

SERVICE DATE - JANUARY 30, 1997

SURFACE TRANSPORTATION BOARD<sup>1</sup>

DECISION

No. 41613

C. H. TRANSPORTATION SERVICE, INC.  
v.  
BURLINGTON NORTHERN RAILROAD COMPANY

Decided: January 21, 1997

By complaint filed September 8, 1995, C. H. Transportation Service, Inc. (CHT) asserted 35 overcharge claims<sup>2</sup> against Burlington Northern Railroad Company (alternatively referred to as "defendant" or "BN")<sup>3</sup> for rail car shipments of corn from various origins in Nebraska and Iowa to destinations in Arkansas, totaling \$142,651.00, on behalf of its clients: (1) the Scoular Company (29 claims totaling \$120,442.00); and (2) The Peavey Company (6 claims totaling \$22,209.00). On November 2, 1995, CHT amended its complaint to drop its 6 claims involving The Peavey Company [claim numbers 29-34].

On October 31, 1995, BN filed an answer to CHT's complaint and a motion to dismiss 26 of the 35 claims. On November 8, 1995, CHT replied. Because The Peavey Company's claims have been withdrawn, we will address BN's motion only to the extent it pertains to the Scoular Company's claims.

DISCUSSION AND CONCLUSIONS

Applicable standards. For claims against a common carrier to recover overcharges under 49 U.S.C. 11705(b)(1), a person may elect to file a complaint with the ICC (now the Board) pursuant to section 11705(c)(1). Such claims accrue "on delivery or tender of delivery by the carrier." 49 U.S.C. 11706(g).

The statute of limitations for claims under section 11705(c)(1) is contained in section 11706(b), which provides that

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<sup>1</sup> Proceedings before the Interstate Commerce Commission (ICC) that remained pending on January 1, 1996, must be decided under the law in effect prior to that date if they involve functions retained by the ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803. This proceeding was pending with the ICC prior to January 1, 1996, and relates to functions retained under Surface Transportation Board (Board) jurisdiction pursuant to new 49 U.S.C. 10701. Citations are to the former sections of the statute, unless otherwise indicated.

<sup>2</sup> These claims are numbered and set forth in Appendix A. All of the claims rely on the same issue of tariff interpretation. CHT disputes BN's use of a combination of rates set forth in Items 33450 and 33550 of Tariff ICC BN 4022-G instead of a mileage rate constructed using Items 33940, 33945, and 11050 of Tariff ICC BN 4022-G.

<sup>3</sup> On October 12, 1995, the ICC served a notice and copy of the complaint on defendant's representative.

"the complaint must be filed within 3 years after the claim accrues." Section 11706(d) extends the limitation period "for 6 months from the time written notice is given to the claimant by the carrier of disallowance of any part of the claim specified in the notice if a written claim is given to the carrier" within the limitation period.

BN's arguments. BN concedes that claim numbers 16, 25, and 35 are timely, as they involve shipments delivered after September 8, 1992, and that claim numbers 6, 7, and 14 qualify for the 6-month extension of section 11706(d). However, BN seeks to dismiss the remaining 23 claims<sup>4</sup> filed on behalf of the Scoular Company, alleging that these 23 claims are barred by the 3-year statute of limitations contained in 49 U.S.C. 11706(b) and are otherwise not timely under the 6-month extension of the statute of limitations contained in 49 U.S.C. 11706(d). See V.S. of Mark A. Summers, BN's Commodity Manager in the Agricultural Commodities Business Unit, and Mr. Summers' Attachment No. 1 (listing the claims, date of written declination, amount of each claim, waybill numbers, and date of delivery to destination).

CHT's reply. In its reply, CHT concedes that the claims at issue accrued more than 3 years before the complaint was filed, but it contends that its complaint was timely because all of its claims were subject to the 6-month extension period of section 11706(d). It states that its original claims were filed with BN well within the 3-year limitations period, and that BN's overcharge department declined its original claims on various dates beginning on November 11, 1994, with instructions to contact Mr. Summers of BN's marketing department. On November 21, 1994, CHT submitted to Mr. Summers all of the claims declined as of that date, and on January 1, 1995, it submitted the balance of declined claims. These submissions were summarily declined by letter from Mr. Summers on February 16, 1995. On February 22, 1995, CHT resubmitted to Mr. Summers all of the declined claims for further review. BN continued to consider the overcharge claims until August 14, 1995, when Mr. Summers issued a letter declining the claims and stating that "[t]his is our last declination of these overcharge claims."<sup>5</sup> CHT argues that, because BN's final declination was not communicated to the shipper until August 14, 1995, section 11706(d)'s 6-month extension period did not begin to run until August 14, 1995, and did not expire until February 14, 1996.

Analysis. It is uncontested that the 23 claims in question were originally submitted to BN within the 3-year period, and that the dates of BN's initial declination of these claims range from November 11, 1994, to December 28, 1994. BN argues that, because CHT filed its claims with the ICC more than 6 months after BN first declined them, they exceed the time limits in section 10706(d) and, therefore, they are all barred. We disagree.

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<sup>4</sup> Defendant seeks the dismissal of claim numbers 1, 2, 3, 4, 5, 8, 9, 10, 11, 12, 13, 15, 17, 18, 19, 20, 21, 22, 23, 24, 26, 27, and 28.

<sup>5</sup> CHT notes that, by letter dated February 23, 1995, it had requested an informal opinion. In response, ICC staff issued a non-binding, informal opinion letter dated May 17, 1995. CHT states that it submitted a copy of the informal opinion to BN on May 30, 1995.

Section 11706(d) extends the limitation period for an additional 6 months after the railroad declines a claim, as long as a written claim was given to the carrier within the 3-year limitation period. See Deneholz & Janer, Inc., Petition for Declaratory Order, 355 I.C.C. 244, 248, 249 (1977). The statute does not preclude the shipper from resubmitting a claim that the carrier earlier denied. Thus, CHT did not lose its right to file a complaint merely because it resubmitted its claims with BN before filing its formal complaint with the ICC, as long as the last submission to BN occurred within 3 years after the claim accrued and the formal complaint to the ICC was filed within 6 months after its claim was denied.

According to the record before us, CHT made its final resubmission of all its claims to BN on February 22, 1995. At that time, the 3-year period had already expired for seven claims (claim numbers 1, 2, 5, 8, 9, 12, and 13), which had accrued between December 2, 1991, and February 14, 1992. The submissions to BN on November 21, 1994, and January 1, 1995, were the last submissions within the 3-year period for these claims. BN summarily declined all of those claims by letter on February 16, 1995, which is the date to be used in calculating the 6-month extension for those claims. Because the 6-month extension for those claims expired on August 16, 1995, and the formal complaint was not filed until September 5, 1995, those claims are barred by the statute of limitations.

The February 22, 1995 resubmission as to the other 16 claims was well-within the 3-year limitation period. BN declined these claims in writing on August 4, 1995, which is the date to be used in calculating the 6-month extension for those claims. As indicated, CHT filed its formal complaint on September 8, 1995, well within the 6-month extension period.

Based on the above, we find that 49 U.S.C. 11706(b) bars our consideration of claim numbers 1, 2, 5, 8, 9, 12, and 13. Accordingly, BN's motion to dismiss will be granted concerning those claims. A procedural schedule will be established to develop a record upon which a decision can be made for the remaining claims.

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

It is ordered:

1. The motion to dismiss is granted, in part, to the extent claims numbers 1, 2, 5, 8, 9, 12, and 13 are dismissed for the reason stated above.
2. Complainant's opening statement is due March 3, 1997.
3. Defendant's reply is due March 31, 1997.
4. Complainant's rebuttal is due April 21, 1997.
5. This decision is effective on the service date.

By the Board, Chairman Morgan and Vice Chairman Owen.

Docket No. 41613

Vernon A. Williams  
Secretary

APPENDIX A

AMENDED LIST OF CLAIMS

#	Complainant Claim Number	BN Claim Number	Way Bill Number	Delivery Date	Amount Claimed
1	24041950	99114359	681021	02/03/92	1770
2	24041949	99114360	266272	12/02/91	1570
3	24041951	99114358	897788	03/03/92	1270
4	24041962	99114372	16254	03/03/92	5292
5	24041955	99114379	776593	02/14/92	3078
6**	24041957	99114377	862271	10/25/91	7332
7**	24041958	99114376	870883	10/29/91	282
8	24041959	99114375	348232	12/14/91	4134
9	24041960	99114374	370313	12/18/91	78
10	24041961	99114373	307445	04/13/92	5292
11	24041966	99114368	495113	05/07/92	7452
12	24041963	99114371	371945	12/16/91	702
13	24041964	99114370	667963	02/07/92	3125
14**	24041971	99114363	467058	05/04/92	361
15	24041973	99114361	87478	03/21/92	1762
16**	24142039	99114571	590128	09/21/92	7452
17	24142038	99114572	57669	07/17/92	8694
18	24142035	99114575	702336	06/05/92	5096
19	24142041	99114569	156253	07/31/92	5238
20	24142042	99114568	718917	06/07/92	196
21	24042019	99114533	51432	07/10/92	5238
22	24042027	99114525	749941	06/23/92	5500
23	24142043	99114567	778196	06/15/92	3186
24	24142034	99114576	425537	08/29/92	8694
25**	24042014	99114522	541824	09/14/92	5292
26	24042018	99114518	802738	06/19/92	5292
27	24142028	99114524	394943	08/25/92	3078
28	24142036	99114574	869481	07/06/92	5292
29*	24142082	99114798	685564	02/03/92	1770
30*	24142083	99114799	435045	01/08/92	800
31*	24142081	99114797	218264	03/31/92	1360
32*	240552776	99117173	138591	07/22/92	7398
33*	240552777	99117172	670970	10/01/92	6588
34*	240552778	99117171	88081	07/22/92	4293
35**	240652799	99117281	718551	10/05/92	8694

\* Claims removed from the complaint by CHT's amendment filed 11/2/95.

\*\* BN concedes that these claims are timely.