

SERVICE DATE – SEPTEMBER 24, 2021

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. NOR 42172

A.F. GELHAR COMPANY, INC., AND GREDE HOLDINGS, LLC

v.

C&NC RAILROAD COMPANY

Digest:¹ The Board denies as moot an application for emergency service order and an alternative petition for a temporary injunction and directs the parties to confer and report to the Board on a proposed procedural schedule for addressing the pending complaint.

Decided: September 24, 2021

On July 30, 2021, Grede Holdings, LLC (Grede), which operates a foundry in New Castle, Ind. (the New Castle Foundry), and A.F. Gelhar Company, Inc. (Gelhar), a sand extraction and supply business that supplies sand to the New Castle Foundry (collectively, Complainants) filed a complaint against rail carrier C&NC Railroad Company (C&NC), which operated over the rail line that serves the New Castle Foundry.² The complaint alleges that C&NC has imposed an unlawful “embargo” on rail service to Grede and Gelhar and that several charges C&NC has billed the Complainants are unreasonable.

The complaint also includes an application for emergency service order under 49 U.S.C. § 11123 directing C&NC to provide continued and uninterrupted transportation of Gelhar rail cars containing sand bound ultimately for the New Castle Foundry, until the Board can rule on the merits of the claims alleged in the complaint. (Compl. 7-8.) Alternatively, Complainants

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 In a separate proceeding, the Board granted C&NC’s petition under 49 U.S.C. § 10502 for exemption from the prior approval requirements of 49 U.S.C. § 10903 to discontinue its service over the rail lines at issue. See C&NC R.R.—Discontinuance Exemption in Wayne & Henry Cntys., Ind., AB 1093 (Sub-No. 2X) (STB served Aug. 20, 2021). Those rail lines are owned by Norfolk Southern Railway (NSR), and the Board has authorized a new carrier, NCSR, LLC d/b/a New Castle Southern Railroad (NCSR), to operate over the lines. See NCSR, LLC—Lease & Operation Exemption with Interchange Commitment—Norfolk S. Ry., FD 36542 et al. (STB served Sept. 8, 2021). The Board expedited the effective date of C&NC’s discontinuance exemption and NCSR’s lease and operation exemption to September 13, 2021. (Id.)

petition the Board to issue an injunction under 49 U.S.C. § 1321(b)(4) and 49 C.F.R. § 1117.1 requiring C&NC to restore and maintain rail service to prevent irreparable harm. (Compl. 7-8.)

On August 9, 2021, the Board ordered C&NC to respond to the application for emergency service order and alternative petition for injunction by August 13, 2021. The Board also directed Complainants to file a submission addressing whether the sand at issue is an exempt commodity, see 49 C.F.R. § 1039.11; if it is, Complainants were directed to address the impact of the exemption on the Board's ability to grant the requested relief and whether Complainants intended to seek revocation of the exemption.

On August 13, 2021, C&NC filed an answer to the complaint, which included a response to the application for emergency service order and the petition for injunction, arguing that it should be denied because C&NC has continued to provide service to Complainants, and thus "there is no situation requiring immediate action to serve the public under 49 U.S.C. §[]11123" and no rail service that needs to be restored. (C&NC Answer 9.) On that same day, Complainants filed a response to the Board's August 9, 2021 order, asserting that the sand at issue in the proceeding is not an exempt commodity (and alternatively, seeking a partial revocation of the commodity exemption if necessary). (Complainants Response 4.)

As discussed below, the Board will deny as moot the application for emergency service order and the petition for injunction. The Board will also direct the parties to confer and then file with the Board a report that proposes a procedural schedule for the remaining portion of the complaint, alleging claims of unlawful embargo and unreasonable charges, if Complainants intend to pursue adjudication of those claims before the Board.

BACKGROUND

Each week, Gelhar provides rail cars containing sand to Grede for use in the New Castle Foundry.³ (Compl. 3; C&NC Answer 3.) Prior to the Board-authorized discontinuance of C&NC's service, see supra note 2, the rail cars were transported from Gelhar to an interchange with C&NC in New Castle, at which point C&NC transported the rail cars to a transloading facility where the sand was off-loaded and transported by truck to the New Castle Foundry. (Compl. 3; C&NC Answer 3.)

Grede is responsible for paying for the rail transportation at issue. However, C&NC recently billed both Gelhar and Grede for charges allegedly due to C&NC. (Compl. 3; C&NC Answer 3-4.) Complainants state that they have disputed some of those charges as overlapping or related to services provided by Grede's former sand supplier, Covia, Inc. (Covia).⁴ (Compl. 4.) C&NC responds that the charges are not overlapping, and that it sent bills to both Grede and Gelhar because Grede refused to pay for the charges. (C&NC Answer 4.) C&NC

³ Complainants state that Gelhar typically provides four to six rail cars each week, (Compl. 3), but C&NC states that "the rail traffic destined to Grede varies considerably from week to week," (C&NC Answer 3).

⁴ The parties state that Covia obtained a bankruptcy discharge for debts owed, but they disagree about the effect of the bankruptcy discharge. (Compl. 4; C&NC Answer 4.)

also states that both Covia and Gelhar supplied sand to Grede in February 2021, which caused “rail car congestion and traffic problems,” and led to demurrage charges. (*Id.* (asserting that C&NC held Gelhar cars at Grede’s request).) C&NC submits that Grede is legally responsible for all transportation charges, and that C&NC revoked credit for Complainants when the disputed charges were not paid by July 15, 2021. (*Id.* at 5-6; *see* Compl. 4.)

In addition to their allegations concerning unreasonable charges, Complainants describe certain instances in July and August 2021 in which C&NC allegedly provided late service or delivered an inadequate number of cars. (Compl. 5.) Complainants further allege that C&NC had imposed an “embargo” during which it refused to provide service, resulting in a temporary shutdown of certain machines at the New Castle Foundry on July 27, 2021, and July 28, 2021. (*Id.*; Complainants Response 2.) However, Complainants state that C&NC subsequently delivered loaded cars. (Complainants Response 2-3.) In its answer dated August 13, 2021, C&NC asserts that it did not intend to reduce or eliminate rail service and that it had imposed an “embargo” due to operational issues. (C&NC Answer 7, 10.)

DISCUSSION AND CONCLUSIONS

Emergency Service Order and Preliminary Injunction. The Board may issue an order under 49 U.S.C. § 11123 when it determines that circumstances, such as the unauthorized cessation of operations, create “an emergency situation of such magnitude as to have substantial adverse effects on shippers, or on rail service in a region of the United States or that a rail carrier providing transportation subject to the jurisdiction of the Board . . . cannot transport the traffic offered to it in a manner that properly serves the public.” Additionally, the Board may issue an appropriate order, such as a preliminary injunction, “when necessary to prevent irreparable harm.” 49 U.S.C. § 1321(b)(4).

The Board will deny Complainants’ request for an emergency service order or an injunction against C&NC. Not only has C&NC represented that it had “no intention to reduce or eliminate the rail service being provided to Complainants prior to authorization from the Board to discontinue its operation,”⁵ (C&NC Answer 10), but as noted above, *see supra* note 2, the Board has granted both C&NC’s petition to discontinue its service over the lines at issue and NCSR’s request for an expedited effective date for NCSR’s replacement service over those lines. Both authorizations became effective on September 13, 2021. *See NCSR, LLC*, FD 36542 et al., slip op. at 1-2.⁶ Given these circumstances, Complainants’ requests for an emergency service order or injunctive relief to compel continued service by C&NC are moot.⁷

⁵ Complainants also admitted that C&NC had provided service even after imposing its alleged “embargo.” (*See* Complainants Response 2-3.)

⁶ Complainants did not raise an objection in Docket No. FD 36542 to the proposed change in carrier.

⁷ Because Complainants’ requests are moot, the Board need not address whether Complainants identified an emergency situation of a magnitude contemplated by § 11123 or established the necessary elements for a preliminary injunction. *See Wash. Metro. Area Transit Comm’n v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977).

Exempt Commodity. The provisions of 49 U.S.C. § 10502 authorize the Board to exempt types of rail services from its regulation. Currently, the Board’s regulations exempt, among other things, the rail transportation of certain miscellaneous commodities. See 49 C.F.R. § 1039.11. Commodities whose transportation is exempt from the provisions of 49 U.S.C. subtitle IV are identified by Standard Transportation Commodity Code (STCC) numbers. See 49 C.F.R. § 1039.11. One such commodity, identified by STCC number 14 411, is “[s]and (aggregate or ballast).” Id. Because the complaint merely identified “sand” as the commodity being transported, the Board’s August 9, 2021 order directed Complainants to file a submission addressing whether the sand at issue is an exempt commodity. In response, Complainants clarified that the sand at issue is “foundry sand,” identified by STCC number 14 413 10. (Complainants Response 4). Because that STCC number is not listed as an exempt commodity under § 1039.11, the sand at issue is not exempt from the provisions of 49 U.S.C. subtitle IV.

As for that relief sought in the complaint other than Complainants’ now-moot request for an emergency service order and/or an injunction, the parties have not filed a report with the Board setting forth a proposed procedural schedule to govern future activities and deadlines in this case, as required by 49 C.F.R. § 1111.11(a).⁸ Therefore, if Complainants intend to pursue adjudication of the complaint before the Board, the parties will be directed to confer and to file a report with the Board setting forth a proposed procedural schedule by October 13, 2021. See 49 C.F.R. § 1111.11(a).

It is ordered:

1. The application for emergency service order and alternative petition for injunction are denied as moot.
2. If Complainants intend to pursue adjudication of the complaint, the parties are directed to confer and file a report with the Board, either jointly or separately, setting forth a proposed procedural schedule by October 13, 2021.
3. This decision is effective on its date of service.

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

⁸ The Board notes that, rather than being adjudicated before the Board, disputes about demurrage and accessorial rules, as well as other issues, can alternatively be addressed through arbitration and other streamlined dispute resolution procedures. See Pol’y Statement on Demurrage & Accessorial Rules & Charges, EP 757, slip op. at 17 (STB served Apr. 30, 2020). Should they choose to do so, the parties may pursue any such alternative procedure in lieu of continuing to adjudicate claims of unreasonable charges and unlawful embargo in this proceeding.