

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. NOR 42108

THE SPRINGFIELD TERMINAL RAILWAY COMPANY—PETITION FOR
DECLARATORY ORDER—REASONABLENESS OF DEMURRAGE CHARGES

Decided: June 11, 2010

This decision (1) grants the partial motion to dismiss filed by Fore River Warehousing and Storage Co., Inc. (Fore River), (2) grants in part and denies in part Fore River's motion to compel discovery, and (3) sets a new procedural schedule.

BACKGROUND

The Springfield Terminal Railway Company (ST) filed a petition for declaratory order seeking to have the Board resolve a dispute over demurrage charges that ST assessed against Fore River in 2004 (2004 charges) and in 2006 (2006 charges).¹ By decision served on February 10, 2009 (February 10 decision), the Board instituted a declaratory order proceeding, but only for the 2006 charges, as collection of the 2004 charges appeared to be time-barred.²

On October 6, 2009, Fore River filed a motion to compel responses to discovery requests, seeking documents that were referenced in a deposition of a ST representative conducted by Fore River on September 1, 2009, and that, according to Fore River, were subject to its discovery requests. ST filed two responses to Fore River's motion to compel: the first, on October 23, 2009, argues that the additional documents requested either were irrelevant or were already in Fore River's possession; and the second, filed on December 14, 2009, states that ST had

¹ In March 2007, ST originally filed a collection action for both the 2004 charges and 2006 charges against Fore River in the United States District Court in the District of Maine (court), see Springfield Terminal Ry. Co. v. Fore River Warehousing & Storage Co., Inc., No. 07-cv-52-GZS (D. Me. filed Mar. 27, 2007), but the court dismissed that action on July 16, 2008, because ST acknowledged that the matter should be brought before the Board and because neither party had done so during the time provided by the court. There is no pending court referral to the Board.

² In the February 10 decision, the Board provided that, if ST obtained an order from the court that the 2004 charges are not time-barred by the 3-year statute of limitations under 49 U.S.C. 11705(a), then the Board would consider ST's petition concerning the 2004 charges. ST has not submitted any court order addressing the 2004 charges.

produced all of the requested documents, except records reflecting the status of railcars carrying large quantities of roll paper either placed or released from storage-in-transit status by International Paper/Verso (IP/Verso).³ ST argues that IP/Verso's consent is required for release of the documents to Fore River and will not be forthcoming. Fore River did not reply.

In a decision served on October 28, 2009, the procedural schedule in this proceeding was held in abeyance until the Board could rule on the motion to compel. The Board directed ST to inform the Board of the status of any collection action it may be pursuing as to the charges at issue here. It also provided that Fore River would have until November 17, 2009, to file a reply to ST's status report. In a status report filed on November 5, 2009, ST informed the Board that it had re-filed a complaint against Fore River with the court, see Springfield Terminal Ry. v. Fore River Warehousing & Storage Co., No. 2:09-cv-00166-GZS (D. Me. filed Apr. 29, 2009), and that the court stayed the litigation pending a decision by the Board. In a reply and partial motion to dismiss filed on November 16, 2009, Fore River states that it largely agreed with ST's characterization of the proceedings before the court.

In its partial motion to dismiss, Fore River also requests that the Board dismiss the 2006 charges that accrued more than 3 years prior to April 29, 2009, when ST re-filed a collection action with the court. Fore River argues that the first 54 railcars listed in ST's demurrage bill dated June 8, 2006, accrued when those railcars were constructively placed before April 29, 2006, and should be barred by the 3-year statute of limitations under 49 U.S.C. § 11705. On December 7, 2009, ST filed a reply opposing the partial motion to dismiss, arguing that all of the 2006 charges accrued within the 3-year limitation period. ST does not object, however, to Fore River's description of the railcars as "constructively placed" or the date on which this occurred.

PRELIMINARY MATTER

On October 27, 2009, Fore River requested leave to file a reply to ST's first reply opposing the motion to compel, incorporating its reply. The Board's rules do not permit a reply to a reply. See 49 C.F.R. § 1104.13(c). Fore River has not provided sufficient reason for the Board to make an exception to this rule. Fore River's request for leave to file a reply to a reply will therefore be denied, and its reply to ST's reply will not be accepted.

DISCUSSION AND CONCLUSIONS

Partial motion to dismiss

Prior to filing its partial motion to dismiss before the Board, Fore River filed a motion to dismiss the 2006 charges before the court. The court denied the motion to dismiss without prejudice to Fore River renewing any arguments in favor of dismissal at a later date, assuming

³ ST states that IP/Verso (Fore River's customer) had the sole discretion to place rail cars into, and release rail cars from, storage-in-transit status.

those arguments are not mooted by the outcome of the Board’s proceeding. See Springfield Terminal Ry. v. Fore River Warehousing & Storage Co., No. 2:09-cv-166-GZS (D. Me. July 27, 2009) (order on motion to dismiss).

Here, the parties disagree over when the demurrage charges subject to Fore River’s partial motion to dismiss accrued under 49 U.S.C. § 11705(a). Fore River argues that the charges accrued upon constructive placement of railcars, which it argues occurred before ST re-filed its court action, and ST argues that the charges accrued when they were invoiced to Fore River or when those invoices were due to be paid, which ST argues occurred after it re-filed its court action.

Although neither side cites any precedent in support of its position, the matter is clear. The statute provides that a “claim [under § 11705(a)] related to a shipment of property accrues under this section on delivery or tender of delivery by the rail carrier .” (Emphasis added.) 49 U.S.C. § 11705(g). The courts have found that a claim under § 11705(a) for demurrage accrues upon delivery. See Pennsylvania R.R. v. Carolina Portland Cement Co., 16 F.2d 760, 762 (4th Cir. 1927), quoting Davis v. Timmonsville Oil Co., 285 F. 470, 472 (4th Cir. 1922) (“[d]emurrage charges are part and parcel of the transportation charges, and are covered by the same rules of law.”); Atchison, Topeka and Santa Fe Ry. v. Benchcraft, Inc., 381 F. Supp. 603, 604 (W.D. Mo. 1974). The Board has interpreted the date of delivery (or tender of delivery) as the date the railcars are placed at the shipper’s facility, either actually or constructively. See Capitol Materials Inc.—Petition for Declaratory Order—Certain Rates and Practices of Norfolk S. Ry., 7 S.T.B. 576, 584 (2004). A railcar is considered constructively placed when it “cannot be actually placed at the shipper’s facility due to a condition attributable to the shipper (such as no room on tracks in the shipper’s facility) and the railroad holds the car (either at its destination or at another available point) and then sends notice of the hold to the shipper.” Id. at 10. Here, based on ST’s own records, Fore River contends that the cars subject to the contested demurrage charges were constructively placed, and thus tendered for delivery, more than 3 years before ST re-filed its complaint on April 29, 2009. ST does not dispute Fore River’s contention as to when the railcars were constructively placed. Therefore, we will grant the partial motion to dismiss, barring \$6,060 of the charges as accruing outside the 3-year limitation period and leaving \$108,900 of the charges pending before the Board.⁴

Motion to compel

The motion to compel will be denied in part and granted in part. With respect to the requested documents that ST represents it has provided to Fore River, the motion is denied as moot. With respect to the records reflecting a change in status from storage-in-transit to inbound

⁴ We do not reach the issue of whether equitable tolling should be applied to the charges barred under § 11705(a) as the parties do not address that issue before the Board. We defer to the court as to any tolling determination before the court.

to Fore River, the motion is granted. ST objects to producing those records, arguing that they are “confidential business records” the release of which is subject to consent and that consent has been requested and denied.

ST’s bare assertion is insufficient to demonstrate that the “change in status” records cannot be produced. First, ST fails to support its assertion that the records cannot be produced without IP/Verso’s consent; ST provides no evidence of any non-disclosure or confidentiality agreement that would prohibit ST from producing documents in its possession. Second, ST fails to explain why such records would be commercially sensitive in any event. Moreover, even if the records contain confidential, proprietary, or commercially sensitive information, it is well-settled that a protective order ensures that such information will be used solely for the involved proceeding and not for other purposes. See Pennsylvania Power & Light Company v. Consolidated Rail Corporation, et al., Docket No. NOR 41295 (STB served Mar. 10, 1997). Thus, if ST is concerned that the records contain protectable information, then ST may wish to consult with IP/Verso to determine the level of confidentiality appropriate for production of those records and file a motion for the appropriate protective order before producing those records.

ST argues that it is irrelevant whether IP/Verso directs ST to ship its product in railcars to Fore River from IP/Verso’s facilities or from storage-in-transit status, and, therefore, the records showing the storage-in-transit status of certain railcars are irrelevant. But parties are entitled to discovery “regarding any matter, not privileged, which is relevant to the subject matter involved in a proceeding.” 49 C.F.R. § 1114.21(a)(1). Fore River’s discovery requests for the storage-in-transit status of certain railcars may bear on the circumstances under which railcars were placed and the issue of what party was responsible for conditions causing a backup or delay of railcars. Thus, the additional documents sought by Fore River appear relevant to ST’s claims against Fore River for the 2006 charges, as well as reasonably calculated to lead to the discovery of admissible evidence pursuant to 49 C.F.R. § 1114.21(a)(2).⁵

Accordingly, ST will be directed to provide Fore River with the outstanding requested documents by July 6, 2010. Fore River’s reply statement will be due by August 4, 2010, and ST’s rebuttal statement will be due August 24, 2010.

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

⁵ In its reply to Fore River’s motion to compel, ST stated that, on October 7, 2009, it supplemented its response to Fore River’s discovery requests, providing additional documentation regarding the delivery of railcars to Fore River and switches requested by Fore River and performed by ST, in addition to documentation substantiating ST’s calculation of charges.

It is ordered:

1. Fore River's motion for leave to file a reply to ST's reply in opposition to the motion to compel is denied.
2. Fore River's partial motion to dismiss is granted.
3. Fore River's motion to compel is granted in part and denied in part, as discussed above.
4. ST is directed to file any necessary protective order and provide the requested documents by July 7, 2010.
5. Fore River's reply statement is due by August 5, 2010.
6. ST's rebuttal statement is due by August 25, 2010.
7. This decision is effective on its date of service.

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