

SERVICE DATE – MAY 9, 2012

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 35387

AG PROCESSING INC A COOPERATIVE—PETITION  
FOR DECLARATORY ORDER

Digest:<sup>1</sup> A railroad created new rules and charges it would apply to railcars that become overweight during transit due to inclement weather. A group of grain shippers have challenged these new rules. Because of the types of railcars used by these shippers (and the internal weight tolerances used by the railroad), none of these grain shippers has ever been, or is reasonably likely to be, subject to these overweight charges or penalties. Accordingly, the Board will not rule on the reasonableness of the tariff at this time. The declaratory order is dismissed without prejudice to Petitioners or other entities filing a new challenge to the tariff when and if it is applied to Petitioners' form of shipments.

Decided: May 8, 2012

BACKGROUND

Ag Processing Inc A Cooperative (Ag Processing) has filed a petition for a declaratory order challenging the reasonableness of a Norfolk Southern Railway Company (Norfolk Southern) tariff. Ag Processing challenges the tariff insofar as it imposes charges and penalties on loaded railcars that exceed the car's weight limit as a result of weather conditions encountered after the car is delivered to the railroad. For the reasons set forth below, we will dismiss Ag Processing's petition.

Norfolk Southern's Tariff Item 5000, Part D, applies to railcars that become overloaded because of weather conditions (the Inclement Weather Provision) in transit. According to Norfolk Southern, the purpose of the Inclement Weather Provision is to mitigate the railroad's general rule that shippers are responsible for overweight railcars regardless of cause. Norfolk Southern asserts that this provision was specifically designed to address concerns of customers about open-top railcars becoming overweight en route due to inclement weather.

Under the Inclement Weather Provision, if a railcar is detected to be overweight during transit, Norfolk Southern must notify the shipper. Within 24 hours, the shipper must submit a

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<sup>1</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).

certification that the railcar was not overweight at the time that it was loaded. If the shipper fails to provide the certification within 24 hours, then Norfolk Southern will immediately commence assessing charges to the shipper for demurrage, reweighing, and switching as well as a penalty if the railcar is 5,000 or more pounds over the maximum weight stenciled on the railcar. If the shipper does timely provide the certification, however, a five-day window begins wherein the railcar can be brought into compliance if the shipper “partially unloads the car or otherwise eliminates the overload condition at its expense.” If the railcar remains overweight at the end of the five-day period, the shipper will be charged for switching, reweighing, demurrage, and possibly a penalty. However, Norfolk Southern claims that it has established “confidential tolerances,” to which shippers are not privy, that provide a margin over and above the maximum weight stenciled on the railcar. Norfolk Southern will not treat the railcar as overloaded unless it exceeds the stenciled maximum weight plus the tolerance.

On July 20, 2010, Ag Processing filed a petition for declaratory order challenging the reasonableness of the Inclement Weather Provision. The petition was amended to add other shippers, all of whom also ship their products in covered railcars.<sup>2</sup> The current revised tariff became effective on August 4, 2010.

Petitioners claim that they should only be charged for the freight they load in the railcar. They claim that, if they load the railcar within Norfolk Southern’s weight limits, they should not be assessed charges and a penalty for any additional weight as a result of inclement weather while the car is in transit. Petitioners contend that, while they could underload the railcars to avoid the possibility of incurring weather-related charges and penalties, subjecting the shippers to the prospect of these charges and penalties unless they underload also would constitute an unreasonable practice. Also, if Petitioners were to underload, they would need to use more cars and, accordingly, would face higher costs. Petitioners argue that a better practice would be for Norfolk Southern to clear the railcars of ice and snow itself when a railcar becomes overweight due to weather conditions. Petitioners further question why the window to clear a railcar after notification is five days, why they should be charged for weather-related issues that occur on routes not chosen by the shippers, and why they should be liable for the weight of ice or snow accumulating on a railcar after Norfolk Southern has taken possession of the railcar. In sum, Petitioners seek a declaratory order stating that to charge more for a railcar that has become overloaded due to weather while in the railroad’s possession is an unreasonable practice under 49 U.S.C. § 10702.

After Board-sponsored mediation failed, Norfolk Southern filed a motion to dismiss the petition and terminate the proceeding. Norfolk Southern asserts that it created the Inclement Weather Provision at the request of other customers that ship in open top railcars. The tariff was designed to be an improvement over the prior practice that did not distinguish between overweight railcars caused by the shippers overloading them at origin and those made overweight during transit due to inclement weather.

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<sup>2</sup> The amended petition added Bunge North America, Inc., Archer Daniels Midland Company, Louis Dreyfus Corporation, and Perdue Agribusiness, Inc. as petitioners.

In contrast, Norfolk Southern notes that Petitioners transport their shipments in covered railcars. While the tariff on its face applies to shipments in both open and covered railcars, Norfolk Southern argues that, as a practical matter, the provision is unlikely to apply to shipments in covered railcars because of the internal tolerances permitted by the railroad. In support, Norfolk Southern disclosed under seal those internal tolerances and claimed that for the last four years (since Norfolk Southern has been keeping records on this issue), it has no record of Petitioners, or any other covered railcar user, having an overloaded railcar due to weather conditions that would trigger the Inclement Weather Provision. As such, Norfolk Southern argues that there is no controversy here because the Inclement Weather Provision has never been, nor is reasonably ever likely to be, applied to Petitioners.

In reply, Petitioners counter that there is uncertainty and a controversy here. While Petitioners acknowledge that the challenged provisions of the tariff have never been applied to them, they argue that this might only be because the confidential tolerances create a buffer. Without this buffer, which, Petitioners argue, Norfolk Southern can eliminate at any time, they might be charged under the Inclement Weather Provision. Petitioners claim that a shipper must choose each time it loads a railcar in the winter whether to underload the railcar or possibly face the charges and penalty assessed by Norfolk Southern. This dilemma about how full to load a railcar causes uncertainty and controversy, and is compounded by the confidential tolerances that create an unknown maximum weight available for loading beyond the stenciled weight.<sup>3</sup>

In a decision served on September 22, 2011, the Board instituted a declaratory order proceeding and announced an oral argument to further explore the case. The Board held the oral argument on October 25, 2011. In addition to the written documents filed in the record, the Board received additional input from the parties at that hearing.

## DISCUSSION AND CONCLUSIONS

Under 5 U.S.C. § 554(e) and 49 U.S.C. § 721, we have discretionary authority to issue a declaratory order to terminate a controversy or remove uncertainty. We have broad discretion in determining whether to issue a declaratory order. InterCity Transp. Co. v. United States, 737 F.2d 103 (D.C. Cir. 1984); Pet. of Nebkota Ry. and W. Plains Co. for Declaratory Order, FD 35352 (STB served Apr. 28, 2010); Chelsea Prop. Owners—Pet. for Declaratory Order—Highline, FD 34259 (STB served Nov. 27, 2002); Delegation of Auth.—Declaratory Order Proceedings, 5 I.C.C. 2d 675 (1989). As discussed below, we need not rule on the reasonableness of the Inclement Weather Provision because there is no present likelihood that Petitioners will be impacted negatively by the tariff.

The Inclement Weather Provision has not been applied to Petitioners, and Petitioners have not given us any reason to believe that Norfolk Southern is likely to apply the provision to their shipments in the future. For as long as the railroad has been keeping records on the issue, none of the Petitioners has ever been charged for an overweight railcar caused by weather, even

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<sup>3</sup> Petitioners also attempt to demonstrate that there is a controversy here because Norfolk Southern agreed to enter mediation. To protect our mediation process, we will draw no such inference from the fact that parties agreed to participate in Board-sponsored mediation.

during the unusually harsh 2010 winter. Nor have Petitioners alleged that they have underloaded covered railcars to avoid having their cars become overloaded during transit due to snow, ice, or other weather conditions.<sup>4</sup> Covered railcars, by their nature, are far less likely than open top railcars to become overweight due to inclement weather. Petitioners acknowledged at oral argument that “the problem of overweight cars does not involve tank cars and covered hopper cars.” Tr. 15. These facts, when coupled with the overweight tolerances used by Norfolk Southern, mean that as long as Petitioners continue to load their product in covered railcars at the stenciled weight, there is no reasonable likelihood that they will ever be penalized for railcars made overweight during transit due to inclement weather. Under these circumstances, we see no reason to weigh in on a matter where the party seeking declaratory relief has not substantiated any likely potential adverse consequences from operation of the tariff. In short, we do not see a present controversy or uncertainty that rises to the level of needing Board resolution.

The record indicates that Norfolk Southern did not create the Inclement Weather Provision with an intent to impact Petitioners’ covered railcar traffic. Rather, at the request of other customers that ship in open top railcars, the tariff was designed to be an improvement over the prior practice that did not distinguish between overweight railcars caused by the shippers overloading them at origin and those made overweight during transit due to inclement weather. No customers shipping in open top railcars have independently challenged the Inclement Weather Provision, nor did any seek to intervene in this proceeding to voice concerns about it.

We note that it appears to be common industry practice for railroads to create rules to govern overweight railcars. We are reluctant here to opine on the legality of the specifics of Norfolk Southern’s particular provision in the absence of actual or likely concrete injury to Petitioners. Such a ruling could have industry-wide implications and possible unintended consequences. However, no party should construe our decision here as endorsing the Inclement Weather Provision created by Norfolk Southern, the reasonableness of its application, or the reasonableness of other similar tariffs. This is particularly true where, as here, the parties disagree on how the Inclement Weather Provision would operate if it were ever applied to the Petitioners. Moreover, because we do not reach the merits of this case given both parties’ acknowledgement that the tariff is unlikely to be applied to the Petitioners, we need not decide whether Norfolk Southern’s confidential tolerances – which are not known to shippers and are not embodied in the tariff (and thus not binding on Norfolk Southern) – would be sufficient, standing alone, to defeat a claim that the tariff itself is unreasonable.

We dismiss this petition without prejudice. Should Norfolk Southern charge or penalize the Petitioners under the Inclement Weather Provision, Petitioners (or any other affected entity) may seek appropriate relief at the Board.

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<sup>4</sup> At oral argument, Petitioners claimed that they have underloaded railcars that already had accumulations of snow or ice on them at the point of loading in order to avoid exceeding the permissible weight. (Oral Argument Tr. 16-17, Oct. 25, 2011). They do not claim, however, to have underloaded railcars that are presented to them free of ice and snow to prevent those cars from becoming overloaded during transit due to weather.

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

It is ordered:

1. The petition for a declaratory order is dismissed without prejudice.
2. This decision is effective on its date of service.

By the Board, Chairman Elliott, Vice Chairman Mulvey, and Commissioner Begeman. Commissioner Begeman dissented with separate expression.

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COMMISSIONER Begeman, dissenting:

I believe the Board should resolve the issue raised by the petition, rather than choosing to dismiss the case.

The parties have devoted considerable time, effort, and resources to this matter, first raised by Ag Processing in July 2010. They participated in Board-sponsored mediation. They filed pleadings on the merits. And after the Board instituted a declaratory order proceeding, they delivered oral argument. A full record has been developed.

In the past, the Board has issued declaratory orders to terminate controversy or remove uncertainty. It has ruled on the reasonableness of tariff provisions without requiring that the complaining party first suffer penalties. Indeed, other petitions for declaratory orders regarding tariff provisions are pending at the Board. Those, too, were brought to us before parties were subjected to consequences from the operation of the tariff provisions in question. I would hope that the Board will conclude those cases too, without first requiring the imposition of penalties or application of other enforcement provisions. Shouldn't the Board resolve controversy or uncertainty, when it is able to do so, before serious disruption to a particular party?

It may be that the challenged provisions of the tariff at issue have not yet been applied to the detriment of Ag Processing or the other shippers who are petitioners in this case. But the tariff clearly governs their shipments, impacts their business decisions, and imposes consequences on them for events that are not of their doing or within their control. Making the petitioners wait even longer, until after they have been charged or penalized, will not result in a materially different record than the one that has already been developed over the course of this proceeding.

The record here shows that there is uncertainty as to whether or not this tariff is reasonable for all shipments to which it applies, and the Board should issue a decision on the matter in question.