

STB DOCKET NO. 41510

H.B. FULLER COMPANY

v.

SOUTHERN PACIFIC TRANSPORTATION COMPANY

Decided August 20, 1997

H.B. Fuller Company filed a complaint alleging that the level of storage charges assessed by Southern Pacific Transportation Company was unreasonable and that the practice of charging demurrage for privately-owned freight cars was an unreasonable practice. This complaint is being dismissed for lack of jurisdiction.

BY THE BOARD:¹

Complainant H. B. Fuller Company (Fuller) filed a complaint on December 8, 1994, against defendant Southern Pacific Transportation Company (SP), alleging that the level of storage charges assessed by SP was unreasonable and that the practice of charging demurrage for privately-owned freight cars was an unreasonable practice. The storage and demurrage charges were made in connection with vinyl acetate shipments to Fuller in Roseville, CA, that moved pursuant to a railroad transportation contract and predecessor agreements. According to SP, the charges in issue were applied because the contract

¹The *ICC Termination Act of 1995*, Pub. L. No. 104-88, 109 Stat. 803 (*ICCTA*), which took effect on January 1, 1996, abolished the Interstate Commerce Commission (ICC or Commission) and transferred certain functions and proceedings to the Surface Transportation Board (Board). Section 204(b)(1) of *ICCTA* provides, in general, that proceedings pending before the ICC on the effective date of that legislation shall be decided under the law in effect prior to January 1, 1996, insofar as they involve functions retained by *ICCTA*. This decision relates to a proceeding that was pending with the ICC prior to January 1, 1996, and to functions that are generally subject to Board jurisdiction pursuant to 49 U.S.C. 10702, 49 U.S.C. 10709, and 49 U.S.C. 10746. However, as discussed below, we determine that this particular matter was not subject to the jurisdiction of the ICC and, accordingly, is not subject to Board jurisdiction, either. This decision generally applies the law in effect prior to *ICCTA*, and citations are to the former sections of the statute, unless otherwise indicated.

incorporated by reference pertinent provisions of SP tariffs. Fuller claims that SP tariffs concerning demurrage and storage charges are not applicable because the contracts under which the shipments moved made no provision for either of those charges. As it is undisputed that the involved transportation moved under contract, under former 49 U.S.C. 10713(i), we do not have jurisdiction, and we are dismissing the complaint.

BACKGROUND

Fuller, a manufacturer of adhesives, sealants, coatings, and other related products (such as polymers, powder coatings for paint manufacture, and cleaning compounds), operates a facility at Roseville that manufactures polymers for paper making and adhesives manufacture. The commodity most regularly shipped to the Roseville plant is vinyl acetate (STC Code 28-186-68), which is classified by the U.S. Department of Transportation as a "flammable liquid". See, 49 CFR 172.101.

The vinyl acetate, in liquid form, was usually shipped by rail and delivered to Roseville by SP in private tank cars, for which the railroads paid a mileage charge but no per diem or other time-based charges. Between February and July 1993, SP transported 25 rail cars loaded with vinyl acetate to Fuller's Roseville plant; 8 rail cars had earlier been delivered between December 1991 and May 1992.

All of this transportation was subject to a contract for carriage (ICC-SP-C-11773) dated July 3, 1992, and effective July 4, 1992, and predecessor agreements.² Under the contract, Fuller was to pay transportation charges for SP's portion of the route, and SP was to pay mileage charges not to exceed 70 cents per loaded mile for the cars supplied by the customer. The contracts did not explicitly address demurrage or track storage charges but provided generally that the transportation was to be governed by the tariffs, rules, and regulations

² While eight of the movements occurred before the effective date of ICC-SP-11773, as indicated, Fuller states that all movements were carried out under that contract "and predecessor agreements." Complaint at 2. Fuller also indicates that the contract "is representative of contracts applicable to all relevant shipments via SP to the Fuller Roseville Plant." *Id.* SP states that "[i]t appears that all of the movements in issue took place under a transportation contract duly filed with the ICC." SP statement at 23.

that would have applied if the contract had not been in effect.³ SP and Fuller differ as to whether this provision specified SP demurrage and storage charge tariffs. Fuller has paid a total of approximately \$205,748 in freight transportation charges under the contract and earlier agreements. SP levied a total of \$35,628 for track storage on SP track for all of these shipments and \$39,914 for demurrage charges on the same cars stored on SP track.⁴

Fuller's objection to the track storage rates is founded on comparison with similar charges by other railroads. Fuller characterizes the storage charges as being, in effect, a short-term lease of track, and it reasons that "rental" of this trackage should entitle it to an exemption from demurrage. SP should not, it argues, be entitled to charge twice for rental of the same property.

SP, on the other hand, maintains that the risks of holding cars containing hazardous materials such as vinyl acetate on its operating property are both real and substantial, and that the hazardous storage fee provides some compensation to the railroad against potentially astronomical costs in case of a spill and serves as a constant reminder to receivers to bring these commodities under receiver supervision as quickly as possible. It notes that Fuller's Roseville facility has no storage tracks under Fuller's exclusive responsibility and control and, thus, until a car can be spotted for delivery on Fuller's siding, it is subject to risks while on railroad property that can be virtually unlimited.

SP further notes that demurrage charges are intended, in part, to compensate railroads for the use of their operating property. It describes its transportation system as designed to support a continuous flow of cars from loading point to receiving point, such that additional costs are created when a car must be taken out of the flow and held for an indeterminate length of time.

DISCUSSION AND CONCLUSIONS

SP has moved to dismiss the complaint, on the ground that all the subject movements took place under a transportation contract duly filed with the ICC, and that accordingly Fuller may not challenge the charges at issue. Under former 49 U.S.C. 10713(i)(1):

³ The contract stated:
Except as provided herein, transportation of commodities hereunder will be governed by the tariffs, rules and regulations which would apply if this Agreement were not in effect * * *.

⁴ Fuller has already paid \$4,678 of the storage charges and \$4,890 of the demurrage charges.

A contract that is approved by the Commission under this section, and transportation under such contract, shall not be subject to this subtitle, and may not be subsequently challenged before the Commission or in any court on the grounds that such contract violates a provision of this subtitle. In addition, under former 49 U.S.C. 10713 (i)(2):

The exclusive remedy for any alleged breach of a contract entered into under this section shall be an action in an appropriate State court or United States district court, unless the parties otherwise agree.

These provisions remove transportation under a rail contract from any subsequent regulatory review.⁵ *Cleveland-Cliffs Iron Co. v. ICC et al.*, 664 F.2d 568, 588 (6th Cir. 1981); *Burlington N. R.R. v. ICC et al.*, 679 F.2d 934, 941-42 (D.C. Cir. 1982); *Railroad Transportation Contracts*, 3 I.C.C.2d 219, 230 n.6 (1986); *Railroad Transportation Contracts*, 4 I.C.C.2d 228, 231 (1988); *Paducah & L. Ry.--Acq. & Oper. Exempt.--Illinois C.G. R.R.*, 5 I.C.C.2d 729, 744 n.30 (1989).

In this case, the transportation was performed under contract, even though the terms of the contract refer to the carrier's tariff. Thus, even if, as SP alleges, the referenced tariffs would have applied generally to storage and demurrage charges, the Board would not have jurisdiction over services provided under contracts incorporating those tariffs. The contract, even though it may rely on the tariff for certain terms, reflects the bargain of the parties. The fact that the parties may have chosen to incorporate tariff terms into their contract does not make transportation under the contract subject to regulation. Rather, the referenced tariff terms became contract terms for purposes of transportation performed under the contract. As such, issues regarding the breach, or precise construction of those terms will have to be resolved in an appropriate court of law.

Accordingly, because the record indicates that all shipments in issue moved under the contract or its predecessors, we find no jurisdiction to consider the matters raised by Fuller's complaint.

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

It is ordered:

1. This proceeding is dismissed for lack of jurisdiction.
2. This decision will be effective on August 22, 1997.

By the Board, Chairman Morgan and Vice Chairman Owen.

⁵ Under the new statute, similar provisions are found at 49 U.S.C. 10709(c)(1) and (2).