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SURFACE TRANSPORTATION BOARD

DECISION

STB Docket No. 42060

NORTH AMERICA FREIGHT CAR ASSOCIATION — PROTEST AND
PETITION FOR INVESTIGATION — TARIFF PUBLICATIONS OF THE
BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY

STB Docket No. 42061

RAILWAY PROGRESS INSTITUTE COMMITTEE ON TANK CARS
PETITION FOR INVESTIGATION AND PROTEST PURSUANT TO EX PARTE NO. 328

STB Docket No. 42062

THE CHLORINE INSTITUTE, INC. — PROTEST AND
PETITION FOR INVESTIGATION — TARIFF PUBLICATIONS OF
UNION PACIFIC RAILROAD COMPANY

STB Docket No. 42063

RAILWAY PROGRESS INSTITUTE COMMITTEE ON TANK CARS
PETITION FOR INVESTIGATION AND PROTEST PURSUANT TO EX PARTE NO. 328

STB Docket No. 42064

E. I. DUPONT DE NEMOURS AND COMPANY —
PROTEST AND PETITION FOR INVESTIGATION

Decided: October 17, 2001

These proceedings involve an agreement reached a number of years ago by representatives of the railroad industry, on the one hand, and owners and suppliers of tank cars, on the other. The agreement was approved and prescribed by our predecessor, the Interstate Commerce Commission (ICC), in 1986, following several years of industry-wide negotiations by interested parties.¹ The 1986 Agreement replaced an earlier version, adopted in 1979, which itself had a long history.

The 1986 Agreement establishes a formula for the calculation of allowances to be paid by railroads to private tank car owners for use of the owners' cars,² based upon a variety of factors.

¹ The agreement (hereinafter the 1986 Agreement) was prescribed in Investigation of Tank Car Systems, 3 I.C.C.2d 196 (1986).

² Id. at 204-09. (1986 Agreement, §§1-4, 6).

It also provides a mechanism for periodic updates.³ The tank car allowances are contained in a national mileage allowance “tariff,” which also sets out charges applicable to handling and holding empty private tank cars under certain circumstances.⁴ The 1986 Agreement establishes procedures, including the availability of investigation, to address what are described as “departures” from the prescribed allowance system.⁵ To provide flexibility to continue to adapt to changing circumstances, the 1986 Agreement contains a specific provision for the ICC to require the parties to reopen negotiations under certain circumstances.⁶

The instant proceedings involve challenges to certain charges recently imposed on privately owned tank cars by The Burlington Northern and Santa Fe Railway Company (BNSF) and Union Pacific Railroad Company (UP). By petitions filed June 26, 2001, and June 27, 2001, respectively, the North America Freight Car Association (NAFCA)⁷ and the Railway Progress Institute’s Committee on Tank Cars (RPI-CTC) ask us to declare that BNSF tariffs establishing certain storage and diversion charges are “departure tariffs” because they add new or increased charges for services that, according to NAFCA and RPI-CTC, are not consistent with the tank car allowance formula.⁸ NAFCA and RPI-CTC ask us to investigate whether these new charges are lawful and reasonable under the standards set up in the 1986 Agreement. Similar petitions challenging similar UP tariffs published to become effective on October 1, 2001, were filed on September 25, 2001, by RPI-CTC, on September 26, 2001, by E. I. DuPont de Nemours and Company, and also on September 26, 2001, by CI.⁹

BNSF has filed a motion to dismiss each of the proceedings involving it. BNSF argues that the tariffs establishing the new charges are not departure tariffs because the new charges are consistent with the tank car allowance formula in the 1986 Agreement. BNSF also argues that the new charges are lawful under existing ICC precedent.¹⁰ UP has replied in opposition to the

³ Id. at 209. (1986 Agreement, §7).

⁴ Id. at 208-09. (1986 Agreement, §5).

⁵ Id. at 209-10. (1986 Agreement, §8).

⁶ Id. at 211. (1986 Agreement, §9).

⁷ NAFCA’s petition was filed on behalf of itself and 10 of its separately identified owner/lessor members.

⁸ Requests for intervention were filed on August 7, 2001, by The Chlorine Institute, Inc. (CI), on August 16, 2001, by BP Corporation of North America Inc., on September 10, 2001, by the U.S. Clay Producers Traffic Association, Inc., and on September 13, 2001, by the National Industrial Transportation League (NITL).

⁹ On October 5, 2001, NITL filed requests to intervene in two of the proceedings involving UP (STB Docket Nos. 42063 and 42064).

¹⁰ In support, BNSF cites Charges for Movement of Empty Cars, B&P RR, Inc., 7 I.C.C.2d 18 (1990).

petitions in the proceedings involving UP. UP maintains that its charges, which have been challenged as they relate to storage of tank cars, are not departure tariffs.¹¹

DISCUSSION AND CONCLUSION

The 1986 Agreement expressly provides for us to require the parties to reopen the negotiations when more than three interested parties file petitions at the agency. Here, petitions have been filed by numerous parties. A broad base of affected parties has raised concerns and BNSF and UP have responded to the challenges of their publications. We will resolve this matter, if it becomes necessary for us to do so. At this time, however, we believe that the private parties are in a better position than we are to determine how best to resolve the issues raised in these proceedings. Therefore, we will hold these proceedings in abeyance and require the parties to engage in negotiations as provided for in the 1986 Agreement. Because these proceedings raise issues of industry-wide importance, discussions should be held on an industry-wide basis so that all affected parties can have the opportunity to participate.

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

It is ordered:

1. These proceedings will be held in abeyance while the parties and other interested individuals and organizations negotiate concerning the issues raised in these proceedings.
2. The parties shall provide the Board with a written report on the progress of these negotiations by January 16, 2002.
3. This decision is effective on its service date.

By the Board, Chairman Morgan, Vice Chairman Clyburn, and Commissioner Burkes. Commissioner Burkes commented with a separate expression.

Vernon A. Williams
Secretary

¹¹ In addition, similar petitions challenging similar Norfolk Southern Railway Company (NS) tariffs published to become effective on October 3, 2001, were filed on September 27, 2001, by RPI-CTC, on September 28, 2001, by CI, and also on September 28, 2001, by U.S. Clay Producers Traffic Association, Inc. (Clay Producers). On October 10, 2001, NS announced that it had withdrawn the tariff provisions challenged by RPI-CTC, CI, and Clay Producers, in STB Docket Nos. 42065, 42066, and 42067, respectively.

Commissioner Burkes, Commenting:

These proceedings involve certain storage and diversion charges recently imposed on privately owned tank cars by the Burlington Northern and Santa Fe Railway Company (BNSF) and Union Pacific Railroad Company (UP). Protestants allege that these new charges are "departure tariffs" that violate a 1986 agreement between the railroad industry and the owners and suppliers of tank cars. This private sector agreement was approved and prescribed by our predecessor, the Interstate Commerce Commission (ICC), and set forth in Ex Parte No. 328, Investigation of Tank Car Allowance System, decided September 23, 1986 (3 I.C.C. 2d, at 196) (1986 Agreement).

This decision holds these proceedings in abeyance and requires the parties "to engage in negotiations as provided for in the 1986 Agreement." While I am very much in favor of negotiated solutions and private sector agreements and hope the parties use the time provided to reach one here, I believe the decision misconstrues the 1986 Agreement and the pending protests and petitions for investigation. I also believe that, in mandating negotiations, the Board would be deviating from the dispute resolution procedures previously negotiated by the parties and approved by the ICC in Ex Parte No. 328. In so doing, we would actually undermine our policy of supporting negotiated solutions.

The protests and petitions for investigation were filed under the provisions of Section 8, Departure Tariffs, of the 1986 Agreement. Protestants allege that the storage and diversion charges represent "departures tariffs" within the meaning of the 1986 Agreement and, therefore, are subject to a mandatory investigation by the Board under the terms of Ex Parte No. 328 which states that "A departure tariff *will* be investigated (but not suspended) by the Commission . . ." (emphasis included). BNSF and UP maintain that these charges are not departure tariffs and thus are not subject to investigation under Ex Parte No. 328.

Therefore, the question before us is whether or not these charges represent departure tariffs under the 1986 Agreement. It is a legitimate question. The Ex Parte No. 328 decision merely defines a departure tariff as a "tariff that departs in any manner from the allowance system" and lists tariffs with "allowance caps" as an example, but not the only method of "departure" subject to investigation.

Rather than dealing with the issue, however, by either instituting an investigation into the matter or by dismissing the protests and petitions, the decision holds these proceedings in abeyance (without a request from any party) and requires parties "to engage in negotiations as provided for in the 1986 Agreement." I think the decision misconstrues the 1986 Agreement. Section 8 does not include a negotiation provision. Only Section 9 of Ex Parte No. 328 addresses renegotiations. It states, in part:

... the Commission will reopen negotiations ... whenever the Commission receives petition(s) by any three or more interested parties, without requiring that such parties demonstrate good cause for renegotiation. After such requests are received by the Commission, the provisions of this order will remain in effect until revised by the Commission. (3 I.C.C. 2d, at 211)

Section 9, as I see it, requires the Board to compel renegotiation of Ex Parte No. 328, as it has here, only when the Board has been "petitioned" to do so by a minimum of three parties. No such petitions have come before the Board. The only "petitions" before the Board are those expressly under Section 8 of Ex Parte No. 328 seeking an investigation of rules changes alleged to be "departure tariffs." UP emphasizes this fact in its Reply Statement. The "renegotiation" provisions of Section 9 referenced in this decision are thus inapplicable. Parties actually desiring renegotiation appear to me to be fully capable of saying so, and none have done that. In any event, even if a Section 9 renegotiation request had been made, the other provisions of Ex Parte No. 328 would remain in effect, so that we would still be obligated to investigate "departure tariffs" if petitioned to do so.

The ICC was faced with a similar dispute in 1988 when Buffalo & Pittsburgh Railroad, Inc. established charges for the movement of empty cars to repair facilities. Protests were filed by three parties under Section 8 of Ex Parte No. 328. The ICC instituted an investigation to determine whether the departure provisions in Section 8 applied. In 1990, the ICC ultimately concluded that the tariffs were not departure tariffs and thus were not subject to automatic investigation. I believe the same approach could have been applied here. The Board could have instituted an investigation as to whether or not these tariffs are "departure tariffs" and, in the meantime, encouraged a negotiated solution during the investigation.

Finally, I remind the parties that the required negotiations should be narrowly focused on and limited to "the issues raised in these proceedings." It would be a mistake, in my mind, to reopen negotiations on the entire national mileage allowance system and formula without being requested to do so by any party. The 1986 adjustments to the earlier Ex Parte No. 328 agreement took over four years to negotiate and implement. Open-ended negotiations could not conceivably be completed in the 90-day time frame provided here. I also note that, although only 2 Class I railroads have actually published the alleged departure tariffs, the decision requires negotiations to be on an "industry-wide basis so that all affected parties can have the opportunity to participate." Consequently, in addition to the other 5 Class I carriers, there are some 500 other railroads and many other "affected parties" that could be involved, possibly adding costs and complexity to the mandated negotiations.