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SERVICE DATE - OCTOBER 27, 1998

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 33582

CROSS OIL REFINING & MARKETING, INC.

v.

UNION PACIFIC RAILROAD COMPANY

Decided: October 19, 1998

On March 30, 1998, Cross Oil Refining & Marketing, Inc. (Cross Oil) filed a complaint against the Union Pacific Railroad Company (UP) requesting that the Board order UP to cease and desist from the allegedly unreasonable and inadequate rail service it was providing Cross Oil; that UP be ordered to pay Cross Oil \$1.6 million in damages allegedly resulting from the poor service; and that the Board invoke our authority under 49 U.S.C. 11123(a) to remedy UP's asserted service deficiencies. UP filed an answer and a motion to dismiss for lack of jurisdiction or, in the alternative, for an order to make the complaint more definite.<sup>1</sup> Cross Oil filed a response to the motion to dismiss, and UP filed a reply, together with a motion for leave to file the reply.

PRELIMINARY MATTER

We first consider UP's request to file a reply to Cross Oil's response to UP's motion to dismiss. UP moved to dismiss the complaint, because the traffic at issue allegedly moves under transportation contracts entered into pursuant to 49 U.S.C. 10709, and is thus outside the Board's jurisdiction. In response, Cross Oil contends that the alleged contracts do not constitute transportation service contracts. UP seeks leave to file a reply because, it submits, Cross Oil has made a "surprising assertion" that UP "could not have anticipated": instead of claiming that the traffic does not move under existing contracts, Cross Oil argues that the agreements themselves do not qualify as contracts.

We will accept UP's reply. Although, under 49 CFR 1104.13(c), a reply to a reply is prohibited, we may waive application of the rule for good cause. Missouri Pacific Railroad Company--Abandonment in Douglas, Champaign and Vermilion Counties, IL (Westville and Jamaica Branches) in the Matter of a Request to Set Terms and Conditions, Docket No. AB-3 (Sub-No. 103) (ICC served June 4, 1993). Cf. 49 CFR 1110.9, 1100.3. Cross Oil has not objected to the filing, and UP has explained why it did not submit this information earlier. Good cause having been shown, UP's reply will be allowed.

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<sup>1</sup> The motion was supported by an affidavit of Jonathan D. Busche. Attachments to Mr. Busche's affidavit contain confidential information that was filed under seal and is not part of the public record.

### CROSS OIL'S JURISDICTIONAL CLAIMS

Cross Oil asserts that the purported contracts are not transportation service contracts. The agreements, according to Cross Oil, do not require it to tender a minimum amount of traffic to UP, nor do they require UP to provide to Cross Oil any special service.<sup>2</sup> Accordingly, Cross Oil argues that there is no mutuality of obligations for the parties.

Alternatively, Cross Oil contends that, even if the agreements are deemed to be contracts, the Board should still assert jurisdiction. Cross Oil notes that, under the agreements, service and equipment are to be provided on the same basis as provided to other shippers (see note 2). Cross Oil argues that this means that service will be provided on a common carrier basis and that, under 49 U.S.C. 11101, the carrier is obligated to provide service upon reasonable request. Because UP has allegedly failed to meet this requirement, Cross Oil argues that the contracts have been breached, and, accordingly, that UP has been serving it on a common carrier basis, and such service is subject to the Board's jurisdiction.

### DISCUSSION AND CONCLUSIONS

We will grant UP's motion to dismiss Cross Oil's complaint. The statute provides that rail carriers may enter into contracts "to provide specified services under specified rates and conditions," 49 U.S.C. 10709(a), and, under 49 U.S.C. 10709(c)(1):

A contract that is authorized by this section, and transportation under such contract, shall not be subject to this part, and may not be subsequently challenged before the Board or in any court on the grounds that such contract violates a provision of this part.

Rather, under 49 U.S.C. 10709(c)(2):

The exclusive remedy for any alleged breach of a contract entered into under this section shall be an action in an appropriate State court or United States district court, unless the parties otherwise agree. . . .

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<sup>2</sup> For example, the alleged contracts assert that "shipments are subject to the provisions of Rules Circular UP 6600-Series." (Rules Circular). The Rules Circular, inter alia, provides:

Railroad will provide service and equipment on the same basis that it provides it to customers who are not party to the Agreement.

Accordingly, shipments moving under rail contract may not be challenged on the basis that there has been a violation of the Interstate Commerce Act. Omaha Public Power District v. Union Pacific R.R., STB Docket No. 42006 (STB served Oct. 17, 1997).

In this case, we find that the transportation was performed under contracts. Each contract states: “This **CONTRACT** is made pursuant to 49 U.S.C. 10709. . . .” Each contract names Cross Oil as the shipper, identifies the origins and destinations, specifies the term of the contract, and specifies the rates for the commodities.<sup>3</sup>

Contrary to Cross Oil’s argument, it is unnecessary for a rail contract to contain a minimum quantity requirement. Cf. Union Pacific R.R.--Exemption--Waiver of Undercharges, Docket No. 39983 (ICC served July 12, 1985) (involving rail contract for a one-time shipment of a locomotive crane and parts). Moreover, rail contracts can incorporate tariff provisions and still be outside the Board’s jurisdiction. H.B. Fuller Co. v. Southern Pac. Transp. Co., Docket No. 41510 (STB served Aug. 22, 1997) (Fuller).

We also reject Cross Oil’s alternative argument that the Board has jurisdiction, even if its agreements with UP are valid transportation contracts. First, whether a common carriage tariff provision incorporated into a contract has been violated, thus causing a breach of contract, is a matter for the court, not the Board. As we observed in Fuller at 3, “the referenced tariff terms became contract terms . . . . As such, issues regarding the breach, or precise construction of those terms will have to be resolved in an appropriate court of law.” Moreover, if a contract is breached, the underlying service is not, as Cross Oil claims, recharacterized as common carriage subject to our jurisdiction.<sup>4</sup> See also Burlington Northern R. Co. v. PUC of Texas, 812 F.2d 231, 235 (5th Cir. 1987) (citation omitted) (“Once a contract is approved, it may not subsequently be challenged under the Interstate Commerce Act and any remedy for its breach is an action in court.”)

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

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<sup>3</sup> UP points out that many of the contracts contain zero-mileage rates, which would not be the case under the otherwise applicable UP Tariff, UP 4912-A.

<sup>4</sup> Cf. Ford Motor Co. v. Security Services F/K/A Riss Intl., 9 I.C.C.2d 892, 895 (1993), where the ICC found, for purposes of motor carrier service, that:

if there is a contract carrier relationship . . . and the carrier performs those services, there is no statutory basis . . . to remedy any actual or asserted deficiencies or breaches of the contract of performance thereunder by voiding the contract carrier relationship and retroactively treating the transportation as that of a motor common carrier.

It is ordered:

1. UP's motion for leave to file a reply is granted.
2. UP's motion to dismiss is granted.
3. This decision is effective on its date of service.

By the Board, Chairman Morgan and Vice Chairman Owen.

Vernon A. Williams  
Secretary