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SERVICE DATE – SEPTEMBER 30, 2011

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.

Docket No. FD 35517

CF INDUSTRIES, INC. v. INDIANA & OHIO RAILWAY, POINT COMFORT AND
NORTHERN RAILWAY, AND THE MICHIGAN SHORE RAILROAD—PETITION FOR
DECLARATORY ORDER

Digest:¹ This decision requests additional information regarding a complaint and a motion for injunctive relief related to common carriage of specified chemical cargo. It also provides for development of a single record for this and another proceeding that raises similar issues.

Decided: September 28, 2011

In the 2 captioned dockets, several chemical shippers and trade associations (collectively, shippers) challenge 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 several of its railroad subsidiaries. In light of the apparent factual and legal overlap between the 2 cases and to ensure ample opportunity for input by all interested persons and the general public, the Board will address these issues in a single record in the declaratory order proceeding in Docket No. FD 35517. In Docket No. NOR 42129, complainants are directed to file, within 15 days of the date of service of this decision, supplemental information clarifying briefly what specific practices they are currently challenging and seeking to enjoin. Replies may be filed 15 days later. Thereafter, the Board will rule on complainants' injunction request. Following the Board's ruling, Docket No. NOR 42129 will be held in abeyance pending issuance of the Board's final decision in Docket No. FD 35517 after public comment.

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).

BACKGROUND

As discussed below, the issues in these dockets are substantially similar because the shippers in both cases appear to challenge the same tariff requirements and the same RailAmerica Standard Operating Practice (SOP) for handling TIH/PIH materials. The primary difference between these proceedings is that Docket No. NOR 42129 arises from a complaint, in which specific relief is sought, while Docket No. FD 35517 arises from a petition for declaratory order, in which general guidance is sought.

1. Docket No. NOR 42129

On April 15, 2011, American Chemistry Council, The Chlorine Institute, Inc., The Fertilizer Institute, and PPG Industries, Inc. (collectively, complainants) filed a complaint in Docket No. NOR 42129 against Alabama Gulf Coast Railway (AGR) and RailAmerica (collectively, defendants). Complainants request a determination by the Board that the SOP, 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 under 49 U.S.C. § 11101, and they ask that the Board enjoin those practices.

Complainants challenge specific practices that they allege were adopted in AGR Tariff 0900,² including elements of the SOP that complainants contend AGR Tariff 0900 implements. The challenged practices include:

- Dedicated train service (dedicated crew and train) called “special train service” for TIH traffic;
- A special permit for TIH required to be tendered to AGR no less than 5 days prior to interchange; and
- A limitation of no more than 3 TIH railcars per dedicated train.

With respect to the first of these items, complainants further allege that the “special train service” set forth in AGR Tariff 0900, as further described in the SOP, requires that (1) RailAmerica subsidiary railroads, including AGR, move TIH at no more than 10 miles per hour; (2) each TIH car be inspected by a qualified mechanical employee before the car is pulled from the interchange track; and (3) employees of the RailAmerica subsidiary railroad accompany the TIH shipment at all times while on RailAmerica property and until the receiver has acknowledged receipt.

² AGR Tariff 0900 was not submitted into the record. The discussion of the provisions of the 0900 tariff in this decision is based on the complainants’ representations. Defendants submitted copies of the SOP and the subsequently adopted AGR Tariff 0900-1 as exhibits to their Response to Motion for Injunctive Relief, filed May 9, 2011.

In response to the complaint, defendants filed an answer and a motion to dismiss on May 5, 2011. In both filings, defendants state that AGR Tariff 0900 was canceled on April 29, 2011 (canceled tariff), and that AGR Tariff 0900-1 was instead adopted on the same day (replacement tariff). Defendants argue that replacement tariff 0900-1 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 between AGR and affiliated railroads and shippers of TIH/PIH materials. They claim that the SOP only recommended certain actions, such as a speed limit and inspection, accompaniment, and permitting provisions.

The table below compares the 2 tariffs:

Provision	canceled tariff (0900)	replacement tariff (0900-1)
Train service (name)	“Special train service” – dedicated train and crew.	“Priority train service” -- “More expeditious service” than the normal course of business to receiver.
Permit/Notice	Special permit – tendered to AGR no less than 5 days before interchange	Notice form – tendered to AGR with date AGR requested to take possession
Car limit	1-3 TIH/PIH cars per train	1-3 TIH/PIH cars per train
Speed Limit	10 m.p.h. (per the SOP, according to complainants).	No specific speed limit – reasonable speed for conditions
Inspection	RailAmerica qualified mechanical employee to inspect each car at interchange (per the SOP, according to complainants)	Mechanical inspector shall inspect cars upon placement on interchange track
Accompaniment	AGR employees must accompany TIH shipments at all times while on railroad property (per the SOP, according to complainants)	None

The comparison shows several differences between the 2 tariffs. On May 16, 2011, complainants filed 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 the “special train service” required by AGR.

2. Docket No. FD 35517

In Docket No. FD 35517, CF Industries, Inc. (CF) filed a petition for declaratory order on May 17, 2011, requesting that the Board declare invalid and unenforceable certain tariffs addressing the movement of TIH/PIH materials issued by the Indiana & Ohio Railway Company (IORY), the Point Comfort and Northern Railway Company (PCN), and the Michigan Shore Railroad, Inc. (MSR) (collectively, the RailAmerica railroads), as well as any associated implementation procedures under the SOP. The challenged tariffs are identical to the replacement tariff in Docket No. NOR 42129, other than the actual rates charged.

On June 6, 2011, the RailAmerica railroads replied, requesting that the petition be denied and contending that the declaratory order process is inappropriate in this case. The RailAmerica railroads argue that: (1) CF should be required to file a complaint under 49 U.S.C. § 10702(b), instead of petitioning for a declaratory order; (2) there is no case or controversy here that needs to be resolved under the declaratory order process, and the SOP is without force and effect; and (3) a reference in CF's petition to the transportation charges in the challenged tariffs is actually a thinly veiled rate reasonableness complaint that should be litigated under 49 U.S.C. §§ 10701 and 10707. The RailAmerica railroads also assert that the SOP is simply a presentation intended to open a dialogue between the RailAmerica railroads and shippers of TIH/PIH materials and that it has no binding effect. They note that the RailAmerica railroads' tariffs adopted different processes than those in the SOP with respect to train speed and notice of shipment.

PRELIMINARY MATTERS

1. Docket No. NOR 42129

In Docket No. NOR 42129, defendants moved to dismiss the complaint on the basis that AGR has canceled the originally challenged tariff, AGR Tariff 0900. Defendants contend that in light of this cancellation, the complaint no longer presents a case or controversy for the Board to resolve. Defendants also moved to dismiss RailAmerica as a defendant, arguing that RailAmerica is not a rail carrier subject to the Board's jurisdiction. The Board is requesting supplemental information in connection with the complaint and the request for injunctive relief, and after the Board rules on the motion for injunctive relief, it will hold Docket No. NOR 42129 in abeyance pending issuance of the Board's final decision in Docket No. FD 35517, as discussed below. Accordingly, defendants' motion to dismiss will be addressed in a later decision.

On June 13, 2011, Arkema Inc. (Arkema) filed a Petition for Leave to Intervene. Defendants filed a reply on July 12, 2011, opposing Arkema's petition. While Docket No. NOR 42129 is held in abeyance, Arkema's petition will be similarly held in abeyance. However, Arkema, like all interested persons and the general public, will have an opportunity to participate in the declaratory order proceeding in Docket No. FD 35517. If necessary, Arkema's petition for leave to intervene in Docket No. NOR 42129 will be addressed in a later decision.

2. Docket No. FD 35517

On June 20, 2011, CF requested leave to file a reply to the RailAmerica railroads' reply in Docket No. FD 35517. The RailAmerica railroads responded to CF's request on July 11, 2011, asking the Board to reject the request and arguing again that a declaratory order proceeding is unnecessary. In the interest of compiling a more complete record, we will accept the surreplies.

On June 6, 2011, Edison Electric Institute (EEI) requested leave to file a letter as amicus curiae in Docket No. FD 35517. The RailAmerica railroads filed a reply on June 27, 2011, requesting that the Board deny EEI's request and strike the amicus letter from the record. In this decision, the Board is instituting a declaratory order proceeding in Docket No. FD 35517 to provide an opportunity for the parties in both cases, all other interested persons and the general public to participate in developing a single record. Therefore, EEI's request for leave to file its letter is granted.

DISCUSSION AND CONCLUSIONS

1. Need for Clarification in Docket No. NOR 42129

The complaint and request for injunctive relief are not premised solely on the SOP, and it is unclear whether the challenge encompasses tariff provisions that have been changed. Compare Motion for Injunctive Relief at 7 (asking the Board to “enjoin the RailAmerica SOP and its resulting tariffs by RailAmerica subsidiaries . . .”) with Complainants' Reply to Motion to Dismiss filed May 16, 2011 at 7-8 (stating that complainants do not challenge the actions of AGR alone, or a tariff or items issued by AGR alone, but instead challenge the SOP and “special train service”). For example, the replacement tariff specifically eliminates (1) any reference to the SOP; (2) the 10 mile per hour speed limit for trains carrying TIH cars; and (3) reference to a dedicated train and crew. In addition, it is unclear whether the replacement tariff's “priority train service” is substantially different from the canceled tariff's “special train service,” and, if so, in what respects.

These changes raise questions about exactly what practices complainants are challenging and seeking to enjoin. Thus, complainants are directed to file supplemental information in Docket No. NOR 42129 clarifying briefly what specific practices, whether found in the SOP, replacement tariff, or elsewhere (including the actual tariff or other items that are the subject of the request for injunctive relief), they are challenging and seeking to enjoin by October 17, 2011. Replies will be due on October 31, 2011. We will rule on complainants' injunction request after the requested supplemental information and any replies have been filed.

2. Reasons for Instituting a Declaratory Order Proceeding in Docket No. FD 35517 to Develop a Single Record on the Remaining Issues

In both proceedings, the tariffs involved – i.e., AGR replacement tariff 0900-1 (if complainants in Docket No. NOR 42129 intend to challenge the replacement tariff), IORY Tariff 0900, PCN Tariff 0900, and MSR Tariff 0900 – share common substantive terms. Moreover, each of the tariffs appears to integrate some of the provisions of the SOP or could do so, as complainants allege AGR did in the cancelled tariff. Thus, the relevant facts concerning the practices of the defendant railroads appear to be substantially the same.

The basic controversies also appear to be the same, although presented to the Board as different types of proceedings. Many of the legal issues before us here likely will involve the same statutes – 49 U.S.C. § 10702 (unreasonable practice) and § 11101 (violation of the common carrier obligation). The parties' arguments on the merits in both cases are also likely to be similar. The same precedent should therefore apply to both cases.

Finally, the legal issues presented may ultimately affect not only the parties to the 2 cases before the Board, but others within the industry that transport, handle, receive, or ship TIH/PIH. Thus, the Board's determination in either of these cases is likely to resolve similar issues that might be raised in future proceedings.

Accordingly, good cause exists to address the issues raised in both cases in one proceeding and to allow for broader public input. To do so, the Board is instituting a declaratory order proceeding in Docket No. FD 35517, in which the parties in that docket as well as Docket No. NOR 42129 and any other interested persons and the general public may participate, to allow a single record to be developed for both cases. The complaint proceeding, Docket No. NOR 42129, will be held in abeyance following the Board's ruling on complainants' motion for injunctive relief. Following resolution of the declaratory order proceeding, complainants will have the opportunity to seek appropriate relief, if any, in Docket No. NOR 42129, based on the record developed in Docket No. FD 35517.

In Docket No. FD 35517, the RailAmerica railroads contend that the declaratory order process is inappropriate and that CF should be required to file a complaint under 49 U.S.C. § 10702(b).³ But under 5 U.S.C. § 554(e) and 49 U.S.C. § 721, the Board has broad discretion to

³ The RailAmerica railroads argue that a party should be required to use the more specific complaint process when it is available, rather than the more general declaratory order process, citing Entergy Arkansas, Inc. v. Union Pacific Railroad, NOR 42104, slip op. at 1-2 (STB served June 26, 2009). That decision, however, does not address whether a party must file a complaint as opposed to seeking a declaratory order. For the reasons discussed in this decision, allowing a single record to be developed in Docket No. FD 35517 is an appropriate way to address the issues raised in these cases.

issue a declaratory order to terminate a controversy or remove uncertainty.⁴ Here, the complainants in Docket No. NOR 42129 and the petitioner in Docket No. FD 35517 seek guidance regarding the validity and enforceability of requirements related to the transportation of TIH/PIH materials. Moreover, as noted, the issues raised in both proceedings may affect others in the industry that either handle or ship TIH/PIH. Providing a single forum for all interested persons and the general public to address the issues presented by CF and complainants will contribute to administrative efficiency. Thus, a petition for declaratory order is an appropriate procedural mechanism to address the common issues presented in these cases.⁵

Pursuant to the Board's authority under 5 U.S.C. § 554(e) and 49 U.S.C. § 721, a proceeding will be instituted to resolve the controversies at issue here. Any person who wishes to participate in this proceeding as a party of record (POR) must file, no later than October 17, 2011, a notice of intent to participate and must adhere to the procedural schedule established in the Appendix. To ensure each POR receives all filings, the Board will serve, as soon as practicable, a notice containing the official service list (the service-list notice). Each POR will be required to serve upon all other PORs, within 10 days of the service date of the service-list notice, copies of all filings previously submitted by that party (to the extent such filings have not previously been served upon such other parties).⁶ Each POR also will be required to file with the Board, within 10 days of the service date of the service-list notice, a certificate of service indicating that the service required by the preceding sentence has been accomplished.

Although the legal nature of a declaratory order proceeding might not always necessitate discovery, because of the factually intense nature of the dispute here and because the record that will be developed will govern not just the declaratory order case in Docket No. FD 35517 but the complaint case in Docket No. NOR 42129 as well, we will permit discovery among complainants, defendants, CF, the RailAmerica railroads, and any other shippers potentially affected by the challenged practices, including shipper organizations that represent those shippers. These entities may conduct discovery pursuant to the Board's regulations at 49 C.F.R. § 1114.21, et seq.

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

⁴ See Bos. & Me. Corp. v. Town of Ayer, 330 F.3d 12, 14 n.2 (1st Cir. 2003); Delegation of Auth.—Declaratory Order Proceedings, 5 I.C.C.2d 675 (1989).

⁵ The RailAmerica railroads' contention that CF's reference to the transportation charges in the challenged tariff provisions turns this into essentially a rate reasonableness complaint would not, even if correct, preclude a declaratory order proceeding. CF's petition is not limited to arguments regarding costs, but rather encompasses a variety of practices.

⁶ Service may be made by e-mail if service by e-mail is acceptable to the recipient.

It is ordered:

1. Complainants are directed to file supplemental information in Docket No. NOR 42129 clarifying briefly what specific practices, whether found in the SOP, replacement tariff, or elsewhere (including the actual tariff or other items that are the subject of the request for injunctive relief), they are challenging and seeking to enjoin by October 17, 2011. Replies are due on October 31, 2011.

2. The request for institution of a declaratory order proceeding is granted, and a declaratory order proceeding under 5 U.S.C. § 554 and 49 U.S.C. § 721 is instituted in Docket No. FD 35517.

3. The parties to the proceedings in Docket Nos. FD 35517 and NOR 42129 shall comply with the procedural requirements described in this decision and the procedural schedule shown in the Appendix.

4. EEI's request for leave to file a letter as amicus curiae is granted.

5. CF's June 20, 2011 filing and the RailAmerica railroads' July 11, 2011 filing are accepted.

6. This decision is effective on its service date.

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

APPENDIX

Procedural Schedule

September 30, 2011	Declaratory order proceeding instituted
October 17, 2011	Notices of intent to participate due
November 29, 2011	Close of discovery
January 13, 2012	Opening evidence and argument due from all PORs
February 27, 2012	Reply evidence and argument due from all PORs
March 13, 2012	Rebuttal evidence and argument due from all PORs