but rather challenges only proportional tariff rates. We cannot generally rule on the reasonableness of segment rates such as those that Grain Land seeks to challenge. See MidAmerican Energy Co. v. STB, 169 F.3d 1099 (8th Cir. 1999); Great Northern Ry. v. Sullivan, 294 U.S. 458, 463 (1935). Thus, even viewing all disputed facts most favorably to the complainant, Grain Land has not put before us any particular rates that we could find unreasonable, and for that reason, we must grant the motion to dismiss the rate reasonableness claims in Count 3.

⁴ The complaint does not allege that Grain Land shipped traffic under these rates, and Grain Land no longer seeks a rate prescription for future shipments because CP no longer owns the rail lines. Moreover, Grain Land does not request reparations; rather, Grain Land only seeks lost opportunity costs of \$75,200 for business it allegedly lost as a result of what it terms “embargo-level rates.”

⁵ A proportional rate is set by a single carrier for applicability only to its portion of a through movement. Grain Land acknowledges that the surcharges apply only to CP proportional rates.

⁶ Grain Land argues that the proportional rates to any destination beyond Kansas City and Chicago would result in a revenue-to-variable cost percentage greater than 180.

That does not necessarily mean that the surcharge issue may not be addressed at all. On the basis of the numerous filings submitted to date, it does not appear that Grain Land really intends to prove that it ever paid, or was otherwise subjected to, unreasonable through rates. Rather, Grain Land alleges unreasonable rates to show that the surcharges, along with the failure to deliver cars, were part of a plan to embargo its traffic so that it could not move in CP cars to points beyond Chicago and Kansas City. Evidence of an intent to improperly embargo Grain Land's traffic could be used to support Grain Land's common carrier obligation claim (Count 1) or its discrimination claim (Count 2). Thus, although we will not in this proceeding issue an order declaring any specific proportional rates to be unreasonably high, we will not preclude Grain Land from presenting any relevant evidence about the alleged embargo in connection with its other claims.

Procedural schedule. Finally, after this proceeding was instituted, the Board adopted a policy for the parties in complaint cases to discuss discovery and procedural matters soon after the answer to the complaint is filed. 49 CFR 1111.10(a). We presume that the parties have completed discovery and are ready to submit evidence. Accordingly, we will direct to parties to discuss procedural issues within 7 days of the service of this decision and to file with the Board, within 14 days of the service date of this decision, a report setting forth a proposed procedural schedule to govern future activities and deadlines in this case.

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

It is ordered:

1. The second amended complaint is accepted for consideration.
2. CP's motions to dismiss Counts 2 and 4 are denied.
3. CP's motion to dismiss Count 3 is granted.
4. Within 7 days of the service of this decision, the parties are to discuss procedural issues. Within 14 days of the service date, the parties, either jointly or separately, shall file a report with the Board that includes a proposed procedural schedule.
5. This decision is effective on the date of service.

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

Vernon A. Williams
Secretary