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SURFACE TRANSPORTATION BOARD

DECISION

STB Docket No. 42099[1]

STB Docket No. 42100

STB Docket No. 42101

E.I. DUPONT DE NEMOURS AND COMPANY
v.
CSX TRANSPORTATION, INC.

Decided: December 17, 2007

On August 21, 2007, E.I. du Pont de Nemours and Company (DuPont) filed three separate complaints challenging the reasonableness of rates charged by CSX Transportation, Inc. (CSXT) for the movement of non-exempt commodities, including hazardous materials. DuPont's complaints stated that it intended to pursue relief under the simplified procedures in Rate Guidelines—Non-Coal Proceedings, 1 S.T.B. 1004 (1996). On September 4, 2007, CSXT filed a motion to dismiss the complaints, arguing that the rates at issue are not subject to the Board's jurisdiction because they are not common carrier rates, but rather contract rates pursuant to 49 U.S.C. 10709. CSXT further argued that rates for the transportation of hazardous materials should not be considered under a simplified procedure. CSXT also requested that the Board stay consideration of the complaints pending a Board decision on its motion to dismiss.

By a decision served on September 5, 2007, the Board clarified and modified its simplified procedures for rate reasonableness complaints. Simplified Standards for Rail Rate Cases, STB Ex Parte No. 646 (Sub-No. 1) (STB served Sept. 5, 2007) (Simplified Standards). In a decision in this proceeding, served on September 7, 2007, the Board ordered DuPont to supplement its complaints to conform to the Board's decision in Simplified Standards. DuPont filed its reply to CSXT's motion to dismiss on September 24, 2007, and its amended complaints on October 30, 2007.

As discussed below, we will deny CSXT's motion to dismiss.

[1] These proceedings are not consolidated. A single decision is being issued for administrative convenience.

BACKGROUND

DuPont challenges rates, including rates for hazardous materials such as chlorine and nitrobenzene, set forth by CSXT in documents referred to as "Private Price Lists" (PPLs), which took effect June 16, 2007. Prior to issuing these rates, CSXT transported commodities for DuPont pursuant to a rail transportation contract that covered virtually all of DuPont traffic handled by CSXT (Master Contract). The Master Contract went into effect on June 1, 1998, and provided for regular adjustment of rates. The Master Contract was revised on several occasions. Under the terms of amendments adopted in 2004, the Master Contract was scheduled to expire on May 31, 2007.

Discussions regarding the renewal of the Master Contract began in 2006. DuPont states that it had informed CSXT in February 2006, and again in the spring and summer of that year, of its desire to begin negotiations for contract renewal and requested a contract proposal. DuPont states that, in a correspondence sent in September 2006, CSXT advised DuPont of the terms it wanted to address in contract renewal discussions and that CSXT would offer DuPont a contract proposal in January 2007.

CSXT states that, prior to its September 2006 correspondence, it indicated to DuPont that a renewed contract would include increased rates. CSXT states that its September 2006 correspondence provided DuPont with a formal written notice of its desire and intention to negotiate new terms of their contract. In the months following, according to CSXT, parties exchanged proposed pricing terms and held multiple meetings to negotiate a new contract.

During this period, DuPont states that it received a written contract proposal on March 9, 2007 (March 9 proposal), containing substantial rate increases and other terms unacceptable to DuPont. DuPont rejected this proposal on March 19, 2007. DuPont states that it was then in the position that it had to submit a counter-proposal covering hundreds of traffic lanes across multiple businesses.

DuPont asserts that, in May 2007, CSXT informed DuPont that it intended to publish the rates contained in its March 9 proposal, which DuPont had rejected, if the parties did not reach an agreement by June 1. After expressing its disappointment with CSXT's decision to publish such rates, DuPont asked CSXT to extend the existing Master Contract for 2 months so the parties could negotiate another mutually acceptable agreement. On May 25, CSXT agreed to extend the Master Contract rate for 2 weeks, until June 15. CSXT also advised DuPont that it would publish the March 9 proposed rates in "several, private DuPont tariffs," effective June 16, 2007, if parties failed to reach an agreement by June 7. Furthermore, CSXT indicated that, if the parties agreed to a contract, the contract would replace the "private tariffs."

DuPont states that, on June 8, 2007, CSXT rejected its request to further extend the Master Contract until June 30, 2007, and informed DuPont that it would publish "several temporary rate authorities," effective June 16. On June 14, DuPont informed CSXT that it desired to continue contract negotiations but, in the interim, would pay the rates set forth in circulars as "common carriage, non-contract moves," further noting that it did not agree that such rates were acceptable for future inclusion in a renewed contract. DuPont notes that, in its response, CSXT did not contest DuPont's characterization of the rates as common carrier rates.

With the parties unable to reach an agreement to renew the Master Contract, CSXT issued four PPLs that read, "CSX Transportation Private Price List . . . Containing Confidential Information for DuPont Patron Group," effective June 16, 2007. The terms of the PPLs state that "Rail Transportation Contracts take precedence over prices published herein for the same commodities over the same routes." The PPLs permit CSXT to unilaterally increase or change the rates at any time through advance notice. Since the expiration of the Master Contract on June 15, 2007, DuPont has tendered traffic to CSXT under the PPLs.[2]

POSITIONS OF THE PARTIES

CSXT argues that DuPont challenges confidential, private rates, as opposed to public common carrier rates, and therefore that the complaints are not subject to the Board's jurisdiction and should be dismissed. CSXT asserts that common carrier rates are public rates in that they can be used by the general public and that the rates are matters of public record that must be provided to any person upon request. Because the PPL rates are available only to DuPont and are confidential, CSXT contends that they are contract rates. CSXT claims that it advised DuPont that it would issue common carrier rates to replace the PPLs upon DuPont's request, but that DuPont has not made any request, formal or otherwise, for common carrier rates, as provided under 49 CFR 1300.2.

CSXT also argues that rate cases involving commodities that are toxic-by-inhalation (TIH) hazards or other hazardous materials should not be determined under any simplified methodology. Because of the costs and complex issues involved in transporting hazardous materials by rail, CSXT argues that the Board should consider challenges to rates for rail transportation of hazardous materials (including DuPont's challenges to CSXT's rates charged for rail transport of chlorine and nitrobenzene), if at all, under a full stand-alone cost or constrained market pricing analysis, supplemented as appropriate to consider the extraordinary issues and challenges posed by transportation of TIH and other hazardous materials.

In its reply, DuPont argues that the rates it challenges are not contract rates, but common carrier rates subject to the Board's jurisdiction. DuPont notes that the Board and its predecessor, the Interstate Commerce Commission (ICC), have long permitted shipper-specific tariffs. DuPont also notes that 49 U.S.C. 11101(b) does not require rates to be publicly disseminated, as

[2] CSXT states that DuPont has shipped freight pursuant to all but one of the PPLs at issue, having not shipped chlorine between Niagara Falls, NY, and New Johnsonville, TN, since early 2007.

argued by CSXT; rather, DuPont maintains that section 11101 requires a carrier to provide its rates and service terms only to the person requesting it. DuPont further argues that the facts establish that the rates it challenges are common carrier rates. Specifically, DuPont notes that it rejected the rates published by CSXT during the course of contract negotiations; CSXT repeatedly referred to the published documents as "tariffs," "rate authorities," "circulars," and "price lists," but never "contracts"; the published rates were imposed on, not negotiated with, DuPont; the rates were never characterized as an "offer," nor was there acceptance by DuPont or signatures of either party to the documents; and DuPont specifically told CSXT that it understood the rates to be common carrier rates, which CSXT did not refute. Thus, DuPont asserts that there was no meeting of the minds to create a contractual arrangement and that it never intended to opt out of the federal protections afforded in the Interstate Commerce Act, including rate regulation by the Board.

With regard to CSXT's argument regarding challenges to rates for hazardous materials, DuPont argues that, because hazardous materials seldom move between an origin and destination in quantities that would justify a full stand-alone cost (SAC) presentation, an aggrieved hazardous materials shipper would be denied regulatory rate protection if it could only challenge a rail rate under the SAC procedures. DuPont also asserts that the Simplified Standards do not contain any restriction against application of the simplified procedures to either hazardous materials in general or the more narrow category of TIH traffic. DuPont further argues that, contrary to CSXT's assertions, under the Three-Benchmark approach in Simplified Standards, the costs of moving hazardous materials would be reflected in the rates of the comparable traffic group. Lastly, DuPont asserts that a rulemaking proceeding, not a motion to dismiss, would be the appropriate avenue for CSXT to raise its objection to applying the simplified standards to TIH and other hazardous materials traffic.

DISCUSSION AND CONCLUSIONS

For the reasons discussed below, we find that the rates contained in the PPLs are subject to the Board's jurisdiction and that consideration of the complaints under Simplified Standards is appropriate. Therefore, CSXT's motion will be denied.

Rail Transportation Contracts

The core dispute here is whether these PPLs are common carrier pricing documents or rail transportation contracts. If they are rail transportation contracts, then the rates set forth in those agreements cannot be challenged as unreasonable before the Board. See 49 U.S.C. 10709(c). There is, however, no clear distinction in the statute or our precedent between a contract and a common carrier rate. See Kansas City Power & Light Company v. Union Pacific Railroad Company, STB Docket No. 42095 (STB served Mar. 29, 2007). Whether a contract or

common carrier rate exists has been examined on a case-by-case basis in light of the parties' intent. See Aggregate Volume Rate on Coal, Acco, UT to Moapa, NV, 364 I.C.C. 678, 689 (1981).[3]

The Board has primary authority to determine its own jurisdiction. See Burlington N., Inc. v. Chicago & N.W. Transp. Co., 649 F.2d 556, 558 (8th Cir. 1981). When the question is whether a valid rail transportation contract exists, the Board will often defer to the courts. But before we will dismiss a rate complaint, the defendant railroad must demonstrate a reasonable possibility that a rail transportation contract governs the movement in question. See Toledo Edison Co. v. Norfolk & Western Ry. Co., 367 I.C.C. 869 (1983).

Here, CSXT has not met this burden. The record does not indicate~~s~~ that the parties possessed the requisite intent to enter into a rail transportation contract under 49 U.S.C. 10709. Rather, the facts demonstrate just the opposite: that, following months of unsuccessful attempts at renewing the Master Contract, the PPLs were established by CSXT as the alternative to a mutually agreeable contract between the parties. CSXT referred to publishing the rejected terms and rates at issue as "private tariffs" and did not raise the contract issue until after DuPont filed its rate reasonableness complaint with the Board. Moreover, DuPont has submitted evidence that indicates that it contemporaneously regarded the rates at issue as common carrier rates at the time it shipped under them and made that belief clear to CSXT. Finally, and most significantly, by their own terms, the first section of the PPLs unambiguously state that "*Rail Transportation Contracts* take precedence over prices published herein for commodities over the same routes." (emphasis added). A plain reading of this language indicates that CSXT intended that the PPLs be something other than a rail transportation contract under 49 U.S.C. 10709. Having referred to these agreements as "private tariffs" in their correspondence with DuPont, and then having included a provision that clearly states these PPLs are not "Rail Transportation Contracts," there is no reasonable basis to conclude that a rail transportation contract exists between the parties.

CSXT also argues that the nature and terms of the PPLs demonstrate that the PPLs are rail transportation contracts and not common carriage agreements. For example, CSXT argues that these rates cannot be common carriage agreements because they apply to only one shipper. But the agency has long held that shipper specific common carrier rates are permissible. National Grain & Feed Assoc. & Burlington N. R.R. Co., 8 I.C.C.2d 421, 438 (1992), overruled on other grounds, 5 F.3d 306 (8th Cir. 1993); Rates For A Named Shipper Or Receiver, 367 I.C.C. 959 (1984).

We also find unpersuasive CSXT's argument that the PPLs cannot be common carriage agreements simply because CSXT designated them as confidential. CSXT has an obligation to make common carrier rates available to any person upon request under 49 U.S.C. 11101(b). See 49 CFR 1300.2(a); Pejepscot Industrial Park—Pet. For Declaratory Order, 6 S.T.B. 886, 893

[3] In STB Ex Parte No. 669, the Board is considering whether and how to better distinguish common carriage tariffs from rail transportation contracts. See Interpretation of the Term "Contract" in 49 U.S.C. 10709, STB Ex Parte No. 669 (STB served Mar. 29, 2007). In the meantime, we continue to examine the issue on a case-by-case basis.

(2003). As such, it is unclear whether CSXT's unilateral attempt to designate the agreement "confidential" is consistent with its obligations under section 11101. Nor is it clear what information it deemed confidential, as the documents merely state that they "contain confidential information" but do not specify what terms are confidential or provide guidance for the handling of confidential material. In any event, simply labeling a pricing document confidential cannot transform a common carrier rate into a rail transportation contract.

In sum, the PPLs cannot be viewed as rail transportation contracts on the facts of this case. Here, DuPont expressly rejected a proposed rail transportation contract containing the same rates published in the PPL because it viewed those rates as unreasonably high. It defies logic to suggest that DuPont tendered shipments under these PPLs with the understanding that doing so precluded it from challenging those same rates as unreasonable. Finally, CSXT could have included a provision in the PPLs prominently warning DuPont that tendering shipments under the PPLs would constitute acceptance of a rail transportation contract pursuant to 49 U.S.C. 10709. Instead, it included a provision stating that a rail transportation contract would take precedence over the prices published in the PPLs, and in its correspondence with DuPont referred to the agreements as tariffs, rate authorities, and circulars. Under these circumstances, we find that the agreements in question are common carriage tariffs subject to our jurisdiction.

Hazardous Materials

Alternatively, CSXT argues that the Board should declare that rates for the transportation of hazardous materials should not be considered under Simplified Standards. Simplified rate review procedures have applied to shipments of hazardous materials since 1996 and CSXT has had numerous opportunities to comment on the adequacy of the simplified procedures. Indeed, we recently completed a lengthy review of our simplified procedures. In that rulemaking, CSXT was aware that hazardous materials traffic could be subject to simplified rate complaint procedures,[4] but never asked the Board to exempt such traffic from the Simplified Standards.

In any event, Congress directed the Board to "establish a simplified and expedited method for determining the reasonableness of challenged rates in those cases in which a full stand-alone cost presentation is too costly, given the value of the case." 49 U.S.C. 10701(d)(3). A full SAC presentation would be prohibitively expensive for over 90% of chemical shipments, see Simplified Standards at 35, and we can presume that a similar percentage of hazardous chemical shipments would be unable to justify a full SAC presentation. Thus, in effect CSXT's argument would foreclose from rate review the vast majority of hazardous materials shipments. But CSXT has neither provided the information needed, nor evoked the necessary procedures, to exempt this traffic from rate regulation under the standards set forth in 49 U.S.C. 10502(a). Accordingly, we will apply Simplified Standards to these complaints.

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

[4] See NS/CSXT Opening Comments at 18 in STB Ex Parte No. 646 (Sub-No. 1).

It is ordered:

1. CSXT's motion to dismiss is denied.

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

By the Board, Chairman Nottingham, Vice Chairman Buttrey, and Commissioner Mulvey.

Vernon A. Williams
Secretary