

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. NOR 42120

CARGILL, INCORPORATED v. BNSF RAILWAY COMPANY

Digest:¹ This decision defers consideration of BNSF’s motion to compel discovery regarding any damages Cargill may have suffered as a result of allegedly unreasonable practices by the rail carrier until after consideration of the practices themselves.

Decided: April 8, 2011

BACKGROUND

In a complaint filed under 49 U.S.C. § 11701(b), Cargill, Incorporated (Cargill), has challenged the lawfulness of fuel surcharges collected by BNSF Railway Company (BNSF) under BNSF Rules Book 6100-A, Item 3375L Section B, and its predecessor and successor iterations. Cargill contends that BNSF’s fuel surcharge constitutes an unreasonable practice under 49 U.S.C. § 10702(2). BNSF filed an answer to the complaint and a motion to dismiss it in part.² In a decision served on January 4, 2011, the Board: (1) denied the motion to dismiss Cargill’s second claim (the “Profit Center” claim); (2) granted the motion to dismiss Cargill’s third claim (the “Double Recovery” claim); (3) declined to rule on the damages issue; and (4) adopted a procedural schedule that included a 90-day discovery period and incorporated the expedited discovery dispute resolution procedures set forth in 49 C.F.R. § 1114.31(a)(1)-(4).³

On January 24, 2011, Cargill filed a petition asking the Board to reconsider its dismissal of the Double Recovery claim and, if reconsideration is granted, to permit Cargill to amend the claim. BNSF filed a reply in opposition on February 7, 2011. Cargill’s petition is currently pending before the Board.

¹ 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. See Policy Statement on Plain Language in Decisions, EP 696 (STB served Sept. 2, 2010).

² Cargill filed a supplement to the complaint on March 4, 2011, and BNSF filed a supplemental answer on March 23, 2011.

³ In the first of its 3 claims, Cargill alleged that “the general formula [BNSF] used to calculate the surcharge bears no reasonable nexus to, and overstates, the fuel consumption” for the relevant traffic.” Complaint at 3. BNSF did not move to dismiss this claim.

On March 3, 2011, BNSF filed a motion to compel discovery, asserting that “[t]his case presents novel questions regarding what type of injury and damages, if any, a shipper may claim in challenging a fuel surcharge under an unreasonable practice theory” Motion at 1. In BNSF’s view, damages in the form of overcharges (the difference between what was assessed and what is found reasonable) would be contrary to Union Pac. R.R. v. ICC (Union Pacific), 867 F.2d 646 (D.C. Cir. 1989). Moreover, BNSF argues that it is entitled to seek “any information that would tend to show: (1) that Cargill suffered no injury as a result of any misrepresentation regarding BNSF’s mileage based fuel surcharge; and (2) that any injury Cargill may have suffered was not manifested in pecuniary damages because any recoverable loss was offset or mitigated.” Id. at 6.

Specifically, BNSF seeks to compel discovery on: (1) Cargill’s competitive transportation alternatives and how they may have affected its rail transportation costs and purchasing decisions; (2) whether Cargill passed the impact of the fuel surcharge through to other parties; and (3) whether Cargill used hedging strategies to mitigate the effects of the fuel surcharge. Cargill, in a reply filed on March 14, 2011, argues that these discovery requests are neither relevant nor calculated to lead to the discovery of admissible evidence and that they are “impossibly burdensome.” Reply at 14.

Acting under 49 C.F.R. § 1114.31(a)(4), the Director of the Office of Proceedings (Director), in a decision served on March 24, 2011, declined to rule on BNSF’s motion to compel, finding that it raised a number of novel and complex issues. The Director stated that the motion would be decided by the entire Board and denied a BNSF request for a discovery conference. We are now addressing BNSF’s motion to compel.

DISCUSSION AND CONCLUSIONS

1. The motion to compel. As noted, the Board in the January 4, 2011 decision declined to rule on the damages issue. Specifically, the Board stated as follows:

BNSF also argues that Cargill cannot recover damages under any of its 3 claims because any alleged injury would amount to a claim that the fuel surcharges resulted in rates that were too high. At this early stage in the proceeding, before any finding of unlawful conduct and before any evidence has been presented, it would be premature for us to rule on this aspect of the motion to dismiss. Therefore, we will not rule on this request at this time.

For the same reasons, we conclude that it would likewise be premature to rule on BNSF’s motion to compel discovery on this damages-related issue in the absence of a finding of unlawful conduct.

Although the Board ordinarily allows simultaneous discovery of substantive and damage issues, this is not an ordinary case. Cargill has challenged the fuel surcharges BNSF has collected as an unreasonable practice under 49 U.S.C. § 10702(2). As we noted in our January 4, 2011 decision, this case represents only the second complaint challenging a specific fuel surcharge program following the Board's decision in Rail Fuel Surcharges, EP 661 (STB served Jan. 26, 2007). As such, the Board has not yet developed the case law that will flesh out how the general approach set forth in that decision will be applied in specific cases, particularly with regard to the availability and computation of damages. It would be an inefficient use of the Board's limited resources to rule on those issues now. Accordingly, we are bifurcating this proceeding into a merits phase and a damages phase, and as a consequence, we will hold the motion to compel discovery on damages-related issues in abeyance until we rule on the merits phase of Cargill's complaint.

2. Additional Matter. On March 25, 2011, Cargill and BNSF filed a joint motion to amend the procedural schedule in this proceeding. The parties state that they will not be able to complete discovery by the current April 4, 2011 deadline, regardless of the contested matter at issue in BNSF's motion to compel discovery. They request that the Board suspend the current discovery cut-off date and filing deadlines and require the parties to submit a revised procedural schedule, either jointly or individually, within 5 days after the Board rules on the motion to compel discovery.

The procedural schedule in this proceeding will be suspended pending further order of the Board. Within 5 days of the service date of this decision, the parties are directed to submit a revised procedural schedule, either jointly or individually. The Board will then issue a decision establishing a new a procedural schedule.

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

It is ordered:

1. BNSF's motion to compel discovery will be held in abeyance until the Board rules on the merits of Cargill's claims.
2. The procedural schedule in this proceeding is suspended. Within 5 days of the service date of this decision, the parties are directed to submit a revised procedural schedule, either jointly or individually.
3. This decision is effective on the service date.

By the Board, Chairman Elliott and Commissioner Mulvey.