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SERVICE DATE – FEBRUARY 10, 2009

SURFACE TRANSPORTATION BOARD

DECISION

STB Docket No. 42108

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

Decided: February 10, 2009

By petition filed on July 8, 2008, The Springfield Terminal Railway Company (ST) seeks a declaratory order to resolve a dispute over demurrage charges that it assessed against Fore River Warehousing and Storage Co., Inc. (Fore River) in April, May, June, and October of 2004 totaling \$34,320 (2004 charges) and in May, June, July, and August of 2006 totaling \$114,960 (2006 charges). ST identifies seven questions for the Surface Transportation Board (Board) to consider:¹

- 1) Whether ST can assess, impose or collect demurrage charges against Fore River.
- 2) Whether ST's demurrage rates and/or charges are reasonable and/or serve the purposes set forth in 49 U.S.C. 10746.
- 3) Whether the manner in which ST calculates its demurrage charges is reasonable and/or serves the purposes set forth in 49 U.S.C. 10746.
- 4) Whether the rules and/or practices pursuant to ST's imposition of demurrage charges are reasonable and/or serve the purposes set forth in 49 U.S.C. 10746.
- 5) Whether ST was responsible for delay or backup of rail cars.
- 6) Whether all rail cars were subject to such charges.
- 7) Whether ST's switching services violate 49 U.S.C. 11101.

On July 25, 2008, Fore River filed a reply to ST's petition, asserting 15 affirmative defenses, and a separate motion for partial dismissal on the ground that collection of the 2004

¹ ST claims that these questions were referred by the United States District court in the District of Maine (court), but while the court stayed action on the case before it to allow the parties to bring the matter before the Board, for nine months neither party initiated any action at the Board regarding this matter. Subsequently, the court dismissed that case without prejudice.

charges is barred by the 3-year statute of limitations under 49 U.S.C. 11705(a).² In its reply to the motion to dismiss, ST argues that the statute of limitations was tolled by the filing of its complaint in the court. Fore River moved for leave to file rebuttal to ST's reply, alleging that ST mischaracterized the court's July 16, 2008 order (Dismissal order) as a court referral.

A declaratory order proceeding will be instituted to provide the parties with an opportunity to complete the record before the Board concerning the 2006 charges. As discussed below, the 2004 charges will not be considered in that proceeding because, in dismissing ST's complaint, it appears that the court did not intend to preserve ST's claim to the 2004 charges.

Given the procedural history of the court case and the court's decision to dismiss ST's complaint, Fore River's rebuttal in this proceeding is unnecessary, and, therefore, Fore River's motion for leave to file rebuttal will be denied.

BACKGROUND

On March 28, 2007, ST filed a complaint before the court, Case No. 2:07-cv-00052-GZS, seeking recovery of the 2004 and 2006 charges. On June 4, 2007, Fore River filed a motion to stay the court case and refer the seven questions outlined above to the Board. ST opposed the motion; but, on September 6, 2007, the court stayed the case so that the parties could refer the questions to the Board.

On March 12, 2008, ST sought an extension of the stay, which was unopposed, and the court extended the stay until June 6, 2008. ST also filed a status report on March 12, 2008. On May 5, 2008, ST changed legal counsel, using a different attorney from the same law firm. A month later, on June 6, 2008, the stay ended. On June 16, 2008, ST's new counsel filed another motion to stay the court case. But, in the Dismissal order, the court denied ST's motion for further stay and ordered ST's complaint dismissed without prejudice. Shortly before the Dismissal order, ST filed its petition with the Board on July 8, 2008.

DISCUSSION AND CONCLUSIONS

1. 2004 Demurrage Charges

In its motion for the Board to dismiss all claims as to the 2004 demurrage charges, Fore River contends that ST did not file its petition for declaratory order within the 3-year statute of limitations for civil complaints involving demurrage charges, set forth at 49 U.S.C. 11705(a).³

² Section 11705(a) provides:

A rail carrier providing transportation or service subject to the jurisdiction of the Board under this part must begin a civil action to recover charges for transportation or service provided by the carrier within 3 years after the claim accrues.

³ Section 11705(a) has been applied to demurrage charges. See R. Franklin Unger,
(continued . . .)

Fore River argues that ST's filing of a complaint in district court did not toll the statute of limitations because the court dismissed ST's complaint, and dismissal, even without prejudice, does not toll the applicable statute of limitations, citing Chico-Velez v. Roche Prods., Inc., 139 F.3d 56, 59 (1st Cir. 1998) (Chico-Velez).

In its reply, ST argues that the statute of limitations was tolled because ST did three things: (a) filed a complaint to recover the 2004 charges with the court within the 3-year statute of limitations period; (b) filed its petition with the Board prior to the Dismissal order; and (c) experienced a "miscommunication" between its attorneys. ST also asserts that the court specifically dismissed ST's complaint so that the parties could get before the Board to refer the questions presented to the court.

The court stayed the court case for 9 months so that ST could refer the questions to the Board. When ST failed to do so, the court denied ST's request for a further stay and dismissed ST's complaint, stating that because plaintiff "fail[ed] to follow the court's orders and bring this matter before the STB prior to June 26, 2008, the court believes that the proper course is to dismiss this case" The court concluded that ST would be left to pursue "whatever remedies (if any) may still be available to it from the Surface Transportation Board."

Because demurrage charges can be pursued only in court, any proceeding the Board initiates, and any action the Board takes, is designed primarily for the benefit of the parties and the court hearing a collection action. And although a suit was timely brought as to all of the charges, it appears that the court, by dismissing the case, does not intend to permit ST to seek to collect the 2004 charges. The fact that the court dismissed the case without prejudice does not mean that the court will hear ST's claims once our proceeding is concluded; in cases that are dismissed without prejudice, subsequent filings are vulnerable to being time-barred because the dismissal does not in and of itself stop the running of the statute of limitations.⁴ Indeed, the court dismissed ST's complaint after ST urged it to do so without prejudice, rather than with prejudice, so that only the 2004 charges would be barred and not those from 2006.⁵ The Board will not ask

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Trustee of the Indiana Hi-Rail Corporation, Debtor—Petition for Declaratory Order—Assessment and Collection of Demurrage and Switching Charges, STB Docket No. 42030, slip op. at 1 n.2 (STB served June 14, 2000).

⁴ See Johnson v. Nyack Hospital, 86 F.3d 8, 11 (2nd Cir. 1996) (Nyack Hospital); see also Chico-Velez at 59 ("[D]ismissal of the original suit, even though labeled as without prejudice, nevertheless may sound the death knell for the plaintiff's underlying cause of action"); Ortiz v. Reyes, 528 F. Supp. 2d 9 (D.P.R. 2007) ("[A] prescriptive period is not tolled by filing a complaint that is subsequently dismissed without prejudice.") (internal citations omitted).

⁵ See Plaintiff's Reply Memorandum in Support of its Motion to Enlarge Stay and in Opposition to Defendant's Motion to Dismiss, The Springfield Terminal Railway Company v. Fore River Warehousing and Storage Co. Inc., Civil No. 2:07-cv-00052-GZS (D. Maine filed

(continued . . .)

the parties to expend resources arguing a claim that the court's dismissal appears to have mooted. Therefore, this declaratory order proceeding will address only the 2006 charges.⁶

2. 2006 Demurrage Charges

The Board has discretionary authority under 5 U.S.C. 554(e) to issue a declaratory order to terminate a controversy or remove uncertainty. In this case, there is a controversy surrounding the reasonableness of the 2006 charges as set forth in the questions listed above. Pursuant to the Board's authority under 5 U.S.C. 554(e) and 49 U.S.C. 721, a proceeding will be instituted to resolve the controversies at issue here. The Board will consider this matter under the modified procedure rules at 49 CFR part 1112.⁷

The parties have neither submitted a proposed procedural schedule nor requested discovery. ST has submitted evidence of the 2006 charges, but Fore River has not submitted evidence supporting its affirmative defenses. A procedural schedule similar to those adopted in other petitions for declaratory order concerning demurrage charges will be adopted, except that ST's petition will be treated as its opening evidence.

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

It is ordered:

1. A declaratory order proceeding is instituted.
2. This proceeding will be handled under the modified procedure on the basis of written statements submitted by the parties. The parties must comply with the Rules of Practice at 49 CFR subchapter B, including 49 CFR parts 1112 and 1114.
3. Fore River's motion for leave to file rebuttal is denied.
4. Discovery will be completed by April 13, 2009.

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June 26, 2008).

⁶ Of course, if ST obtains 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 will consider ST's petition concerning the 2004 charges.

⁷ The parties should not presume that the institution of this proceeding by the Board tolls any statute of limitations applicable to the disputed 2006 charges. Should ST not file a new civil action within 3 years of when the 2006 charges accrued, see 49 U.S.C. 11705(a), any arguments as to tolling would have to be made in court.

5. Fore River's reply statement is due by May 13, 2009.
6. ST's rebuttal statement is due by June 2, 2009.
7. This decision is effective on its service date.

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

Anne K. Quinlan
Acting Secretary