

33808
DO

SERVICE DATE - NOVEMBER 14, 2003

SURFACE TRANSPORTATION BOARD

DECISION

STB Docket No. 42082

MARTIN GAS SALES, INC.–PETITION FOR DECLARATORY ORDER–CERTAIN RATES
AND PRACTICES OF UNION PACIFIC RAILROAD COMPANY

Decided: November 10, 2003

By petition filed on July 7, 2003, Martin Gas Sales, Inc. (Martin), a wholesaler of asphalt, seeks a declaratory order to resolve a dispute over demurrage charges assessed by the Union Pacific Railroad Company (UP) for shipments of asphalt received at Martin's bulk facility in the Neches Industrial Park, near Beaumont, TX. This matter is on referral from the United States District Court for the Eastern District of Texas, Tyler Division, in Union Pacific Railroad Company v. Martin Gas Sales, Inc., Civil Action No. 6:02-cv-180 (referral order dated May 27, 2003). The court proceeding was initiated by UP to collect from Martin \$737,150 in demurrage charges, which allegedly accrued from December 2000 to February 2002.¹ Martin filed a counterclaim alleging that the demurrage charges are: (1) unreasonable and violate 49 U.S.C. 10701, 10702(1), and 10704(a)(1); and (2) an unreasonable practice in violation of 49 U.S.C. 10702(2) and 10704(a)(1).

The court referred the matter to the Board to consider the issues raised in Martin's counterclaim. The court stayed its proceedings pending Board action on the referral. Martin, in its petition, requests that a procedural schedule, including a reasonable period for discovery, be established.²

Under 5 U.S.C. 554(e), the Board has discretionary authority to issue a declaratory order to terminate a controversy or to remove uncertainty. The Board and its predecessor, the Interstate Commerce Commission (ICC), have exercised broad authority in handling such requests, considering a number of factors, including the significance to the industry and the ripeness of the

¹ UP alleges that Martin failed to timely return rail cars pursuant to the provisions of UP's Rail Car Demurrage Tariff 6004.

² Martin indicates that it plans to pursue discovery of rail car records.

controversy. See Delegation of Authority–Declaratory Order Proceedings, 5 I.C.C.2d 675, 676 (1989). There, the ICC noted that petitions for issuance of a declaratory order premised on referral from a federal court are routinely accepted and treated procedurally in the same manner as a complaint.³

Under 5 U.S.C. 554(e) and 49 U.S.C. 721, a proceeding is instituted to resolve the controversy here. This matter has been referred by a court of competent jurisdiction and otherwise appears to be within the Board’s primary jurisdiction. The Board will resolve this matter pursuant to the modified procedural rules at 49 CFR 1112. A procedural schedule is set forth below.

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

It is ordered:

1. A declaratory order proceeding is instituted. This proceeding will be handled under the modified procedure, on the basis of written statements submitted by the parties. All parties must comply with the Rules of Practice at 49 CFR subchapter B, including parts 1112 and 1114.

2. The procedural schedule for this proceeding is as follows:

December 29, 2003	End of discovery period.
January 28, 2004	Opening statement due.
February 27, 2004	Reply statement due.
March 15, 2004	Rebuttal statement due.

3. This decision is effective on the date of service.

³ It then delegated the responsibility for taking initial action in disposing of such matters to the Director of the Office of Proceedings. See 49 CFR 1011.7(b)(6).

4. A copy of this decision will be mailed to:

The Honorable William M. Steger
United States District Court
for the Eastern District of Texas
211 W. Ferguson, Room 106
Tyler, TX 75702

RE: Civil Action No. 6:02-cv-180

By the Board, David M. Konschnik, Director, Office of Proceedings.

Vernon A. Williams
Secretary