STB FINANCE DOCKET NO. 33989

PEJEPSCOT INDUSTRIAL PARK, INC., d/b/a GRIMMEL INDUSTRIES–PETITION FOR DECLARATORY ORDER

Decided November 5, 2003

The Board, on reconsideration, modifies the date on which it previously determined that the respondent railroads first violated their common carrier obligation.

BY THE BOARD:

The Board will grant in part the petition of Maine Central Railroad Company, Springfield Terminal Railway Company, and Guilford Transportation Industries, Inc. (collectively, Guilford) for reconsideration of the decision in this proceeding, *Pejepscot Industrial Park–Pet. For Declaratory Order*, 6 S.T.B. 886 (2003) (May 15 Decision). In that decision, the Board determined that, as of June 26, 1996, Guilford had not complied with its statutory common carrier obligation to provide rates and service upon specific requests made by Pejepscot Industrial Park, Inc., d/b/a Grimmel Industries (Grimmel). On the basis of its consideration of newly submitted information, the Board now finds that Guilford was obligated to provide a rate for the transportation of Automobile Shredder Residue (ASR) following a specific request for rates from Grimmel on May 22, 1997, and its failure to do so resulted in a violation of its common carrier obligation shortly after that date.

BACKGROUND

Grimmel's original petition for a declaratory order arose in connection with a legal proceeding before the United States District Court for the District of Maine, in which the court referred to the Board the question of whether Guilford refused to supply rail service to Grimmel in violation of its common carrier obligations under 49 U.S.C. 11101.[1] In its May 15 Decision, the Board explained that, on the basis of the record before it, it was not possible to determine with certainty whether and/or at what time Grimmel's numerous discussions with Guilford prior to June 18, 1996, triggered Guilford's common carrier obligation to supply Grimmel with rates for rail service from Topsham, ME, where Grimmel has a plant.[2] *See id.* at 894-895. However, applying the

[1] A detailed discussion of the court proceeding and the facts giving rise to the dispute between Grimmel and Guilford is set forth in the May 15 Decision, 6 S.T.B. at 886-891.

[2] In their respective pleadings on the petition for a declaratory order, the parties primarily focused upon whether Guilford failed to provide *service* from Topsham upon reasonable request in violation of 49 U.S.C. 11101(a). The Board noted, however, that, to reach such a question, it would (continued...)

facts in the record before it to the law governing rail common carriers, the Board found that: (1) Guilford was legally obligated to furnish Grimmel with rates and service upon request for the transport of scrap metal and ASR from Grimmel's plant at Topsham, ME, until such time as the transportation of these commodities by rail was no longer regulated;[3] and (2) Guilford had failed to provide rates for the transport of ASR[4] from Topsham in response to clearly articulated requests from Grimmel on June 18, 1996,[5] and had thus breached its common carrier duty under 49 U.S.C. 11101(b) to supply a shipper with rates upon request.

On June 4, 2003, Guilford filed its petition for reconsideration. In it, Guilford offers evidence intended to show that Grimmel did not request rates for the transportation of ASR on June 18, 1996.[6] Specifically, Mr. Kenneth Berg, a Guilford employee, states that his previous testimony contained an unintended, inaccurate description of his contact with Grimmel at that time – a mistake that came to his attention upon reviewing the May 15 Decision. Mr. Berg claims that a closer examination of his records reveals that, on June 18, 1996, Grimmel asked for rates for rail transportation of scrap metal, but not ASR. *See* Pet. for Recon., Verified Statement of Kenneth Berg at 1-2. In support of his position, Mr. Berg offers a document that he says corroborates his testimony that Grimmel did not ask for ASR rates on June 18. He further asserts that Steelton, PA (the traffic destination in that rate request) is an unlikely point to which Grimmel or anyone else would ship ASR. *Id.* at 2 & Exhibit A.

In addition, Guilford argues that its response to Grimmel's May 22, 1997 request for ASR rates fulfilled its obligations under section 11101. Specifically, Guilford claims that, even though the rate it quoted was conditioned upon the restoration of the rail line to which Grimmel's plant connected,[7] Guilford also imposed additional, allegedly permissible preconditions to the provision of rail service that Guilford believes Grimmel would not have accepted, even if Guilford's rail line to Topsham were in service at the time. *See* Pet. for Recon. at 3. In Guilford's view, Grimmel's likely rejection of the allegedly permissible

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[2](...continued)
first have to resolve whether there were rates pursuant to which Grimmel could make service requests. *See* May 15 Decision, 6 S.T.B. at 893-94 & n.18.

[3] *See id.* 891-93.

[4] For reasons set forth in its May 15 Decision, the Board limited its focus to the transportation of ASR, which was not yet exempt from regulation at the time that Grimmel made its requests for rates on June 18, 1996, and May 22, 1997. *See id.* 894-95, 897 n.26.

[5] Guilford acknowledges that Grimmel requested rates for transportation of ASR from Topsham on May 22, 1997. Guilford's response to that rate request is discussed in this decision.

[6] In its pleading and testimony offered in the original proceeding, Guilford stated that, on June 18, 1996, Grimmel asked it for rates for the transport of both scrap metal and ASR.

[7] The Guilford-operated rail line from which Grimmel's plant could be served (the Lewiston Lower) was out of service at the time that Grimmel made its requests for rates. The record reflects that Guilford sought funding from Grimmel for rehabilitation of the Lewiston Lower, which Grimmel refused to provide. *See* May 15 Decision, 6 S.T.B. at 888-89. The Board found that Guilford's demand for track-rehabilitation funding from Grimmel was an impermissible precondition to the provision of service, and stated that Guilford's proffered rates, which were tied to such a precondition, were not responsive to Grimmel's request and thus did not satisfy Guilford's obligations under section 11101(b). *See id.* at 898-99.

service preconditions overcame any defects in its response to Grimmel's rate request.

Grimmel opposes Guilford's petition for reconsideration. It characterizes Guilford's pleading and the supporting testimony as self-serving, and argues that the new material offered by Guilford in support of its petition does not qualify as new evidence under 49 CFR 1115.3(b). Grimmel criticizes Guilford for failing adequately to explain why this additional evidence was not adduced earlier, particularly in light of Guilford's position that the alleged mistake is an "obvious" one. Grimmel also repeats its assertion that it contacted Guilford on frequent occasions to request service for the transport of both ASR and scrap metal.

DISCUSSION AND CONCLUSIONS

Parties in proceedings such as this one are strongly encouraged to provide the Board with a complete and accurate record prior to the issuance of the Board's decision. Indeed, the Board would not ordinarily accept evidence or argument offered in connection with a petition for reconsideration unless the material in question is truly new (as opposed to newly offered) evidence.[8] In this case, however, the matter before the Board has been referred to it by the district court, and the Board will therefore provide the court with as much assistance as possible. To supply this assistance, the Board will consider both the additional evidence and testimony that accompanied Guilford's petition for reconsideration as well as the responsive pleading and testimony offered by Grimmel.

By accepting this testimony, the Board must choose between the prior testimony of Guilford's witness that Grimmel had requested rates for the movement of ASR from Topsham on June 18, 1996, and his subsequent testimony that Grimmel did not do so.[9] Based on all of the evidence submitted to the Board by both parties, it now appears that Grimmel requested rates only for scrap metal movements on June 18, 1996, and did not request rates for ASR transportation at that time. Under these circumstances, the Board would no longer have a basis for concluding, as it did in the May 15 Decision, that Guilford violated its common carrier obligation on June 26, 1996. Of course, the district court may make its own findings in the proceeding before it, and if the court finds that Grimmel had requested rates for movement of ASR from Topsham on June 18, 1996, or on some earlier date, the court has the benefit of the Board's views that were expressed in the May 15 Decision.

The record continues to support, however, a Board finding that Guilford failed to fulfill its common carrier obligation to Grimmel when Guilford declined to provide a responsive rate for ASR in connection with Grimmel's May 22,

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[8] *See Friends of the Sierra R.R., Inc. v. ICC*, 881 F.2d 663, 667 (9th Cir. 1989) ("*newly raised* evidence is not the same as *new* evidence" for purposes of reopening an administratively final decision) (emphasis in original); *Canadian National, et al.–Control – Illinois Central, et al.*, 6 S.T.B. STB 344, 350 (2002) ("'new evidence' is not newly presented evidence, but rather is evidence that could not have been foreseen or planned for at the time of the original proceeding").

[9] Guilford characterizes its petition for reconsideration as an effort to correct prior misstatements in the record concerning the scope of Grimmel's June 18, 1996 rate request.

1997 request. Although Guilford acknowledges that the rates it supplied in response to that request were "conditioned upon [among other things] Guilford's access to the Lewiston Lower" (Pet. for Recon. at 3), Guilford argues that its response to Grimmel's request for ASR rates on May 22, 1997, nonetheless satisfied its statutory obligations. Consistent with its findings in its May 15 Decision, the Board understands the condition to mean that Guilford would not provide service pursuant to the offered rates unless Grimmel first agreed to fund repairs to the Lewiston Lower.

As the Board stated in its May 15 Decision, "A rail carrier cannot make its service contingent upon * * * the shipper's advance funding of repairs to the line over which service would be provided." May 15 Decision, 6 S.T.B. at 898-99 (footnote omitted). While it may be that Guilford's rate quote contained other, legitimate preconditions to service that Grimmel may have also found to be unacceptable, the existence of an illegitimate precondition means that Guilford failed to supply a responsive rate to Grimmel's request of May 22, 1997. Thus, Guilford violated its common carrier obligation as set forth at 49 U.S.C. 11101 shortly after May 22, 1997,[10] and that violation continued until May 21, 1998, when the ASR commodity exemption took effect.

It is ordered:

1. The petition for reconsideration is granted in part as set forth above.
2. This decision is effective on its date of service.
3. Copies of this decision will be served upon the United States District Court for the District of Maine as follows:

The Honorable Gene Carter
156 Federal Street
Portland, ME 04102

and

William S. Brownell
Clerk - U.S. District Court
156 Federal Street
Portland, ME 04102

By the Board, Chairman Nober.

[10] Neither party identifies the exact date on which Guilford responded to Grimmel's May 22, 1997 rate request.