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SURFACE TRANSPORTATION BOARD

DECISION

STB Docket No. 42109

RAILROAD SALVAGE & RESTORATION, INC., AND G.F. WEIDEMAN INTERNATIONAL, INC. – PETITION FOR INVESTIGATION AND FOR EMERGENCY RELIEF UNDER 49 U.S.C. 721(B)(4) – SECURITY DEPOSIT FOR DEMURRAGE CHARGES, MISSOURI & NORTHERN ARKANSAS RAILROAD COMPANY, INC.
(Revised Item 1010)

STB Docket No. 42107

RAILROAD SALVAGE & RESTORATION, INC., AND G.F. WEIDEMAN INTERNATIONAL, INC. – PETITION FOR INVESTIGATION AND FOR EMERGENCY RELIEF UNDER 49 U.S.C. 721(B)(4) – SECURITY DEPOSIT FOR DEMURRAGE CHARGES, MISSOURI & NORTHERN ARKANSAS RAILROAD COMPANY, INC.

Decided: July 25, 2008

In STB Docket No. 42107, we are granting the motion of Missouri & Northern Arkansas Railroad Company (MNA) to dismiss the request of Railroad Salvage & Restoration, Inc. (RSR) and G.F. Weideman International, Inc. (GFW) (collectively, petitioners) for investigation of a security deposit requirement that MNA adopted several weeks ago. That particular requirement has been canceled and replaced by a different security deposit requirement in the revised tariff at issue in STB Docket No. 42109.

In STB Docket No. 42109, we are denying the request of RSR and GFW for emergency relief that would enjoin MNA from applying the new security deposit in the revised tariff. We are also denying petitioners' request that we investigate the lawfulness of that security deposit requirement.

BACKGROUND

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In June 2008, MNA published a proposed demurrage tariff that provided a new fee structure and adopted a new provision pertaining to credit and security deposits. The latter provision required all shippers served by MNA (or their agents) to apply for credit for payment of demurrage and storage charges and stated that credit would be granted solely at the discretion of the subscribing carrier. If credit were denied and a shipper receiving multiple loads failed to pay accessorial charges (including demurrage charges) after written demand, the shipper would be required to pay a security deposit of the higher of \$10,000 or the amount of "existing past due

accessorial charges” before it could receive car service from MNA. The tariff provided further that security deposits would not be required if the shipper were placed on the carrier’s authorized credit list or paid all outstanding charges and gave assurance “to the satisfaction of the Carrier’s credit office that future accessorial charges will be paid within the credit period prescribed in applicable tariffs.” MNA notified the petitioners of the new demurrage tariff containing the security deposit provision and announced that the new tariff would become effective on July 1, 2008.

RSR and GFW filed a petition with the Board requesting: (1) an investigation into the lawfulness of the security deposit provisions in the new demurrage tariff; and (2) an order under 49 U.S.C. 721(b)(4) precluding MNA from applying those provisions to them pending completion of the requested investigation. Petitioners stated that they were contesting MNA’s attempt to assess four sets of demurrage charges – two of which are being litigated before the Board,¹ and two of which are not yet being litigated because MNA so far has not filed suit for collection. According to petitioners, the total amount at issue in the four sets of disputed demurrage charges is \$399,530, of which \$340,055 has been invoiced to RSR, and \$59,475 has been invoiced to GFW.² According to petitioners, MNA informed them in a telephone conference call on June 12, 2008, that they would be subject to having to pay security charges under the new demurrage tariff in the full amount of these contested charges and that if they did not pay, they would lose rail service.

Petitioners argued that MNA cannot lawfully require them to pay a security deposit based on disputed demurrage charges that allegedly accrued before July 1, 2008, the effective date of the tariff requiring the deposit. According to petitioners, any attempt to do so would be an impermissible attempt to apply a tariff retroactively. Petitioners also argued that use of the tariff to require petitioners to pay a security deposit in this situation would be an unreasonable practice under 49 U.S.C. 10702(2) because the purpose and effect of applying the security deposit provision to them was to coerce them into paying charges that are being contested, citing Illinois Central Gulf R. Co. – Security Deposits, 358 I.C.C. 312 (1978).

On June 23, 2008, MNA filed a reply opposing petitioners’ request for injunctive relief in STB Docket No. 42107 and stating that a separate response to petitioners’ request for an investigation would be filed on or before July 8, 2008.

¹ The two proceedings before the Board, which have been consolidated, are: Railroad Salvage & Restoration, Inc – Petition for Declaratory Order – Reasonableness of Demurrage Charges, STB Docket No. 42102 (petition filed Oct. 5, 2007); and G.F. Weideman International, Inc. – Petition for Declaratory Order – Reasonableness of Demurrage Charges, STB Docket No. 42103 (petition filed Oct. 29, 2007).

² Of these amounts, in STB Docket No. 42102 RSR is challenging \$199,265 in demurrage charges that allegedly accrued between January 2005 and August 2006 (and for one car in October 2006), and in STB Docket No. 42103 GFW is challenging \$12,025 in demurrage charges that allegedly accrued between September 2006 and January 2007.

By decision served on June 30, 2008, we enjoined MNA from applying to petitioners the security deposit provisions of its new demurrage tariff until further order of the Board, pursuant to 49 U.S.C. 721(b)(4) and based upon the Holiday Tours criteria.³ In granting injunctive relief, we found, based on the record before us, that the security deposit requirement appeared to place an undue financial burden on petitioners⁴ and that it represented an improper means of collecting from shippers an amount that was at issue before the Board. We found that collection of the nearly \$400,000 security deposit prior to a ruling on its merits would cause irreparable harm to petitioners because they are completely dependent on rail service and could irretrievably lose business due to their inability to pay such a large deposit. By contrast, we found that an injunction would not likely irreparably harm MNA, because MNA itself joined RSR and GFW in asking the Board to stay the pending proceedings in STB Docket Nos. 42102 and 42103 (see supra note 2), and MNA permitted demurrage charges to accrue for almost 3 years before bringing an action to collect the charges or putting the shippers on a cash basis. Finally, we found that the public interest supported an injunction because MNA's demand for such payment as a precondition for continued rail service constituted an inappropriate self-help measure that appeared to be designed to collect the disputed charges at issue before the Board had an opportunity to determine whether those charges were lawfully payable.

On July 8, 2007, MNA filed a motion to dismiss the petition for investigation filed in STB Docket No. 42107. Attached to MNA's motion is a revised tariff item providing that, if a security deposit is required, the total amount required for deposit will not exceed the lesser of existing past accessorial charges accrued or \$25,000. Noting that the \$25,000 charge per petitioner is less than the \$50,000 charge per company that the ICC found reasonable in G&T Terminal, MNA argues that the revised tariff's security deposit requirement cures the objections raised to the canceled provision that was enjoined by the Board. The revised tariff item is scheduled to become effective on July 28, 2008.

³ Under 49 U.S.C. 721(b)(4), the Board may issue an appropriate order to prevent irreparable harm. In determining whether to issue such an order, the agency applies the traditional stay criteria of Holiday Tours, *i.e.*, whether: (1) there is a strong likelihood that the movant will prevail on the merits of its challenge to the action sought to be stayed; (2) the movant would suffer irreparable harm in the absence of a stay; (3) other interested parties would not be substantially harmed; and (4) the public interest supports the granting of the stay. See Washington Metro. Area Transit Comm'n v. Holiday Tours, Inc., 559 F.2d 841, 843 (D.C. Cir. 1977) (Holiday Tours); Virginia Petroleum Jobbers Ass'n v. Fed. Power Comm'n, 259 F.2d 921, 925 (D.C. Cir. 1958); Hilton v. Braunskill, 481 U.S. 770, 776 (1987).

⁴ See Rail General Exemption Authority – Miscellaneous Agricultural Commodities – Petition of G&T Terminal Packaging Co., Inc., et al., to Revoke Conrail Exemption, Ex Parte No. 346 (Sub-No. 14A) (ICC served June 13, 1989) (G&T Terminal). There the ICC denied a request by a family of larger shippers — which the carrier claimed owed \$2 million in outstanding demurrage charges — for injunctive relief from a letter-of-credit requirement in the amount of \$50,000 per company to ensure future collection of demurrage. In doing so, the ICC held that security programs must be reasonable and established at levels based on past payment performance, while avoiding undue financial burden on shippers.

On July 15, 2008, petitioners filed a reply in opposition to MNA's motion to dismiss their petition for investigation. Petitioners argue that the revised tariff's security deposit provision does not resolve the Board's concerns about undue financial hardship. Petitioners argue that the security deposit in G&T Terminal – although it may have been larger in absolute dollars – took the form of a letter of credit, which they say is not as disruptive of a small company's financial liquidity as a requirement of a substantial cash deposit. Petitioners also argue that other issues about the ultimate lawfulness of MNA's security deposit provisions remain despite the cancellation of the enjoined provision and substitution of the revised provision, including whether a cash deposit should be required in lieu of reasonable alternatives, such as a letter of credit or performance bond, and whether the substitute deposit requirement continues to require the payment of charges that are being disputed before the Board.

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On July 15, 2008, petitioners also filed a petition asking us (1) to investigate the lawfulness of MNA's revised security deposit requirement and (2) to stay the application of that requirement to them pending completion of the requested investigation. Petitioners reiterate the arguments made in their reply in opposition to MNA's motion to dismiss their petition for investigation filed in STB Docket No. 42107. They also argue that the new tariff is unlawful because MNA intends "to apply the revised provision retroactively to demurrage charges that allegedly accrued long before the tariff provision became effective, instead of prospectively to charges that accrue on and after the effective date of the tariff provision."⁵ They assert that MNA has failed to include the issue date or effective date for the revised tariff page and has failed to give petitioners the 20 days' advance notice required under 49 U.S.C. 11101(c).⁶ They also contend that "[o]nce the Board begins an investigation into the reasonableness of a rail carrier's tariff provisions, the rail carrier cannot, without leave of the Board, lawfully establish revised tariff provisions on the same subject matter prior to completion of the investigation."⁷

On July 21, 2008, MNA filed a reply in opposition to petitioners' request for emergency relief. MNA concedes that in trying to collect outstanding demurrage charges to help MNA become revenue adequate, MNA may have over-reached in requiring a security deposit equal to the full amount of demurrage owed, but it asserts that in crafting its revised tariff, it followed the Board's guidance, set out in our June 30, 2008 order. Further, MNA argues that petitioners would not be irreparably harmed by a security deposit that is limited to \$25,000, noting that statements on petitioners' websites undercut petitioners' claims as to the fragility of their businesses. Claiming that petitioners' failure to pay demurrage contributed to MNA's losses in 2006 and 2007, and that MNA has incurred extraordinary costs because of the flooding in Missouri this year, MNA asserts that an injunction could harm its business. Finally, MNA argues that petitioners' use of the Board's processes to continue to evade applicable demurrage charges contravenes public policy.

⁵ Petition at 8.

⁶ Petition at 5.

⁷ Petition at 4.

DISCUSSION AND CONCLUSIONS

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We will grant MNA's motion to dismiss STB Docket No. 42107. The tariff item that was the subject of the requested investigation has been canceled. The revised tariff's security deposit provision is substantially different in magnitude, and the other issues that petitioners assert remain – including whether a cash deposit should be required in lieu of reasonable alternatives, such as a letter of credit or performance bond, and whether the substitute deposit requirement continues to require the payment of charges that are being disputed before the Board – are the subject of our scrutiny in STB Docket No. 42109 and are addressed below.

STB Docket No. 42109

We will deny the request for investigation and emergency relief filed in STB Docket No. 42109. Security deposits for the payment of demurrage have never been held to be unreasonable per se. Although the new provision is based on past demurrage charges, the security deposit is now capped at \$25,000. In G&T Terminal, the ICC declined to enjoin a much larger security deposit provision that was also based on outstanding past demurrage charges. Unlike the canceled security deposit provision, the substitute provision is not linked to either of the sums at issue in the pending Board proceedings or sums that are in dispute – the deposit is uniformly capped at \$25,000 per shipper, regardless of the extent of unpaid charges. And although it has been imposed as a result of the dispute over past charges, the revised tariff is prospective only in that it does not attempt to collect the charges in dispute and thus is not the same as a retroactive application of charges.

In G&T Terminal, the ICC found that in addition to being otherwise reasonable, security programs should avoid imposing an undue financial burden on the shipper. Here, petitioners have not shown that the \$25,000 cash security deposit imposes an undue financial burden on them, and the evidence submitted in MNA's reply⁸ indicates that the new security deposit will not impose an undue burden on petitioners.

Finally, there is no need to investigate the revised tariff for violation of the tariff publication requirements of 49 U.S.C. 11101(c) and 49 CFR 1300.4(a).⁹ Petitioners acknowledge that they received the revised tariff page on July 7, 2008.¹⁰ By letter to their

⁸ MNA's reply to the petition proffers evidence that suggests petitioners are businesses of a size for which a \$25,000 security deposit would not impose an undue financial hardship. For example, with respect to RSR, MNA quotes statements from RSR's website asserting that RSR sells hundreds of tons of scrap or reroll rail to steel mills each month. MNA quotes a website on which GFW's vice president asserts that GFW handles scrap pick up from two Class I railroads covering half the territory of the United States and Mexico.

⁹ Petitioners also assert that a carrier may not replace an offensive tariff that is the subject of a Board investigation with a new tariff designed to comply with the law, but they provide no support for that claim.

¹⁰ Petition, Appendix 1.

counsel from MNA's counsel dated July 9, 2008,¹¹ petitioners were informed that the tariff would not become effective as to them until July 28, 2008, which is 21 days after the July 7, 2008 notification. MNA therefore has given petitioners sufficient advance notification.

As demonstrated by our action enjoining the tariff at issue in No. 42107, we take seriously our responsibility to take action, when appropriate, under the provisions of 49 U.S.C. 721. But the emergency provision at section 721(b)(4) is not to be used as a matter of course. If petitioners have concerns about the lawfulness of the new tariff, they may file a formal complaint under 49 U.S.C. 11701.¹² But on this record, petitioners have not shown that an investigation, or an injunction under section 721(b)(4), is warranted.

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 the proceeding in STB Docket No. 42107 is granted.
2. The petition for investigation and emergency relief in STB Docket No. 42109 is denied.
3. This decision is effective on its date of service.

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

Anne K. Quinlan
Acting Secretary

¹¹ Petition, Appendix 3.

¹² We expect the parties to concentrate on resolving the already pending proceedings in STB Docket Nos. 42102 and 42103, which lie at the heart of the parties' disputes, and we urge them to complete the record in those proceedings pursuant to the schedule set by the Board.