

SERVICE DATE – DECEMBER 23, 2020

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. NOR 42169

BELL OIL TERMINAL, INC.

v.

BNSF RAILWAY COMPANY

Digest:¹ This decision grants a motion to dismiss the complaint filed by Bell Oil Terminal, Inc., for failure to state a claim.

Decided: December 22, 2020

On July 10, 2020, Bell Oil Terminal, Inc. (Bell Oil), filed a complaint against BNSF Railway Company (BNSF), alleging that, in reducing service to Bell Oil's facility, BNSF failed to provide the requisite notice to Bell Oil of a change to a common carrier service term, in violation of 49 U.S.C. § 11101(c).² Bell Oil alleges that it received an email message from BNSF on April 10, 2020, stating that effective the next week, Bell Oil's service would be reduced from three days per week to two, and that service was reduced beginning on April 13, 2020. (Compl. 3.) According to Bell Oil, because the number of days per week on which a rail carrier provides service to a shipper is a common carrier service term within the meaning of § 11101(c), BNSF failed to provide the requisite 20-day statutory notice and the reduction of service did not lawfully take effect. (Compl. 3-4.) Bell states that it has incurred, and is continuing to incur, damages including, but not limited to, lost profits on business that Bell would have participated in but for the service reduction. (Id. at 4.)

On August 3, 2020, BNSF filed an answer and, on August 17, 2020, a motion to dismiss the complaint. BNSF requests that the Board dismiss the complaint because it does not state a cause of action under § 11101(c). (Mot. to Dismiss 1.) BNSF contends that § 11101(c) expressly applies only to specific service terms that a common carrier is required to establish under § 11101, and that it does not apply to the day-to-day operating details of a common

¹ The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. See Pol'y Statement on Plain Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

² Section 11101(c) states that "[a] rail carrier may not increase any common carrier rates or change any common carrier service terms unless 20 days have expired after written or electronic notice is provided to any person who, within the previous 12 months—(1) has requested such rates or terms . . . or (2) has made arrangements with the carrier for a shipment that would be subject to such increased rates or changed terms."

carrier's transportation, such as delivery days. (*Id.* at 1, 3.) BNSF argues that the complaint should be dismissed because Bell Oil fails to identify any service term that BNSF established under § 11101 to which the notice provisions of § 11101(c) apply. (*Id.* at 1.) BNSF further argues that its tariff and related rules governing the transportation at issue expressly state that BNSF "agrees to transport shipments with reasonable dispatch" and that it "does not guarantee rail service within any particular time frame." (Mot. to Dismiss, Ex. 2 at 18.) For these reasons, BNSF requests that the Board dismiss Bell Oil's complaint in its entirety.³ (*Id.* at 11.)

On September 8, 2020, Bell Oil responded to BNSF's motion to dismiss. Bell Oil argues that frequency of service relates directly to the common carrier obligation of rail carriers and that the Board should act to preserve the integrity of the service protections afforded under § 11101(c). (Reply 7.) Bell Oil further asserts that a common carrier service term protected under this statute need not be contained in a rail carrier's tariff, as BNSF alleges, but may, among other things, be part of a rail industry custom and practice. (*Id.*)

DISCUSSION AND CONCLUSIONS

The Board may dismiss a complaint if it "does not state reasonable grounds for investigation and action." 49 U.S.C. § 11701(b). In reviewing a motion to dismiss, the Board will view the alleged facts in the light most favorable to the complainant. Cent. Valley Ag Grinding, Inc. v. Modesto & Empire Traction Co., NOR 42159, slip op. at 4 (STB served July 25, 2018) (citing Consumers Energy Co. v. CSX Transp. Inc., NOR 42142, slip op. at 1 (STB served June 15, 2015) (Decision ID 44521); Montana v. BNSF Ry., NOR 42124, slip op. at 3 (STB served Feb. 16, 2011)). A complaint is dismissed under § 11701(b) only when the Board finds that there is no basis upon which it could grant the relief sought. Grain Land Coop. v. Canadian Pac. Ltd., NOR 41687, slip op. at 2-3 (STB served Dec. 8, 1999).

Viewing the allegations of the complaint in the light most favorable to Bell Oil, the Board finds that the complaint does not state reasonable grounds for investigation or action. Bell Oil is correct that § 11101(c) permits carriers to change common carrier service terms only upon 20 days' notice. But Bell Oil does not allege any specific common carrier service term or arrangement with BNSF, made within the previous 12 months, that would require a specific level of service to Bell Oil's facility. To the contrary, although the representations made by BNSF in the applicable tariff and related rules speak generally to BNSF's obligation to provide "reasonable dispatch," they expressly state that BNSF "does not guarantee rail service within any particular time frame." (*See* Mot. to Dismiss, Ex. 2 at 18.)

³ On August 18, 2020, the parties filed a joint status report requesting that the Board defer any action on a procedural schedule until the Board has ruled on BNSF's motion to dismiss.

Nor does the complaint identify any other source of an enforceable commitment by BNSF, in writing or otherwise,⁴ to provide a particular frequency of service.⁵ Additionally, the Board agrees with Bell Oil that frequency of service can be a relevant consideration in determining whether a rail carrier has met its common carrier obligations under § 11101(a).⁶ However, Bell Oil has not alleged that BNSF's reduction in its frequency of service violated either the general common carrier obligation or the specific terms of the governing BNSF tariff. Finally, even if Bell Oil is correct that a common carrier service term need not be part of a tariff but instead could be part of a rail industry custom and practice, (Reply 7), Bell Oil has not alleged nor demonstrated that two days of service per week is contrary to industry custom or practice.

Therefore, the Board finds that there is no actionable claim before the agency and no basis for the Board to investigate or act upon Bell Oil's complaint. While this decision finds that the complaint at issue fails to state a claim, this decision does not reach the question of whether a change in frequency of service could *ever* be a common carrier service term within the meaning of § 11101(c). Based upon the foregoing, the Board will grant BNSF's motion to dismiss and dismiss without prejudice Bell Oil's complaint.

⁴ To the extent one could argue (though Bell Oil has *not* here) that the Board's regulatory definition of "service terms" is broad enough to encompass carrier-specific "practices" not necessarily memorialized in writing or electronically under § 11101(b), see 49 C.F.R. § 1300.1(e), the complaint does not sufficiently allege that the three day per week service that Bell allegedly received prior to April 13, 2020, is a service term subject to the 20-day notice requirement. The complaint alleges that Bell Oil received service three days per week prior to April 13, 2020, (Compl. 3), and that within a 12-month period prior to that date it "made arrangements with BNSF for shipments that would have been subject to the changed common carrier service term," (*id.*), but it does not allege that the arrangement Bell Oil made with BNSF was for three day per week service. Rather, Bell Oil has merely alleged that BNSF provided three-day-a-week service at an unspecified point and for an undefined duration prior to April 13, 2020.

⁵ BNSF argues that a change in frequency of service is merely an operational change, rather than a common carrier service term that could be subject to the notice provisions of § 11101(c). (Mot. to Dismiss 6.) But BNSF fails to cite any regulation or precedent to explicitly support that position.

⁶ Indeed, looking beyond the notice provisions of § 11101(c), the Board notes that it has entertained claims that curtailment of service amounted to violations of the common carrier obligation and/or the requirement that carriers establish reasonable rules and practices. See, e.g., Central Valley Ag Grinding, Inc., NOR 42159, slip op. at 4-5; Montana v. BNSF Ry., NOR 42124 (STB served Apr. 26, 2013); Granite State Concrete Co. v. Bos. & Me. Corp., NOR 42083, slip op. at 7 (STB served Sept. 15, 2003); see also Ind. Hi-Rail Corp.—Lease & Operation Exemption—Norfolk & W. Ry. Line Between Rochester & Argos, Ind., FD 32162, slip op. at 6 (STB served Jan. 30, 1998).

It is ordered:

1. BNSF's motion to dismiss is granted.
2. Bell Oil's complaint is dismissed without prejudice.
3. This decision is effective on the date of service.

By the Board, Board Members Begeman, Fuchs, and Oberman.