

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

ENTERED
Office of Proceedings
February 16, 2021
Part of
Public Record

Sanimax USA LLC,	)	
	)	
Complainant,	)	
	)	
v.	)	
	)	
Union Pacific Railroad Company,	)	
	)	
Defendant.	)	

**SANIMAX USA LLC’S REPLY IN OPPOSITION
TO UNION PACIFIC RAILROAD COMPANY’S MOTION TO DISMISS**

SANIMAX USA LLC (Sanimax) respectfully submits this Reply in opposition to UNION PACIFIC RAILROAD COMPANY’s (UP’s) Motion to Dismiss, filed on November 30, 2020.¹

Introduction

For the reasons explained below, for purposes of this case the Board should revoke the class exemptions relating to the perishable, time-sensitive food and agricultural products that Sanimax ships via UP. Partial revocation of the exemption for purposes of this case eliminates the asserted grounds for UP’s Motion to Dismiss, so the Motion should be denied. The Board should proceed to a decision on the merits of this case, ordering UP to comply with its common carrier obligation to provide reasonable and necessary rail service as described in Sanimax’s complaint, on which Sanimax must rely to stay in business.

¹ By decision served December 18, 2020, the Director, Office of Proceedings extended the deadline to file this Reply to UP’s Motion to Dismiss to February 16, 2021.

Sanimax's complaint explains that UP unilaterally reduced the number of scheduled service days to Sanimax's rendering plant in South St. Paul, Minnesota, thereby imposing substantial hardship on Sanimax because of the demonstrable fact that UP has failed to provide even the inadequate 3-days-per-week service it unilaterally imposed. UP asserts in its Motion to Dismiss that all the claims in Sanimax's complaint are precluded because Sanimax's commodities have been exempted from Board regulation.

UP's contention fails to meet the high bar for a Motion to Dismiss and should be rejected. First, the Board certainly has authority to – and in this case it should – revoke the class exemptions with respect to Sanimax's commodities to the extent necessary to consider the Complaint and order UP to comply with its common carrier obligations. Second, UP's assertion that it lacks the market power that would support revocation of the exemption is clearly incorrect, and in any case is a disputed question of fact that would be inappropriate grounds on which to dismiss this case.

The Board Generally Disfavors Motions to Dismiss

Under Surface Transportation Board practice, motions to dismiss are generally disfavored. *See Central Valley Ag. Grinding, Inc. v. Modesto & Empire Traction Co.*, NOR 42159, slip op. at 4 (STB served Jul. 25, 2018). The Board will review all alleged facts in the light most favorable to the complainant. *See id.*, citing *Consumer Energy Co. v. CSX Transp., Inc.*, NOR 42142, slip op. at 1 (STB served Jun. 15, 2015) and *Montana v. BNSF Ry.*, NOR 42124, slip op. at 3 (STB served Feb. 16, 2011). The Board will dismiss a complaint only when it finds that there is no basis upon which it could grant the relief sought. *See Grain Land Coop. v. Canadian Pac. Ltd.*, NOR 41687, slip op. at 2-3 (STB served Dec. 8, 1999).

The assertions in UP's Motion to Dismiss fail to meet this high bar that would preclude the Board from reaching the merits of Sanimax's complaint. UP's motion should be denied.

Sanimax Requests a Partial Revocation of Exemption with Respect to the Subject Commodities; A Formal Revocation Petition Is Not Required

UP states that “the only loaded railcars that Union Pacific transports to or from the South St. Paul facility consist of exempt commodities.” Motion to Dismiss at 1.² UP asserts that because Sanimax challenges UP’s unlawful service defaults and failure under 49 U.S.C. §§ 11101 and 10702 and the subject commodities are exempt from regulation, the claims in Sanimax’s complaint are precluded. UP asserts that because “Sanimax has not petitioned for partial revocation of the applicable exemptions,” the complaint should be dismissed. See Motion to Dismiss at 3-4.

Contrary to UP’s assertion, however, the Board certainly may set aside a commodity exemption in the context of a specific dispute, such as the instant case, without requiring a formal petition to institute an exemption proceeding or to fully revoke the exemption. “The Board may revoke an exemption, to the extent it specifies, when it finds that application in whole or in part of a provision of this part to the person, class, or transportation is necessary to carry out the transportation policy of section 10101 of this title.” 49 U.S.C. § 10502(d). The Board has expressly ruled that it “retain[s] the flexibility to evaluate exemption revocation requests that are made in the course of ongoing regulatory proceedings when appropriate.” *Granite State Concrete Co., Inc. v. Boston & Maine Corp.*, NOR 42083, slip op. at 7 (STB served Sep. 15, 2003), *aff’d sub nom. Granite State Concrete Co. v. STB*, 417 F.3d 85 (1st Cir. 2005). In *Granite State*, the Board explained that this authority to consider exemption revocation is especially important where “there is a need for expedition,” and revoked the challenged exemption in that case. Slip op. at 7. In affirming the Board’s decision in *Granite State*, the Court of Appeals noted that the Board had revoked the applicable class exemption for purposes of the case before it “to the extent necessary

² Sanimax acknowledges that UP has accurately identified the commodities at issue.

to allow the STB to consider the merits of the dispute.” 417 F.3d 85 at 91 n.9. The Board’s and the Court of Appeals’ reasoning in *Granite State* accords with the Rail Transportation Policy “to require fair and expeditious regulatory decisions when regulation is required” in 49 U.S.C. § 10101(a)(2).

Sanimax urges the Board to adopt the *Granite State* approach in the instant case, pursuant to 49 U.S.C. § 10502(d). To the extent the commodity exemptions cited by UP – Animal Refuse (STCC 2014491), Tankage (STCC 2014490), Grease or Inedible Tallow (STCC 2014350), Animal Grease (STCC 2013945), and Lard (STCC 2013190) – would allow the railroad to engage in unreasonable practices and violate its common carrier obligations with impunity, Sanimax seeks a partial revocation of these exemptions by the Board. Revocation for purposes of this case is necessary because UP has sufficient market power to abuse its position as the monopoly railroad serving Sanimax’s South St. Paul facility.

UP Has Sufficient Market Power to Dictate Its Service Practices on Sanimax

UP claims there is no basis to revoke the applicable commodity class exemptions, asserting there is enough competition for Sanimax’s traffic that UP “lack[s] the ability to abuse market power,” citing *WTL Rail Corp. Pet. for Declaratory Order & Interim Relief*, NOR 42092 et al., slip op. at 3 (STB served Feb. 17, 2006). In support of its assertion, UP cites continued communications between Sanimax and UP after UP unilaterally reduced its service below tolerable levels last year, the limited availability of highway transportation, and UP’s alleged “careful consideration” of Sanimax’s traffic levels. See Motion to Dismiss at 4-5.

UP’s assertions fail to meet the Board’s high threshold for granting a motion to dismiss and thereby completely foreclosing all relief to Sanimax.

To begin with, the mere existence of a stop-gap motor carrier alternative to avoid a total shutdown of Sanimax’s facility does not mean that UP lacks market power to exercise predatory practices. Market power is not predicated upon the complete absence of an alternative source for shipping. As recognized by Congress in 49 U.S.C § 10707(a) with respect to market dominance in rail rate proceedings, rail carrier market power concerns “an absence of *effective* competition from other rail carriers or modes of transportation” (emphasis added).

Here, *UP lacks effective competition with respect to its practices*. There is no intramodal competition for rail service. UP is the only railroad that serves Sanimax’s South St. Paul facility and Sanimax has no alternative to UP for rail transportation. With respect to intermodal competition, Sanimax has invested significant capital and resources for its South St. Plant to use rail service to move its products. The sunk costs of rail loading and loading equipment installed at the plant, the structural limitations on truck transportation at the South St. Paul yard, and the rigid time constraints imposed by the decay of inbound organic materials make Sanimax captive to rail service for shipping enough outbound products to avoid a plant shutdown.³ The resolution of these monopoly-power concerns provides more than enough grounds to revoke the commodity exemptions for purposes of this case and deny UP’s Motion to Dismiss – especially where factual disputes are involved.

³ Among the arguments in opposition to the ICC’s original exemption of grease and inedible tallow which are among Sanimax’s commodities, the Chemical Manufacturers Association observed that “investment by shippers in railroad equipment for bulk movement effectively ties these shippers to rail service.” *Rail General Exemption Authority – Exemption of Grease or Inedible Tallow, Etc.*, EP 346 (Sub-No. 31), 1994 WL 687462 at *3 (ICC served Dec. 9, 1994). While the ICC allowed the exemption, it did note that if a “pocket of monopoly power” emerged in the future, “the Commission may revoke the exemption in part.” *Id.* UP exercises just this kind of “pocket of monopoly power” with respect to the South St. Paul facility, and Sanimax accordingly requests partial revocation of the applicable exemptions.

With respect to UP's claims that it has made some limited accommodation to Sanimax by providing additional switches, changing its unilateral assignment of service days from Monday-Wednesday-Friday to Sunday-Tuesday-Thursday, and assigning a dedicated crew to the South St. Paul facility – those claims do not demonstrate that UP lacks sufficient market power to abuse its position relative to Sanimax. They are highly disputed factual assertions that are inappropriate grounds for granting a motion to dismiss.

Considered in the light favorable to Sanimax as required by Board precedent, the facts show that UP's dominant position as the monopoly railroad forces Sanimax to find temporary, highly suboptimal alternatives to ship out its products or face shutting down the plant when UP fails to provide reasonable and adequate service. Sanimax has no market recourse to correct these failures. It has repeatedly objected to UP's unilateral changes to the service schedule. Yet Sanimax's limited negotiating power with UP has forced Sanimax to accept the decrease in scheduled service days with only the most modest concessions. Moreover, promised improvements continue to falter to the detriment of Sanimax. Recent communications between UP and Sanimax demonstrate that when UP fails to provide proper or adequate service, as has happened constantly over the past year which forced the filing of the instant complaint, Sanimax has no recourse to correct these problems even in the face of a potential plant shutdown. *See* Exhibit 1 attached [CONFIDENTIAL – EXCLUDED FROM PUBLIC VERSION].

CONCLUSION

Considering the facts described in the complaint in the light favorable to Sanimax, the complaint confirms that UP has sufficient monopoly power to support a partial revocation of the exemptions for the commodities at issue. Accordingly, to the extent necessary to grant the

requested relief, Sanimax requests that the Board revoke any applicable commodity exemptions for purposes of this case, and Sanimax urges the Board to deny UP's Motion to Dismiss.

Respectfully submitted,

Date filed: February 16, 2021

/s/ Richard F. Riley, Jr.

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CERTIFICATE OF SERVICE

Pursuant to 49 C.F.R. § 1104.12, I hereby certify that on February 16, 2021, I served a copy of Sanimax USA LLC's Reply in Opposition to Union Pacific Railroad Company's Motion to Dismiss by first class mail and email to UP's attorney at the following address:

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/s/ Richard F. Riley, Jr.

Richard F. Riley, Jr.

EXHIBIT 1

[CONFIDENTIAL – EXCLUDED FROM PUBLIC VERSION]