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SERVICE DATE - APRIL 27, 1998

SURFACE TRANSPORTATION BOARD

DECISION

STB Docket No. 42023

DEBRUCE GRAIN, INC.

v.

UNION PACIFIC RAILROAD COMPANY

Decided: April 21, 1998

DeBruce Grain, Inc. (DeBruce) filed on November 3, 1997, a complaint and a motion for an emergency order against the Union Pacific Railroad Company (UP) seeking injunctive relief and damages. DeBruce initiated this proceeding before the Board after its action in Federal district court was dismissed. DeBruce Grain, Inc. v. Union Pacific RR, 983 F. Supp. 1280 (W.D. Mo. 1997) (DGI).¹

In a decision served December 22, 1997, the Board denied the motion for an emergency order and dismissed the portion of the complaint that sought injunctive relief. We did not, however, dismiss the remainder of the complaint, but asked DeBruce to inform us if it wished to proceed with the complaint immediately, or await the resumption of more typical service patterns on UP. DeBruce was directed to either propose a procedural schedule for the complaint proceeding or request that the complaint be held in abeyance.

On January 12, 1998, DeBruce filed a petition to reopen the December 22 decision. Also, in response to that decision, DeBruce submitted a letter arguing (1) "that proceeding with respect to the calculation of damages should be held in abeyance until [UP] service is restored to a more normal level," but that the liability issues can be decided now; (2) the parties would propose a procedural schedule when discovery was completed or near completion, but no later than April 1, 1998; and (3)

¹ The court denied DeBruce's request for a temporary restraining order (TRO), stating that it lacked jurisdiction over DeBruce's statutory claims, and that it was precluded under the doctrine of primary jurisdiction from considering the contract claims. The court also stated that, even if it had jurisdiction and the doctrine of primary jurisdiction did not apply, issuing a TRO would be inappropriate. The court dismissed the case without prejudice to DeBruce's right to seek administrative relief.

that the 10-day rule to file a motion to compel be waived.² UP filed a motion to compel discovery from DeBruce.

In this decision, we will deny the petition to reopen and the request to bifurcate the issues of liability and damages. Also, we are not ruling on the motion to compel, but we are directing the parties to discuss discovery and procedural issues and report to the Board.

DECEMBER 22 DECISION

DeBruce sought an emergency order under 49 U.S.C. 721(b)(4) enjoining UP from its alleged violations of 49 U.S.C. 11101(a), 11101(e), 11121(a)(1), and 10741(a)(1).³ It requested, inter alia, that the Board direct UP to (1) give covered hoppers in UP's Guaranteed Freight Pool (GFP) program⁴ the same priority enjoyed by covered hoppers in UP's voucher program;⁵ (2) place cars ordered by DeBruce for its three Nebraska elevators⁶ as responsively as it places cars at other elevators in the same vicinity; and (3) move loaded cars from DeBruce's Nebraska elevators as responsively as loaded cars are moved from other elevators in the same area. DeBruce argued that only a small percentage of its October car orders under the GFP program had been filled, because UP had given priority to cars ordered under its voucher program.

In denying the request for emergency relief, we stated that we did not share DeBruce's position that irreparable harm was the only relevant consideration in determining requests for

² Under 49 CFR 1114.31(a), a motion to compel must be filed within 10 days of failing to obtain a responsive answer in a deposition or within 10 days after expiration of the period allowed for submitting answers to interrogatories.

³ These provisions concern service on reasonable request, transportation in accordance with service terms, safe and adequate car service, and unreasonable discrimination, respectively.

⁴ UP has a Guaranteed Freight Pool (GFP) program under which shippers sublease their private cars to UP and UP guarantees placement of 1.4 times the number of private cars. If UP fails to meet the placement guarantee, it is liable for a penalty of \$250 a car if the order is canceled. DeBruce stated that it had subleased 450 cars to UP, and that it had purchased more than 1000 additional pool cars in the secondary market.

⁵ UP has a voucher program under which it sells vouchers guaranteeing placement of cars in either the first or second half of each month. The voucher cost varies with market conditions. Failure to meet the placement guarantee under the voucher program results in a maximum penalty of \$400 per car, and it is not necessary to cancel the underlying order to collect the penalty.

⁶ The grain elevators are located at Nebraska City, Lexington, and Fremont, NE.

injunctive relief.⁷ In any event, we noted that the district court in DGI had found that DeBruce would not be irreparably harmed because it had other means of obtaining cars, and that it would be entitled to damages under the tariff if it canceled its car orders. Moreover, we found that the relief sought by DeBruce would conflict with our efforts to alleviate the transportation crisis in the West. In response to this crisis, in Joint Petition For Service Order, STB Service Order No. 1518 (STB served Oct. 31, 1997, Dec. 4, 1997, Feb. 17, 1998, and Feb. 25, 1998) (Service Order 1518), we afforded a number of remedies to help free up traffic on the UP system. In doing so, however, we were mindful to avoid directly favoring any particular shipper over any other. Accordingly, we denied (at 4) DeBruce's request for emergency relief because

DeBruce's request for injunctive relief would have us require specifically that DeBruce's shipments be given priority over other shipments, and would generally have us, rather than the railroads and the shippers, prioritize among grain shipments by directing that GFP program cars be given the same priority as voucher cars. DeBruce's approach is not in the public interest, because it conflicts with the efforts of the Board and railroads to solve the serious rail service problems that exist in the western United States.

DISCUSSION AND CONCLUSIONS

Petition to reopen. DeBruce claims that the Board erred in its December 22 decision in several respects. DeBruce contends that we were wrong in denying that irreparable harm was the only relevant consideration in addressing requests for injunctive relief.⁸ DeBruce argues that it did not seek to have its shipments be given priority over those of any other shipper; that, instead, it asked to have UP directed to comply with the terms of its tariff. DeBruce also alleges that the Board ignored its statutory obligation to enforce rail tariffs, provide adequate car service, and prevent irreparable injury. DeBruce also argues that "by unilaterally dishonoring its obligations" UP is undermining the GFP program.⁹

⁷ The generally accepted criteria for an injunction are (1) substantial likelihood of success on the merits; (2) irreparable harm in the absence of the requested relief; (3) issuance of the order will not substantially harm other parties; and (4) granting the relief is in the public interest. See Washington Metropolitan Area Transit Comm'n v. Holiday Tours, 559 F.2d 841, 843 (D.C. Cir. 1977).

⁸ As discussed, infra, DeBruce would still not prevail even if we were to accept that only irreparable harm, instead of the traditional four-part test, needed to be shown in order to grant relief.

⁹ DeBruce points to the seasonality of demand for grain, and contends that railroads cannot be reasonably expected to maintain enough covered hoppers to meet the peak demand of the harvest season. DeBruce claims that the GFP program has probably the best potential of any grain allocation program for alleviating the seasonal demand problem.

DeBruce states that “since the peak of the harvest season has now passed, the level of urgency which prompted DeBruce to file its motion for interim relief is now moot as to much of UP’s conduct.” Accordingly, it will pursue its complaint for damages; yet, “[t]he failure of UP to obey its own tariff . . . is a matter which still warrants the issuance of an emergency order.” Such an order would, according to DeBruce, provide grain shippers a measure of certainty in planning transportation.

We will deny the petition to reopen. As noted, DeBruce acknowledges that its request for an emergency order is now largely moot. This assertion is supported by UP, which states that it “is now current on DeBruce’s car orders.” UP notes that it had filled all of DeBruce’s orders for the second half of January except for one 25-car order that it could not place successfully, because other cars at the elevator had not been billed out. For the first half of February, UP claims that DeBruce has ordered only 100 cars for placement at its own facilities, which is 200 cars fewer than it is entitled to under the GFP program.¹⁰

Second, DeBruce’s more remote justification for an emergency order now - to provide a reasonable degree of certainty for planning - is too speculative a reason for finding irreparable harm under 49 U.S.C. 721(b)(4). A party requesting a stay must show that the claimed injury is “both certain and great.” Wisconsin Gas Co. v. FERC, 758 F.2d 669, 674 (D.C. Cir. 1985). DeBruce’s new justification for an injunction satisfies neither requirement.¹¹

Finally, turning to DeBruce’s broader objections to the December 22 decision, it argues that it did not ask that its shipments be given priority over those of any other shippers, or that we prioritize among grain shippers. Instead, it criticizes the December 22 decision’s assertion that making UP comply as statutorily required with the published terms of service would conflict with efforts to ameliorate the crisis in the West.

¹⁰ According to UP, those 200 cars were ordered for placement at non-DeBruce facilities, which, allegedly, indicates that DeBruce does not need the cars and has sold the placements to other shippers.

¹¹ As indicated, in our December 22 decision, we disagreed with DeBruce’s argument that irreparable harm was the only relevant standard we would use in evaluating a request for an administrative injunction under section 721(b)(4). As in that decision, our finding here that DeBruce’s new basis for relief does not amount to irreparable harm likewise obviates our need to address that argument.

Moreover, as previously noted, even under complainant’s assertedly more urgent basis for injunctive relief, the DGI court found that DeBruce was not irreparably harmed, because it had other means of getting cars, and, eventually, would be entitled to damages under the tariff if it canceled its car orders. See December 22 decision at 3. According to UP, it has already paid \$762,250 in tariff penalties to DeBruce or for its account covering canceled orders related to this episode.

We find these objections to be without merit. In the Service Order 1518 proceeding, we found, pursuant to 49 U.S.C. 11123, that an emergency existed that had substantial adverse effects on shippers and on rail service throughout the West. We observed in this proceeding that, in directing specific steps to mitigate the service emergency, “we were careful to avoid directly favoring any particular shipper over any other.” December 22 decision at 4. In fact, in our December 4, 1997 decision (at 7) in Service Order 1518, we acknowledged the backlog of agricultural shipments and directed UP and Burlington Northern Santa Fe to develop directly with their shippers a prioritization program to move grain. The Board did not participate in the details of the prioritization process.

It was in light of these considerations that we reviewed DeBruce’s request to equalize cars in the GFP and voucher programs and to place and move its cars as responsively as those of other shippers. Because UP did not have enough available cars to fill all of its car orders, it appeared that the only practical way to achieve DeBruce’s ends would have been by giving fewer cars to non-DeBruce and non-GFP shippers. This would, in our view, act to favor DeBruce, and it is why what DeBruce characterizes as ordering UP to “honor the provisions of its own tariff” would have interfered with efforts both by the Board, and by affected railroads and shippers at our direction, to ameliorate the transportation emergency in the West in an even-handed way. Our decision did not make a judgment as to any of the substantive claims that were advanced by DeBruce (the alleged violations of 49 U.S.C. 11101(a), 11101(e), 11121(a)(1), and 10741(a)(1)); rather those issues were deferred for consideration in the complaint proceeding. We simply found that, for purposes of obtaining injunctive relief, it was not appropriate to single out DeBruce for special treatment in the midst of a transportation emergency while efforts were being made by carriers and shippers to resolve that emergency.¹²

Bifurcation. DeBruce proposed bifurcation of the liability and damages issues for two reasons: first, by delaying the damages phase until service returned to normal levels, calculating damages would be easier. Second, if we found no liability, parties would be spared the burden and expense of submitting evidence as to damages. UP responded that service to DeBruce had returned to normal, and bifurcation would create discovery disputes as to whether the sought information or

¹² DeBruce criticizes the Board for quoting extensively from, and relying upon, the DGI court’s decision, alleging that by reciting dicta of a judge without jurisdiction or expertise in the area, the Board was not fulfilling its “independent statutory duty to engage in reasoned decision making.” This argument is without merit. Our findings and conclusions were based on our own independent analysis of the record, which, obviously, included the court’s decision. In quoting a portion of the DGI decision, we stated that “we share the concerns expressed by the court,” and the court’s “concerns mirror those with which we have struggled throughout our review of the crisis in the West.” December 22 decision at 3-4. UP, in its November 14, 1997 reply, also cited the court’s language on the issues of irreparable harm, and harm to UP and other shippers. Finally, as noted, our decision also relied on our October 31, 1997 Service Order 1518 decision, which was issued a day after the DGI decision.

documents concern “damages” or “liability”. DeBruce countered by claiming that UP opposes bifurcation in order to “impose a more onerous burden on DeBruce”; that there will be no confusion as to liability and damages evidence; and that UP is not current on all DeBruce car orders. UP, in reply, denied these arguments.

We will deny the request to bifurcate. UP appears now to be current on all DeBruce car orders. As noted, for the first half of February, DeBruce has only ordered 100 of the 300 cars it is entitled to under the GFP program for placement at its facilities. The remaining 200 cars were ordered for placement at non-DeBruce facilities. Moreover, it appears that the differences between the liability and damages phases of the case are not so clearly delineated. UP points out that it is seeking discovery of the purchases and sales of DeBruce of both GFP placements and vouchers on the secondary market. UP argues that this information is related to both damages and liability. Finally, DeBruce’s claim that not bifurcating will be more onerous is only pertinent if it loses the liability phase. On balance, we believe that proceeding under a unified record will result in a quicker and more administratively workable resolution of this case.¹³

Motion to compel. UP’s motion to compel seeks full and complete responses to 43 interrogatories and 4 document production requests. UP divides the interrogatories into two groups. The first consists of 24 interrogatories asking DeBruce to “state the basis of, and any fact on which you rely in” allegations found in specified paragraphs of its complaint. UP claims that DeBruce’s answers “are plainly evasive and non-responsive.” In most instances, the answers consist of statements that the allegations in the complaint “are based on DeBruce’s experiences” in various activities, such as operation of its business, operating its Nebraska elevators, purchasing vouchers, or UP service at DeBruce’s elevators. Some answers also contain brief references to filings or communications.

UP also seeks to compel answers to a second group of 19 interrogatories. These interrogatories seek specified information concerning allegations made in the complaint, such as grain moving from the three complaint elevators, attempts to purchase vouchers to cover unfilled GFP orders, and sales opportunities lost. UP claims that DeBruce failed to provide any of the requested information, but instead DeBruce stated that it “will produce information responsive to this Interrogatory to an independent professional organization not interested in this proceeding and paid by UP.” This is also the same answer provided to the requests for document production that covered documents referred to or related to DeBruce’s interrogatory answers and certain financial reports and income statements.

DeBruce replied to UP’s motion to compel, claiming that the interrogatories were designed to impose a burden on DeBruce. Nevertheless, DeBruce argues that it “provided timely responses.” Concerning the first group of interrogatories, pertaining to the facts relied upon in various

¹³ Cf. 49 CFR 1111.8. The Board does not generally bifurcate the market dominance and rate reasonableness phases of rate reasonableness complaints.

paragraphs of the complaint, DeBruce claims that it answered in good faith even though the interrogatories were largely objectionable “because most of the factual allegations in the Complaint consisted of non-controversial and indisputable background information concerning the operations of the three Nebraska elevators that are the focus of DeBruce’s complaint.” DeBruce also submits that UP has not contacted complainant on this matter, and DeBruce states that it “remains ready to discuss any such additional information desired by UP.”

DeBruce objects to the second group of interrogatories and the requested document production on grounds of relevancy. Moreover, DeBruce claims that UP already has some of the documents. Nevertheless, DeBruce submits that it has not refused to answer the interrogatories or produce the documents, but would make this information available pursuant to an appropriate protective order. In the end, DeBruce asks that the parties be ordered to try to negotiate satisfactory responses to each other’s discovery requests, with the Board dealing with matters that cannot be resolved.

The policy of the Board in complaint cases is for the parties to meet, or discuss by telephone, discovery and procedural matters soon after the answer to the complaint is filed. 49 CFR 1111.9(a). We believe that such an approach fosters the resolution of discovery disputes, particularly where, as here, DeBruce has indicated its willingness to negotiate discovery issues and to provide requested information under the terms of a confidentiality order. We will, accordingly, defer action on the motion to compel at this time and direct the parties within 7 days of this decision to meet or discuss by telephone the unresolved discovery and procedural issues and then file a report with the Board. If the parties cannot agree on disputed matters after this discussion, they can then seek resolution by the Board.¹⁴

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

It is ordered:

1. The petition to reopen is denied.
2. The request to bifurcate the liability and damages phase of this proceeding is denied.
3. Parties are to meet within 7 days of service of this decision to discuss procedural and discovery issues. Within 14 days of the service date, the parties, either jointly or separately, shall file a report with the Board that includes a proposed procedural schedule.

¹⁴ Because we are directing the parties to negotiate discovery matters, we are waiving the 10-day rule. After negotiations, parties can seek reinstatement of the rule for future discovery requests in this proceeding.

STB Docket No. 42023

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

By the Board, Chairman Morgan and Vice Chairman Owen.

Vernon A. Williams
Secretary