STB DOCKET NO. 42031

PARRISH & HEIMBECKER, INC.
— PETITION FOR DECLARATORY ORDER

Decided May 24, 2001

The Board denies a petition for reconsideration and clarification of a prior declaratory order decision determining that CSX Transportation, Inc. was not entitled to certain surcharges it had imposed on a shipper's grain shipments originating at Brown City, MI, in a situation where the grain shipments moved under transportation contracts between the railroad and third party consignees.

BY THE BOARD:

CSX Transportation, Inc. (CSXT) has petitioned for reconsideration or, alternatively, for clarification of our declaratory order decision in *Parrish & Heimbecker, Inc. — Petition for Declaratory Order*, 4 S.T.B. 866 (2000) (*Decision*) in this court-referred proceeding.[1] In that decision, we determined that CSXT was not entitled to certain surcharges that it had imposed on outbound grain shipments tendered by Parrish & Heimbecker, Inc. (P&H) at Brown City, MI. P&H has replied. We deny the petition.

BACKGROUND

As we described in more detail in our earlier decision, P&H sells corn and other feed grains to animal and poultry industry customers in the Southeast. P&H's grain moved in multiple-car shipments under common carriage tariff rates until 1988, when CSXT negotiated rail transportation contracts with P&H's consignees. Those contracts provided the rates for rail service from P&H's facilities on CSXT's Brown City line to the consignees' facilities in the Southeast and provided for the consignees to bear those charges. As a result, P&H

[1] CSXT filed suit against P&H to collect unpaid surcharge amounts in *CSX Transportation, Inc. v. Parrish & Heimbecker, Inc.*, No. 96-75431 (E.D. Mich. filed Nov. 27, 1996). In response, P&H counterclaimed to recover surcharges previously paid. On February 2, 1998, the court referred this matter to the Board.

tendered shipments to CSXT f.o.b. origin[2] and typically endorsed the non-recourse clause contained in Section 7 of the Uniform Straight Bill of Lading (49 CFR 1035, Appendix B). *Decision* at 867 n.5. Such an endorsement alerted CSXT that it must collect the freight charges from the consignees and absolved P&H of liability for the charges should CSXT fail to do so.

In addition to collecting the contractual line-haul charges, CSXT, beginning on August 1, 1993, asserted its intent to assess P&H a $200 light-density line surcharge for every car that it originated or terminated on the line.[3] P&H paid the surcharge on grain shipments from October 1993 through January 1995, but then refused to make any further payment. Upon notification by CSXT under the terms of the tariff that its shipments would not be accepted absent pre-payment of the surcharge, P&H resumed payment in December 1996, and continued to pay the surcharge until Saginaw Valley Railway Company, Inc., acquired the Brown City line in May 1998 and canceled the surcharge. *Decision* at 868-869 & n.9.

In *Decision*, we determined that CSXT could not assess and collect a common carriage surcharge in connection with shipments that moved under rail transportation contracts, and that its attempt to do so was an unreasonable practice under 49 U.S.C. 10702. *Decision* at 874-876. We also determined that, even if that were not the case, CSXT could not collect surcharges from P&H to the extent they applied to shipments that moved under bills of lading in which P&H had endorsed the non-recourse clause. *Id.* at 877-878.

DISCUSSION AND CONCLUSIONS

In this case, we are required to reconcile two statutory provisions. In its request for reconsideration, CSXT again argues that, because the Staggers Rail Act of 1980, Pub. L. No. 96-449, 94 Stat. 895 (*Staggers Act*), authorized rail carriers to enter into rail transportation contracts and to impose light-density line surcharges, the Board must give effect both to the contracts between CSXT and the consignees and to CSXT's surcharge on P&H for the same transportation, and that we erred in not doing so. CSXT points out that the surcharge directly

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[2] The term f.o.b. (free-on-board) characterizes the responsibility shippers and consignees assume for a shipment. Under "f.o.b. origin," the consignee assumes responsibility for payment and all other matters once the shipment is tendered to, and accepted by, the carrier. In contrast, under "f.o.b. destination," the shipper retains responsibility for payment and all other matters until the shipment is tendered to, and accepted by, the receiver.

[3] Surcharge Tariff ICC CSXT 9804-E. A carrier's authority to impose a light-density line surcharge was contained in former 49 U.S.C. 10705a(b). *Decision* at 871-872, 875.

imposes no additional charge on the contracting parties (the consignees), and it asserts that, because P&H (the consignor) is not a party to those contracts, it may claim no benefit from them. For these reasons, CSXT argues that the surcharge does not detract from the contract or impede Congress' objectives in authorizing and encouraging the wide use of contracts in the railroad industry. Again, we disagree.

Section 10709(c)(1) provides that a "contract that is authorized by this section, and transportation under this contract, shall not be subject to this part." This, we explained, reflects Congress' clear intent that rail contract service be a separate class of rail service, and that "service provided under contract" be exempt "from all regulation and all of the requirements" of the Interstate Commerce Act (now the ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (ICCTA)). *Decision* at 874-875, citing H.R. Rep. No. 96-1430, 96th Cong., 2d Sess. 100 (1980) (Staggers Act Conf. Rpt.). Thus, together with 49 U.S.C. 10709(b), which provides that a contracting party's rights and obligations are defined and limited by the contract itself, Congress broadly indicated that a carrier's assertion of common carriage rights regarding contract service must yield to its rights and obligations under the contract.

This result is reasonable here because surcharges, which by their nature apply to line-haul service, are effectively indistinguishable from line-haul rates. *Decision* at 876-877.[4] The fact that CSXT did not assess the surcharge on the contracting consignees, but rather separately on P&H, does not make the collection of the surcharge reasonable, as CSXT claims. Petition at 2-5. As we explained, Congress intended for rail contracts — like contracts in non-regulated business settings — to provide commercial certainty not available with common carriage.[5] *Decision* at 875. Thus, while CSXT can unilaterally alter the price for common carriage service, it cannot impose a surcharge that would effectively increase the line-haul charges fixed by contract. To do so would undermine the underlying certainty that the involved contracts were meant to afford, and, by

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[4] Thus, CSXT's surcharges are not analogous to demurrage or other kinds of separately identifiable accessorial charges that carriers may impose on consignors and consignees for different costs or services apart from the line-haul transportation service that is provided, as the carrier asserts. CSXT Petition for Reconsideration (Petition) at 11. Rather, as we explained, surcharges are imposed "solely in connection with line-haul movements and form part of, or an addition to, the line-haul rate." *Decision* at 877.

[5] With common carriage service, consignors and consignees know beforehand that rail rates and terms could be changed over the course of their own separate business relationship in ways that could alter underlying expectations.

doing so, dilute the broader benefits that Congress sought to realize through contract service.[6] *Id.*

Accordingly, CSXT's continuing arguments (Petition at 7-9) that Congress' prior authorization of light-density line surcharges precludes an unreasonable practice determination here remain unpersuasive. These surcharges were designed to deal in a limited way with sub-par revenues of more lightly used rail lines.[7] *Decision* at 872 & n.19, 875-876 & n.26, citing Staggers Act Conf. Rpt. at 82-83. But a carrier's authority to surcharge non-contract traffic for this purpose does not justify a surcharge on contract traffic, which would impinge unduly on other important policies advanced by the Staggers Act. *Decision* at 874-876.[8]

Finally, CSXT also requests that we clarify our alternative determination that P&H is not liable for the surcharges because of P&H's endorsement of the non-recourse clauses in the relevant bills of lading.[9] Petition at 9-13. CSXT expresses concern that our decision may be read more broadly as suggesting that other, similarly situated consignors could avoid liability for demurrage and other

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[6] Grain is sold pursuant to agreements between consignors and consignees. When rail service contracts are in place between a carrier and various consignees, a consignor will sell grain, and a consignee will buy it, with the reasonable expectation that the price of line-haul service for the duration of the contracts — and thus the delivered price of the grain — will remain certain. If, as here, a consignor's costs are increased by surcharges that effectively add to the fixed transportation charges, the parties' underlying commercial expectations are likely to be undone: either the consignor will be squeezed and clear less on subsequent deliveries to the consignees; or the consignees will be required to share in the burden of the surcharges and pay more for P&H grain or buy grain from alternative sources that may have been less desirable and were passed over in favor of P&H. CSXT's efforts to have us focus separately on the transportation relationships between the carrier and P&H, on the one hand, and, the carrier and the consignees, on the other, ignores the broader reality that both P&H and the consignees rely on CSXT's rail contracts, and that both are harmed by the surcharges in ways that would lead rail users to avoid contracting if the commercial certainty that rail transportation contracts are supposed to provide may be rendered illusory.

[7] Inadequate line revenues were defined, under former section 10705a(b), as those failing to recover 110% of variable cost plus 100% of the carriers' reasonably expected costs for continuing to operate such lines. Former 49 U.S.C. 10705a(b)(2).

[8] For traffic moving on and after January 1, 1996, our deference to the rail contracting policies of the Staggers Act is further supported by Congress' repeal of the explicit authority for imposing light-density line surcharges in the ICCTA, noting that the limited goals for these (and other specific) surcharges had been "already achieved." S. Rep. No. 104-176, 104th Cong., 1st Sess. 21 (1995).

[9] While CSXT argues that it did not "accept the freight f.o.b. origin," Petition at 6-7, P&H endorsed the non-recourse clauses, and CSXT accepted shipments on that basis. CSXT's real argument is that its surcharge is a distinct accessorial-type charge that should not be covered by the clause.

common carriage accessorial charges, and the carrier asks that we clarify that this is not the case. Because the district court's referral does not encompass such broader issues, and the limited record before us does not address them, it should already be clear that our ruling does not reach beyond the surcharge determination.[10]

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 for reconsideration, or alternatively clarification, is denied.
2. This proceeding is discontinued.
3. This decision will be effective on May 25, 2001.
4. A copy of this decision will be served on:

United States District Court for
the Eastern District of Michigan, Southern Division
(Attn: District Judge Nancy C. Edmunds)
(RE: No. 96-75431)
U.S. Courthouse, Room 211, 231 West Lafayette,
Detroit, MI 48226.

By the Board, Chairman Morgan, Vice Chairman Clyburn, and Commissioner Burkes.

[10] Our determination regarding P&H's non-recourse clause endorsements is not *obiter dicta*, as CSXT suggests. Petition at 9-10. The court called on us to resolve this issue, and should CSXT, pursuant to 28 U.S.C. 1336(b), challenge our determination on the return of this matter, the court should have the benefit of our ruling on what could remain a live issue.