

SURFACE TRANSPORTATION BOARD

DECISION

STB Docket No. 42094 (Sub-No. 1)

PCI TRANSPORTATION, INC.

v.

FORT WORTH & WESTERN RAILROAD COMPANY

Decided: April 24, 2008

On October 26, 2006, PCI Transportation, Inc. (PCI), filed a complaint including a request for injunctive and other relief against Fort Worth & Western Railroad Company (FWWR) concerning FWWR's allegedly wrongful assessment of demurrage charges at PCI's warehouse in Fort Worth, TX. In this decision, we grant FWWR's motion to dismiss the complaint, and we dismiss the counterclaims filed by FWWR.

BACKGROUND

Demurrage fees compensate rail carriers for the expenses incurred when rail cars are held by shippers beyond a reasonable free period and promote better car utilization. Complaints to the Board regarding demurrage fees are rare because carriers and shippers typically are able to work out these matters. Where demurrage is assessed pursuant to a tariff, it is subject to Board regulation under 49 U.S.C. 10702, which requires railroads to establish reasonable rates and transportation-related rules and practices. In addition, pursuant to 49 U.S.C. 10746, rail carriers must compute demurrage charges, and establish rules related to those charges, so as to facilitate freight car use and distribution and promote an adequate car supply. However, if a rail carrier and a shipper enter into a rail transportation contract pursuant to 49 U.S.C. 10709 to govern demurrage, then the terms of that contract govern and the transportation under such contract may not subsequently be challenged before the Board or in any court on the grounds that it violates a provision of the Interstate Commerce Act (Act), 49 U.S.C. 10709(c)(1).

This case involves demurrage fees assessed against PCI, whose warehouse is located on a spur that is served from a switching yard operated by FWWR, a shortline railroad. Union Pacific Railroad Company (UP) and BNSF Railway Company (BNSF) deliver rail cars to FWWR's switching yard, and FWWR delivers these cars to PCI and other customers of UP and BNSF. UP and BNSF compensate FWWR for its switching services and charge FWWR for the time it retains rail cars in UP's and BNSF's account. FWWR, in turn, collects demurrage fees from PCI and the other shippers it serves.

PCI filed a complaint with the Board concerning FWWR's demurrage assessments. Instead of filing an answer to PCI's complaint, FWWR filed a motion to dismiss the complaint

arguing that the Board lacks subject matter jurisdiction because PCI's claims are based on contract and tort law. PCI filed a reply, which included a supplement to its complaint identifying the statutory bases for its claims. In a decision served on February 5, 2007, the Board deferred consideration of the motion to dismiss and directed FWWR to file an answer to PCI's complaint and the parties to file a proposed procedural schedule.

On February 26, 2007, FWWR filed its answer to PCI's complaint, which includes a counterclaim seeking declaratory relief, damages in amount of the allegedly overdue demurrage charges, and compensation for attorney fees. PCI filed an answer to the counterclaim on March 29, 2007. FWWR and PCI also filed proposed procedural schedules in March 2007. The Board, in a decision served on May 11, 2007, adopted a procedural schedule that called for the parties to complete discovery by June 29, 2007, and for the evidentiary record to close by September 14, 2007.

In a petition filed May 29, 2007, FWWR asked the Board to issue a decision on its motion to dismiss. FWWR explained that the District Court for the Northern District of Texas had dismissed the pending claims, counterclaims, and requests for relief that are at issue here on the grounds that they are within the exclusive jurisdiction of the Board.¹ Further, FWWR explained that it had appealed the district court's ruling to the U.S. Court of Appeals for the Fifth Circuit, and that the Fifth Circuit postponed briefing in the case "to allow having the benefit of the Board's action on FWWR's Motion to Dismiss." See FWWR Request for Decision on Motion to Dismiss, filed May 29, 2007, at 3.

On three separate occasions beginning in August 2007, the parties jointly requested that the Board suspend the procedural schedule to give them time to pursue settlement efforts. The Board did so each time. On October 31, 2007, the parties reported that they had resolved several issues but might not be able to resolve the remaining issue. They asked that a procedural schedule be reestablished. That request is rendered moot by our decision here to dismiss the complaint and the counterclaims.²

DISCUSSION AND CONCLUSIONS

In reviewing a motion to dismiss, we must construe the evidence in the light most favorable to the non-moving party (here, PCI). North America Freight Car Association—Protest and Petition for Investigation—Tariff Publications of the Burlington Northern and Santa Fe Railway Company, STB Docket No. 42060 et al., slip op. at 9 (STB served

¹ See PCI Transportation, Inc. v. Fort Worth & Western Railroad Company, Inc., No. 4:04-CV-211-Y (N.D. TX Sept. 26, 2006). That decision was issued after the district court's earlier decision, removing PCI's complaint from Texas state court and denying a preliminary injunction, was affirmed in PCI Transp., Inc. v. Fort Worth & Western R. Co., 418 F.3d 535 (5th Cir. 2005) (PCI Transp.).

² On July 3, 2007, PCI filed a motion to substitute counsel. While notice is proper if there is a change in counsel, Board approval is not required.

Aug. 13, 2004). Even construing the evidence in that manner, we must grant FWR's motion and dismiss PCI's complaint.

PCI's Contract Claims. In its complaint, PCI contends that it was improperly billed by FWR for demurrage in violation of the terms of the Confidential Demurrage Agreement (CDA) they had entered into on August 23, 2001. PCI also contends that FWR improperly attempted to cancel the CDA in a letter dated April 20, 2004, and at that time began assessing demurrage charges under its Tariff FWR 8001-G. Additionally, PCI claims that FWR, by its behavior and actions in connection with the CDA, intentionally and tortiously interfered with the contractual relations between PCI and its existing and potential customers.

PCI requests damages in the amount that it allegedly has been improperly billed for demurrage, as well as damages resulting from FWR's alleged intentional and tortious interference with the contractual relations between PCI and its existing and potential customers. Additionally, PCI requests temporary and permanent injunctive relief to restrain FWR from: (1) giving notice, or contending, that it canceled the CDA; (2) engaging in any of the practices that allegedly resulted in the improper billing of demurrage charges; and (3) notifying credit reporting agencies or PCI's creditors, brokers, or customers of any allegedly unpaid demurrage charges arising out of PCI's Fort Worth operations. PCI also requests a declaratory judgment finding that: (1) the CDA was not terminable at will or upon notice; (2) FWR failed to give reasonable, proper, or effective notice canceling the CDA; and (3) FWR is not entitled to collect demurrage charges from PCI pursuant to Tariff FWR 8001-G.

The underlying dispute between these parties has had a byzantine procedural history as it moved through state court, federal courts, and the Board. The Fifth Circuit concluded that much of the relief sought by PCI is within the Board's general jurisdiction over rail transportation under the Act, citing 49 U.S.C. 10501(b). The court explained that the requested injunctive relief would govern FWR's switching yard, control when FWR may charge demurrage, and determine when FWR's service failures would render demurrage assessments inappropriate – activities that the court concluded Congress intended the Board to regulate. Accordingly, the court held that “at the very least,” a portion of FWR's claims are governed by the statute that the Board administers. See PCI Transp., 418 F.3d at 543. The district court concluded that the court “obviously intended that the STB should determine which claims are litigable in its forum.”³

The Board has primary jurisdiction to determine its own jurisdiction.⁴ In making such a jurisdictional assessment, the Board must first consider whether the claims upon which the requests for relief are predicated come under the Act. The Act limits the jurisdiction of the Board so as to exclude shipments moving under rail transportation contracts. See 49 U.S.C.

³ See PCI Transportation, Inc. v. Fort Worth & Western Railroad Company, Inc., Civil Action No. 4:04-CV-211-Y (Nov. 6, 2006 order denying motion for clarification or reconsideration).

⁴ See Burlington N. Inc. v. Chicago & N.W. Transp. Co., 649 F.2d 556, 558 (8th Cir. 1981).

10709. Indeed, section 10709(c)(1) expressly provides that transportation provided under a contract is not subject to the Act and may not be challenged before the Board or the courts on the grounds that the contract violates the Act.⁵ Moreover, section 10709(c)(2) provides that the exclusive remedy for an alleged breach of contract is an action in state or federal court.

While disputes can arise as to whether a particular agreement comes within the scope of section 10709,⁶ here both parties agree that there was a contract, and that they intended to be bound by it. And while neither party supplied a copy of the CDA, the CDA is described as an agreement for FWWR to provide specified services under specified rates and conditions to PCI. See PCI Transp., 418 F.3d at 537-38.⁷ Thus, the CDA appears to fall squarely within the scope of section 10709. See 49 U.S.C. 10709(a).

In this case, many of the underlying arguments that the parties addressed before the courts – for example, how cars are to be placed, and when or how demurrage is to be assessed – would be subject to the Board’s jurisdiction were the shipments not governed by a contract. But PCI contends that the CDA was a binding contract and that the parties’ demurrage relationship is governed by it and not by FWWR’s demurrage tariff.⁸ Should a court interpreting the CDA later determine that it would be aided by a Board determination on an issue relevant to the underlying contractual dispute (e.g., when or how demurrage is to be assessed), a referral to the Board may be appropriate. However, under 49 U.S.C. 10709(c)(1), the Board cannot itself decide the ultimate issues of whether FWWR breached the CDA prior to April 2004 (when FWWR

⁵ See also Interpretation of the Term “Contract” in 49 U.S.C. 10709, STB Ex Parte No. 669 (STB served Mar. 29, 2007) slip op. at 3 (noting that Congress expressly removed all matters and disputes arising from rail transportation contracts from the agency’s jurisdiction); Omaha Public Power District v. Union Pacific Railroad Company, STB Docket No. 42006, slip op. at 2 (STB served Oct. 17, 1997) (Omaha) (noting that this proposition is “well established”).

⁶ See Union Pacific Railroad Company—Petition for Declaratory Order, STB Finance Docket No. 35021 (STB served May 16, 2007); E.I. Dupont De Nemours and Company v. CSX Transportation Inc., STB Docket No. 42099 (STB served Dec. 20, 2007).

⁷ The court states that “the entire [CDA] is a one-page letter, and is self-styled with two different names—‘Confidential Demurrage Contractual Agreement’ and ‘Confidential Contractual Agreement for Free Time.’ The language of the contract provides that (1) PCI will have four demurrage-free days, and (2) FWWR is committed to providing PCI with a minimum of one ‘switch’ daily, seven days per week. The contract also establishes the demurrage rate applicable after free time expires.” PCI Transp., 418 F.3d at 537-38.

⁸ See, e.g., PCI Answer to Counterclaims, filed Mar. 29, 2007, at 3-4 (“PCI’s contention is that it denies the tariff 8001-G applies to its arrangement with FWWR to the extent that it deviates from the CDA PCI does admit that FWWR continued to provide services to PCI, but denies that such services were under the control or auspices of tariff 8001-G PCI denies that it has failed or refused to pay proper demurrage charges (pursuant to the tariff or otherwise) since it believes that the CDA is still in effect, and the tariff does not apply to the relationship between these parties.”) (emphasis added).

allegedly terminated the CDA) by failing to adhere to common industry practices or whether the disputed demurrage charges were properly assessed pursuant to the CDA. See Omaha, supra.

FWWR contends that it canceled the CDA and that Tariff FWWR 8001-G became applicable in April 2004. PCI disputes that contention and maintains that the CDA remains in effect today. The issue of whether the CDA has been canceled is one of contract law, not rail transportation law. The Board typically defers to the courts with respect to whether a valid rail transportation contract exists.⁹ If it were later determined by a court that the CDA was lawfully canceled and that demurrage charges pursuant to Tariff FWWR 8001-G became applicable, the Board could address whether the disputed demurrage charges were properly assessed under that tariff.¹⁰

PCI's Tort Claims. PCI also alleges that FWWR intentionally and tortiously interfered with the contractual relations between PCI and its existing and potential customers. This common law tort claim is not within the primary jurisdiction of this agency, and is more properly pursued through the courts or through arbitration.¹¹ Accordingly, we will not consider PCI's request for relief based on this claim.

In response to FWWR's argument that PCI failed to allege specific statutory violations under the Act, PCI supplemented its complaint in an attempt to identify cognizable claims under that statute. However, it failed to state a claim upon which relief can be granted. PCI cited only 49 U.S.C. 10101(12) for the allegation that FWWR has engaged in predatory practices. But section 10101(12) cannot give rise to a cause of action. Instead, it is a statement of policy intended to provide guidance to the Board regarding its implementation of the rest of the Act.¹²

PCI also alleges in conclusory fashion that FWWR has violated various other provisions of the Act, including 49 U.S.C. 10702 (which prohibits unreasonable practices), 49 U.S.C. 10704 (which dictates how the Board handles matters brought under section 10702), 49 U.S.C. 10741

⁹ See General Railway Corporation d/b/a Iowa Northwestern Railroad—Exemption for Acquisition of Railroad Line—in Osceola and Dickinson Counties, IA, STB Finance Docket No. 34867, slip op. at 4 (STB served June 15, 2007) (Board is not the proper forum to resolve contract issues).

¹⁰ See, e.g., Parrish & Heimbecker, Inc.—Petition for Declaratory Order, STB Docket No. 42031 (STB served May 26, 2000); Capitol Material Incorporated—Petition for Declaratory Order—Certain Rates and Practices of Norfolk Southern Railway Company, STB Docket No. 42068 (STB served Apr. 12, 2004); R. Franklin Unger, Trustee of the Indiana Hi-Rail Corporation, Debtor—Petition for Declaratory Order—Assessment and Collection of Demurrage and Switching Charges, STB Docket No. 42030 (STB served June 14, 2004).

¹¹ See, e.g., Boston and Maine Corporation and Springfield Terminal Railway Company v. New England Central Railroad, Inc., STB Finance Docket No. 34612 (STB served Feb. 24, 2005).

¹² See, e.g., DHX, Inc. v. Surface Transportation Board, 501 F.3d 1080, 1087-88 (9th Cir. 2007), and cases cited therein.

(which prohibits discrimination) and 49 U.S.C. 10746 (which requires carriers to establish reasonable demurrage rules) with regard to the “demurrage rules, practices and procedures [FWWR] provides to PCI.” See PCI Reply to Motion to Dismiss, filed Dec. 21, 2006, at 18. But PCI repeatedly denies that FWWR’s demurrage tariff governs the parties’ relationship and instead insists that FWWR’s demurrage practices are in fact governed by the CDA (see *supra* note 8), a position that is inconsistent with PCI’s supplemental statutory claims.

We recognize the Fifth Circuit’s concern that PCI’s claims that are not rooted in contract are cognizable, if at all, only under the Act, and that a state court would be preempted from granting the sought relief. PCI’s claims before us, however, are entirely rooted in breach of contract and tort claims predicated on that breach. Indeed, PCI expressly states that the two bases for the injunctive relief it seeks are “the continued oppression with, and improper billing of, demurrage fees in violation of the express contract between the parties; and FWWR’s tortious interference with PCI’s long term lease of the spur and contracts with its customers.” Complaint at 11-12. Neither of these underlying claims may be properly adjudicated before the Board.

Accordingly, we will grant FWWR’s motion to dismiss this complaint. The dismissal will be without prejudice to PCI filing a tariff-based complaint in the event a court decision or other action justifies such a filing.

FWWR’s Counterclaims. We are also dismissing FWWR’s counterclaims. In this case, FWWR seeks a declaratory judgment that its demurrage tariff is lawful.¹³ However, such a ruling from the Board would do little or nothing to resolve the present controversy because a core dispute between the parties is whether, or to what extent, their relationship is in fact governed by the tariff. FWWR also seeks Board rulings that FWWR properly canceled the CDA in April 2004, and thereafter lawfully assessed demurrage charges pursuant to its tariff. But as indicated above, the Board is not the proper forum to determine whether a contract has been properly terminated under its express terms and/or applicable contract law. Under these circumstances, we decline to institute a declaratory order proceeding.¹⁴

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

¹³ Under 5 U.S.C. 554(e) and 49 U.S.C. 721, the Board may issue a declaratory order to terminate a controversy or remove uncertainty. The Board has broad discretion in determining whether to issue a declaratory order. See *InterCity Transp. Co. v. United States*, 737 F.2d 103 (D.C. Cir. 1984); *Delegation of Authority—Declaratory Order Proceedings*, 5 I.C.C.2d 675 (1989).

¹⁴ FWWR requests attorneys fees. But the Board does not generally award attorneys fees, and FWWR has provided no basis on which the Board should depart from its precedent here.

It is ordered:

1. The motion to dismiss is granted. PCI's complaint and counterclaims are dismissed without prejudice.

2. This decision is effective on April 25, 2008.

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

Anne K. Quinlan
Acting Secretary