

SERVICE DATE – JULY 15, 2021

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 36426

PORT OF BENTON, WASH.—PETITION FOR DECLARATORY ORDER

Digest:¹ The Board denies a request for declaratory order filed by the Port of Benton, Wash., and denies as moot a motion to dismiss filed by Tri-City Railroad Company, LLC.

Decided: July 15, 2021

On August 14, 2020, the Port of Benton, Wash. (Port), filed a petition for declaratory order regarding the legitimacy of certain charges Tri-City Railroad Company, LLC (Tri-City), has labeled as “supplemental tariffs” and sought to impose on shippers whose shipments move over the approximately 16 miles of trackage and right-of-way in Richland, Wash., that Tri-City leases from the Port (the Line).² On October 8, 2020, Tri-City filed a motion to dismiss, alleging that the Port is improperly asking the Board to interpret its lease with Tri-City and that “[t]he Port has no basis to seek this Declaratory Order other than to [h]arm [Tri-City].” (Mot. to Dismiss 5, 11.) The Port and several interested businesses—Lamb Weston Holdings, Inc. (Lamb Weston), Preferred Freezer of Richland, LLC (Preferred Freezer),³ and Henningsen Cold Storage (Henningsen)—replied on October 28, 2020, in opposition to Tri-City’s motion.

The Board finds that the charges at issue here that Tri-City seeks to impose as maintenance fees on shippers are not tariffs and do not fall under the Board’s jurisdiction. The characterization of the charges as “tariffs” is inaccurate and, indeed, Tri-City does not contend that it may impose the charges on any basis other than pursuant to alleged contractual rights. Accordingly, there is no uncertainty or controversy before the Board within its jurisdiction that would support issuance of a declaratory order. Therefore, as discussed in more detail below, the Board will deny the Port’s petition for declaratory order and deny as moot Tri-City’s motion to dismiss.

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 Digs. in Decisions, EP 696 (STB served Sept. 2, 2010).

² Pet. App. A § 1.1.

³ Lineage Logistics, the parent company of Preferred Freezer, filed a verified statement of its general manager, Edward Gottschalk, on behalf of Preferred Freezer in support of its reply to Tri-City’s motion to dismiss or discontinue. (Lineage Logistics V.S. Edward Gottschalk 1.)

BACKGROUND

The Line's history was detailed in a recent Board decision resolving an adverse discontinuance proceeding also filed by the Port of Benton. Port of Benton Cnty., Wash.—Adverse Discontinuance of Rail Service—Tri-City R.R. (Adverse Discontinuance Decision), AB 1270, slip op. at 2 (STB served Oct. 31, 2019). As explained in that decision, the Line was constructed in 1947 by the Atomic Energy Commission (AEC) to provide rail service to the Hanford Nuclear Reservation. The AEC granted predecessors of BNSF Railway Company (BNSF) and Union Pacific Railroad Company (UP) operating rights to serve that facility and other customers that would locate on the Line. Id. The Port acquired the Line from the U.S. Department of Energy (DOE) in 1998 and simultaneously entered into an agreement with Tri-City's predecessor for the latter to maintain the Line at the Port's expense; meanwhile, BNSF and UP remained as operators on the Line. Id. Tri-City has been operating over the Line pursuant to a lease agreement with the Port dated August 1, 2002 (the Lease). Id.

Tri-City is required to maintain the Line under the Lease, while BNSF and UP are not required to pay any maintenance costs for the current exercise of their respective trackage rights. (Pet. 1-2.) BNSF and UP previously interchanged with Tri-City for traffic originating or terminating on the Line until BNSF began direct operations over the Line around 2009, with UP doing the same in late 2017. (Mot. to Dismiss 3.)⁴

The Port states that, under the Lease, Tri-City is required to obtain the Port's approval for the imposition of "tariffs" on shippers on the Line. (Pet. 3.) Further, the Lease requires the Port to act as an initial arbiter of disputes between shippers and Tri-City over any "tariffs" issued by Tri-City. (Id.) If the Port is unable to resolve a complaint that concerns a matter within the jurisdiction of the Board, the Lease provides that the Port will refer the matter to the Board. (Id. at 4.)

The Port's petition relates to Tri-City's "tariff" Supplement 1 and proposed Supplement 5. According to the Port, Supplement 1 assesses a "track maintenance charge . . . on all cars that enter" the Line at the Richland Connection in Kennewick, Wash. (Pet. 4; id. at App. B.) The Port approved Supplement 1 on January 16, 2020. (Pet. 4.) Tri-City first invoiced the Port for charges under Supplement 1, which the Port rejected because it does not operate rail cars over the Line and did not believe there was any basis, contractual or otherwise, that would obligate the Port to pay Tri-City's invoices. (Id. at 4-5.) The Port states that it later

⁴ In 2019, the Board granted the Port's petition for adverse discontinuance of Tri-City's operating authority on the Line. Adverse Discontinuance Decision, AB 1270, slip op. at 7. The Port and Tri-City each brought breach of contract claims against the other and are currently litigating those claims in Washington state court. (Mot. to Dismiss 15 (citing Port of Benton v. Tri-City R.R., Super. Ct., Benton Cnty., Wash. No. 20-2-01057-03; Tri-City R.R. v. Port of Benton, Super. Ct., Benton Cnty., Wash. No. 20-2-00549-03).)

was advised by several shippers that Tri-City had invoiced them for charges under Supplement 1 without prior notice and that they disputed any liability for the charges.⁵ (*Id.* at 5.)

On June 8, 2020, Tri-City sent to the Port for approval a copy of its proposed Supplement 5, which would replace the track maintenance charge in Supplement 1 and assess a “Track Use Fee” on “every loaded railcar that is destined to or departing from” a “Local Rail User,” defined as “any entity, person, or business that ships and/or receives railcar loads that traverse [Tri-City] trackage.” (Pet. 6; *id.* at App. C.) The Port argues that it has not approved Supplement 5 and therefore it should not yet be effective. (Pet. 7.) The Port further states that it provided copies of proposed Supplement 5 to BNSF, UP, and several shippers on the Line. (*Id.*) Subsequently, the Port received complaints from Lamb Weston, DelHur Industries, CWCP, Packaging Corporation of America, and Preferred Freezer objecting to Supplement 5 charges on the basis that their (or their customers’) rail service is provided by BNSF or UP, not Tri-City. (*Id.* at 8.)

The Port has asked the Board to resolve the following questions:

- (1) Does a rail carrier such as Tri-City have authority to assess the charges set forth in Supplement 1 against entities that are not rail customers of or shippers served by Tri-City?
- (2) Does a rail carrier such as Tri-City have authority to assess the charges set forth in the proposed Supplement 5 against “Local Rail Users” that are not rail customers of or shippers served by Tri-City?
- (3) Is Tri-City required under 49 C.F.R. Part 1300 to provide copies of its tariffs to any entity it asserts is responsible for the charges, at least 20 days in advance of assessing such charges? Does an invoice assessing charges under a tariff provide sufficient notice of the tariff charges under 49 C.F.R. Part 1300?

(Pet. 10.) While conceding that the “Board leaves for the courts to enforce and interpret contracts,” the Port contends that the “issues here are . . . disputes over tariff requirements—whether and which entities can be assessed under a tariff.” (*Id.* at 11.)

In its motion to dismiss, Tri-City maintains that it has a “contractual right to impose tariffs.” (Mot. to Dismiss 8, 10.) Notably, while Tri-City refers to the above-described charges as “tariffs,” it does not argue that it has the authority to impose them on any basis other than pursuant to the Lease. That is, it does not argue that it may assess the charges as “tariffs” under 49 U.S.C. § 10701(c), which generally authorizes carriers to establish rates for transportation “or other services,” or any other provision of the Interstate Commerce Act (ICA), as amended and codified at subtitle IV of title 49 of the U.S. Code. Rather, Tri-City argues that, in order for the Board to grant the relief requested by the Port, the Board would have to interpret and enforce the terms of the Lease and the underlying agreement, the Indenture between the DOE and the Port,

⁵ Those shippers are Preferred Freezer, Central Washington Corn Processors (CWCP), and Lamb Weston.

“in complete contravention” of the Board’s position that it does not interpret or enforce contracts. (Id. at 6, 8.)

In response, the Port argues that the Board need not interpret the Lease to resolve the questions posed in the petition, nor must it interpret any private contracts between Tri-City and the complaining shippers, as Tri-City has no commercial relationship with any of these shippers. (Port Reply 5.) The Port states that Tri-City is not limiting these tariffs to customers that it serves, but also seeks to assess the tariffs on customers of BNSF and UP. (Id. at 2.)⁶

DISCUSSION AND CONCLUSIONS

The Board has discretionary authority under 5 U.S.C. § 554(e) and 49 U.S.C. § 1321 to issue a declaratory order to terminate a controversy or remove uncertainty. The Board has broad discretion to determine whether to issue a declaratory order. See Bos. & Me. Corp. v. Town of Ayer, 330 F.3d 12, 14 n.2 (1st Cir. 2003); Delegation of Auth.—Declaratory Order Proceedings, 5 I.C.C.2d 675 (1989). Here, the Board will decline to exercise its discretionary authority to issue a declaratory order.

The Board has jurisdiction over transportation by rail carrier, including exclusive jurisdiction over “rates, classifications, rules (including car service, interchange, and other operating rules), practices, routes, services, and facilities.” 49 U.S.C. § 10501(a) and (b)(1). Under 49 U.S.C. § 10702(2), a rail carrier must establish reasonable rules and practices on matters related to the transportation and service it provides. See N. Am. Freight Car Assoc. v. Union Pac. R.R., NOR 42119, slip op. at 5 (STB served Mar. 12, 2015).

Generally, the function of tariffs is to disclose each carrier’s prices for the services it provides. Revision of Tariff Regulations, All Carriers, 1 I.C.C.2d 404 (1984). Historically, carriers gave notice of their rates and general service terms in tariffs that were publicly filed with the Board’s predecessor, the Interstate Commerce Commission (ICC), and that notice had the force of law under the so-called “filed rate doctrine.” See Demurrage Liability, EP 707, slip op. at 3 n.4 (STB served Apr. 11, 2014); Maislin Indus., Inc. v. Primary Steel, Inc., 497 U.S. 116, 127 (1990). The requirement that rail carriers file rate tariffs at the agency was

⁶ Lamb Weston states that it is a shipping customer of BNSF and UP with no contractual privity to or business relationship with Tri-City. (Lamb Weston Reply 1.) Lamb Weston further states that Tri-City labeled its continuing efforts to extract money from Lamb Weston as a “tariff,” without first notifying Lamb Weston. (Id. at 4.) Similarly, Preferred Freezer and Henningsen state that they are warehousemen whose customers contract directly with BNSF or UP for refrigerated railcar rental and rail transportation. (Preferred Freezer and Henningsen Reply 1-2; Lineage Logistics V.S. Edward Gottschalk 1; Henningsen V.S. William Friend 1.) According to Preferred Freezer and Henningsen, neither has a contractual or commercial relationship with Tri-City. (Preferred Freezer and Henningsen Reply 8; Lineage Logistics V.S. Edward Gottschalk 2; Henningsen V.S. William Friend 2.) They state that Tri-City started invoicing Preferred Freezer and Henningsen in the summer of 2020 for the Railroad Maintenance Charge under Supplement 1 without any notice. (Preferred Freezer and Henningsen Reply 3-4.)

repealed in the ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (1995). Nevertheless, rail carriers may still use tariffs to establish and announce the terms of the services they hold out to the public. Demurrage Liability, EP 707, slip op. at 3 n.4.

When common carriers were required to file tariffs with the ICC, and tariffs were explicitly referenced in the statute, a common carrier was required to “publish and file with the Commission tariffs containing the rates” for “transportation or service it may provide” and carriers were prohibited from charging for transportation or services not contained in or different from those in the tariffs. 49 U.S.C. §§ 10761(a), 10762(a)(1) (Supp. III 1979). Thus, tariff charges could only be applied to transportation or services provided to a carrier’s customers upon request. While this language is no longer contained in the relevant statutes, the principle that tariff charges are for transportation or services provided to a common carrier’s customers remains unchanged. Accordingly, to assess charges under a tariff, a carrier must provide transportation or services to a customer after the customer has requested the carrier’s transportation or services under the tariff’s provisions. If a customer has not requested the carrier’s transportation or services under the tariff, and thus not agreed to the tariff’s provisions, the carrier’s charge is not a tariff charge.

As applied to entities that are not customers of Tri-City, the track maintenance charge in Supplement 1 and the Track Use Fee in Supplement 5 cannot properly be considered tariff charges. Tri-City’s characterization of its maintenance charge as a “tariff”—insofar as it purports to impose that charge on *all* cars that traverse the Line and to any entity, person, or business that ships and/or receives those cars, regardless of that entity’s dealings with Tri-City—is a misnomer.⁷ Indeed, Tri-City does not contend that it may assess these charges under 49 U.S.C. § 10701(c) or any other provision of the ICA, and for good reason: the ICA does not provide Tri-City with a basis to impose “tariffs” on entities that have neither requested nor received transportation or services from it. Nor does the fact that Tri-City leases the Line confer the ability to apply such a charge, under the ICA, to entities such as Lamb Weston, Preferred Freezer, Henningsen, or other non-customers of Tri-City simply because those entities move cars over the Line using other rail carriers.

The Board takes no position on whether Tri-City may levy its charge on some basis other than as a tariff under the ICA. Neither party asks the Board to make that determination, and, in any event, the Board generally is not the appropriate forum for determining parties’ rights under a contract. See, e.g., V&S Ry.—Pet. for Declaratory Order—R.R. Operations in Hutchinson, Kan., FD 35459, slip op. at 6-7, 13 n.22 (STB served July 12, 2012). But what is clear is that the Board need not evaluate the Lease (or the Indenture) to determine that the charges assessed in Supplements 1 and 5, as applied here, are not tariff charges. While there are several disputes between Tri-City and the Port arising out of the Lease, the parties are currently litigating those claims in state court. (Mot. to Dismiss 15.) To the extent there are any contract or common law equitable claims to be made for the collection of maintenance fees against users of the Line, Tri-City may pursue those in court. As the Port and Tri-City are aware, the Board generally does not undertake to interpret or enforce contracts, as such issues are for an appropriate court to decide.

⁷ This decision does not consider whether Supplement 1 or Supplement 5 could properly apply to a customer of Tri-City, as that scenario is not at issue.

See Adverse Discontinuance Decision, AB 1270, slip op. at 5 (citing City of Peoria—Adverse Discontinuance—Pioneer Indus. Ry., AB 878, slip op. at 6 (STB served Aug. 10, 2005)).

Because the parties do not (and cannot) dispute whether Tri-City may impose the above-described charges as “tariffs” under the ICA, there is no uncertainty or controversy before the Board falling within its jurisdiction. Accordingly, the Port’s petition for declaratory order will be denied, and Tri-City’s motion to dismiss will be denied as moot.

It is ordered:

1. The Port’s petition for declaratory order is denied.
2. Tri-City’s motion to dismiss or discontinue is denied as moot.
3. This decision is effective on its service date.

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