

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

ENTERED
Office of Proceeding
February 7, 2003
Part of Public
Record

CF Industries, Inc.,)
Petitioner.)
)
v.)
)
Indiana & Ohio Railway Company;)
Point Comfort and Northern Railway)
Company; Michigan Shore Railroad, Inc.,)
Respondents.)
_____)

Docket No. FD 35517

**CF INDUSTRIES, INC.’S REPLY IN OPPOSITION TO MOTION OF RAILAMERICA
TO DISMISS PROCEEDING**

On January 18, 2013, RailAmerica, Inc., Alabama Gulf Coast Railway LLC (“AGR”), Indiana & Ohio Railway Company (“IORY”), Point Comfort and Northern Railway Company (“PCN”), and Mid-Michigan Railroad, Inc. (“MMR” and together with RailAmerica, Inc., AGR, IORY, and PCN, “RailAmerica”) filed a Motion to dismiss this proceeding (“Motion”). Based on amendments to the RailAmerica tariffs challenged in this proceeding (“Tariffs”) to eliminate (1) priority trains to handle Toxic-by-Inhalation Hazardous materials and Poison-by-Inhalation Hazardous materials (“TIH”), and (2) the limitation on trains with TIH cars to three cars per train, RailAmerica contends this proceeding is moot and requests that the Surface Transportation Board (“Board”) dismiss this proceeding. For the reasons set forth herein, CF Industries, Inc. (“CF”) opposes RailAmerica’s Motion.

I. Discussion

CF filed the Petition of CF Industries, Inc. for a Declaratory Order (“Petition”) on May 17, 2011 – nearly two years ago.¹ CF was compelled to do so because of the uncertainty created by RailAmerica’s adoption of a number of practices that are unnecessary, unreasonable, and overly burdensome on TIH shippers.² Although other shippers had previously commenced a proceeding against RailAmerica, Inc. and AGR challenging the same provisions challenged by CF in this proceeding, CF believed there were no facts in dispute at the time CF filed its Petition that would have prevented the Board from granting CF the requested relief and which relief would have provided quick and clear guidance to the shipper community. Nearly two years later, the issues raised by CF in its Petition have been only partially resolved. This, in part, is due to RailAmerica’s continual revision, rescission, and re-characterization of the practices at issue in this proceeding.

As the Board notes in its November 26, 2012 Decision (“November 26th Decision”), CF requested that the Board declare invalid and unenforceable not only the Tariffs but also the “TIH/PIH Standard Operating Practice (SOP)” (“SOP”).³ Notwithstanding that RailAmerica explicitly stated to shippers that the SOP would be implemented on all TIH shipments, RailAmerica stated to the Board that the SOP was merely a “negotiating tool” and not a tariff or contract governing the transportation of TIH. The fact that RailAmerica did not reverse its prior position – that the SOP would be implemented with regard to all TIH shipments – until the shippers commenced this proceeding and the proceeding in Docket No. NOR 42129 calls into

¹ On April 15, 2011, the American Chemistry Council (“ACC”), The Chlorine Institute, Inc. (“TCI”), The Fertilizer Institute (“TFI”), and PPG Industries, Inc. (“PPG”) instituted a proceeding against RailAmerica, Inc. and AGR in Docket No. NOR 42129 challenging the tariff of AGR, which contained the same provisions challenged by CF in its Petition for Declaratory Order.

² See Petition for Declaratory Order.

³ See Petition for Declaratory Order.

question RailAmerica's characterizing the SOP to the Board as a "negotiating tool." Furthermore, it demonstrates the lengths to which shippers had to go to in an attempt to prevent RailAmerica from implementing such practices.

In addition to reversing its position on the SOP, RailAmerica also removed certain requirements from its form of notice to which shippers objected. The Board held that based on RailAmerica's removal of the "date [railroad] is requested to take possession" of TIH shipments, any challenge to the Tariffs relating to such language was moot.

RailAmerica also proposed a 10 mph limitation on trains carrying TIH. Similar to other challenged provisions, RailAmerica subsequently removed this restriction from its Tariffs. However, the Board directed RailAmerica "not to enforce a blanket speed limit, specific to TIH/PIH and lower than speed limits applicable to other commodities, that applies at all times and in all locations."⁴

RailAmerica asserts that any remaining issues are addressed by its issuance of new tariffs that purportedly eliminate (1) priority trains to handle TIH, and (2) the limitation on trains with TIH cars to three cars per train. As such, RailAmerica requests that the Board hold this proceeding in abeyance with regard to its request for comments from the Federal Railroad Administration ("FRA"), the Pipeline and Hazardous Materials Safety Administration ("PHMSA"), and the Transportation Security Administration ("TSA") (which request the Board granted)⁵ and, thereafter, dismiss this proceeding as moot.

II. CF's Opposition to RailAmerica's Motion to Dismiss

CF opposes RailAmerica's request that this proceeding be dismissed. To the extent any issues in this proceeding are moot (and CF is not conceding that such issues are moot), they are

⁴ See November 26th Decision at 7.

⁵ See Decision in Docket No. FD 35517 (Jan. 24, 2013).

moot only because RailAmerica has for the time being decided to issue new tariffs without the challenged provisions. In RailAmerica's view, that is all that is necessary to resolve the controversy that originally gave rise to CF's Petition and render the proceeding "moot." Such a view, however, overlooks the ongoing risk faced by CF and other shippers that RailAmerica simply could issue new tariffs containing the challenged provisions, or substantially similar provisions, in the same manner it has issued new tariffs throughout this proceeding. Absent either a determination by the Board as to the provisions of the original Tariffs challenged in this proceeding or, similar to the Board's direction with regard to speed limits, direction from the Board that RailAmerica not impose any of the challenged provisions, CF could find itself in the same position it was on May 16, 2011 as soon as the Board dismisses this proceeding. CF then would be faced with commencing a new proceeding to address the exact same or similar issues as those raised in this proceeding.

The Board, CF, and other parties have dedicated significant time and resources and incurred substantial costs to address the issues arising from RailAmerica's Tariffs. All parties have had ample opportunity to conduct discovery, prepare their cases, and present evidence. The underlying policy issues in this proceeding have not been eliminated simply because RailAmerica revised its Tariffs – several times. CF sees no reason to terminate this proceeding after two years of litigation and a significant expenditure of resources, absent some guarantee that RailAmerica will not undertake to adopt practices that will result in same issues arising in this proceeding. Having to start over again should RailAmerica decide to issue yet another tariff would be a waste of the Board's and shippers' time and resources, while allowing RailAmerica to game the regulatory process. While CF fully expects that under the management of its experienced new owner, Genesee & Wyoming Inc., RailAmerica will not engage in such actions,

CF has no guaranty and would be deprived of progress made in this proceeding over the last nearly two years should the Board grant RailAmerica's motion to dismiss.

Therefore, CF opposes RailAmerica's Motion to dismiss this proceeding unless the Board directs RailAmerica not to impose special train service or car limitations on trains transporting TIH. Absent such direction, this proceeding should remain in abeyance, including any requested comments from the FRA, PHMSA, and TSA, pending a new complaint by any shipper that RailAmerica is engaging, or threatening to engage, in practices that are the same or similar to those practices at issue in this proceeding.

Furthermore, Docket No. NOR 42129 remains open. As the Board has noted, the two proceedings raise common issues. As such, regardless of any other determination the Board makes with regard to RailAmerica's request to dismiss this proceeding, it should deny such request at a minimum for such time as the proceeding in Docket No. NOR 42129 remains open.

III. Prayer for Relief

For the reasons stated above, CF requests that the Board:

1. Deny RailAmerica's motion to dismiss this proceeding for so long as the proceeding in Docket No. NOR 42129 remains open.
2. Direct that RailAmerica not impose special train service or car limits on trains carrying TIH prior to obtaining Board approval, which approval shall not be sought until after RailAmerica has consulted with and obtained the written support of the FRA, PHMSA, and TSA to impose such restrictions.
3. As an alternative to 2 above, deny RailAmerica's motion to dismiss this proceeding and hold the proceeding in abeyance pending a motion by CF or the other participants to reopen the

proceeding as a result of RailAmerica's implementation or proposed implementation of restrictions that are the same as, or similar to, those challenged in this proceeding.

Respectfully Submitted,



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Attorneys for CF Industries, Inc.

February 7, 2013

CERTIFICATE OF SERVICE

I certify that, on February 7, 2013, I have sent copies of CF Industries, Inc.'s Reply in Opposition to Motion of RailAmerica to Dismiss Proceeding to all parties of record on the service list for Docket No. FD 35517.

/s/ Jeffrey J. Williamson
Jeffrey J. Williamson