

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Sanimax USA LLC,	)	DOCKET NO. NOR 42171
	)	
Complainant,	)	303311
	)	
v.	)	
	)	
Union Pacific Railroad Company,	)	ENTERED
	)	Office of Proceedings
Defendant.	)	December 9, 2021
	)	Part of
		Public Record

**SANIMAX USA LLC’S REPLY
TO UNION PACIFIC RAILROAD COMPANY’S PETITION
FOR CLARIFICATION OR, IN THE ALTERNATIVE, RECONSIDERATION**

Defendant UNION PACIFIC RAILROAD COMPANY (UP), in its Petition filed November 22, 2021, has asked the Board to clarify whether its decision served November 2, 2021, revoking the regulatory exemption applicable to Sanimax’s commodities transported by UP, has retroactive effect prior to the decision’s November 2 service date.

Sanimax Primarily Seeks Prospective Relief

In reply, SANIMAX USA LLC (Sanimax) first observes that the relief sought by Sanimax in this proceeding is primarily prospective in nature. Such relief is not challenged by UP’s Petition, which concerns only the *pre*-November 2 effect of the commodity exemption revocation. In its Verified Complaint filed November 6, 2020 (page 11), Sanimax’s prayer for relief is as follows:

Sanimax respectfully requests that the Board [i] **order UP to cease and desist from such violations [of statutory common carrier obligations]**, [ii] **require UP to restore scheduled service to Sanimax to five days per week**, and [iii] award damages to Sanimax for such violations as may be proven in an investigation of this Complaint. [Emphasis added.]

While Sanimax certainly does seek money damages as compensation for UP's unlawful rail service defaults at least since August 2020 when UP unilaterally reduced its service level at Sanimax's plant from five days per week to three (*see* Verified Complaint at 7-8),¹ the primary relief sought is prospective. The core of this case, as stated in the complaint, is for the Board to *order UP to provide adequate (five days per week) common carrier rail service at Sanimax's South St. Paul, MN plant.* That is prospective relief. Sanimax asks that such relief be afforded as soon as possible.

Request for Clarification If UP's Petition Is Accepted

Should the Board determine that UP's rail service failures are actionable as to damages only as of November 2, 2021, the service date of the exemption revocation decision, Sanimax hereby requests that the Board expressly confirm that such ruling would not limit the scope of discovery, the record or argument in this matter. Specifically, Sanimax asks the Board to order that:

1. Sanimax is entitled to undertake discovery with respect to UP's rail service reductions and violations at Sanimax's South St. Paul plant, and the factors underlying such service reductions and violations and all their consequences, *for time periods both before and after November 2, 2021*, including but not limited to the July-August 2020 period when UP proposed then unilaterally restricted its service to three days per week.
2. Sanimax is entitled to develop and rely upon the record concerning, and argue that, UP's three-days-per-week service restriction and other rail service failures at South St.

¹ Sanimax's money damages as computed to date are for increased transportation costs (hiring trucks to haul the outbound products that UP has failed to transport on time or at all) and demurrage triggered by UP's inadequate and unreliable three-days-per-week service. Sanimax has already specified those costs for the period August 3 through October 2, 2020, *see* Verified Complaint at 9-10 and accompanying Strickler VS, and much more has accrued since then. In addition, even under UP's retroactivity theory, Sanimax is entitled to damages accruing as of Nov. 2, 2021.

Paul violate UP's common carrier obligations, and that the Board can and should order UP to cease such violations *now*, and provide adequate rail service to Sanimax *now*, regardless of the fact that UP imposed three-days-per-week service and began its violations before November 2, 2021.

Pre-November 2, 2021 facts are plainly “relevant to the subject matter” of this proceeding and “reasonably calculated to lead to the discovery of admissible evidence” as to UP's common carrier obligations today, and are thus within the scope of permissible discovery under the Board's regulations. 49 C.F.R. § 1114.21(a)(1), (2). This is true regardless of the Board's determination about the pre-November 2, 2021 effect of its exemption revocation decision. Confirming that very point, the Board's exemption revocation decision specifically points to the pre-November 2, 2021 service problems described in Sanimax's Verified Complaint as “warrant[ing] closer examination and further development of the record.”² Moreover, even if UP, under its broad retroactivity theory, were immune from damages liability for rail service failures occurring before November 2, 2021 (which Sanimax does not concede), nevertheless UP cannot claim unfairness if Sanimax simply makes use of those facts to flesh out the rail service standards that UP must comply with *today*. That would not involve any retroactive financial liability for acts occurring before November 2, 2021.

Retroactivity Analysis As to Damages Is More Circumscribed Than UP Suggests

With regard to the substance of UP's Petition, the law on retroactivity is not as supportive of its position as UP asserts. UP cites *Bowen v. Georgetown University Hosp.*, 488 U.S. 204 (1988) and *Landgraf v. USI Film Prods.*, 511 U.S. 244 (1994) for the general principle that retroactive

² *Sanimax USA LLC v. Union Pac. R.R. Co.*, NOR 42171, slip op. at 6 (STB served Nov. 2, 2021).

application of laws and administrative determinations is disfavored. While that is true, another longstanding and parallel judicial principle is that “a court is to *apply the law in effect at the time it renders its decision*, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary.” *Bradley v. Richmond School Bd.*, 411 U.S. 696, 711 (1974) (emphasis added). The Supreme Court has acknowledged that *Bradley* is in “apparent tension” with *Bowen* with respect to retroactivity, and this Board has recognized that tension. See *San Joaquin Valley R.R. Co. – Abandonment Exemption*, AB-398 (Sub-No. 4X), 1999 STB LEXIS 121 at fn. 13 (STB served Mar. 5, 1999) (citing *Kaiser Aluminum & Chemical Corp. v. Boniorno*, 497 U.S. 827, 837 (1990)).

In the instant case, under the Supreme Court’s *Bradley* approach, the Board’s revocation of the commodity exemptions in its November 2, 2021 decision is now “the law in effect” in this case, meaning that UP is subject to common carrier obligations under the Interstate Commerce Act both before and after November 2, 2021, and both pre-November 2 and post-November 2 violations could support Sanimax’s claim for damages. In ruling on UP’s Petition in the light of the apparent continued uncertainty about retroactivity under Supreme Court precedents, the Board should specifically provide that its November 2, 2021 decision is “the law in effect” in this case under *Bradley*, supporting Sanimax’s claim for pre-November 2 damages.³

In any event, the Supreme Court’s more recent (1994) *Landgraf* case on retroactivity expressly supports the two specific points stated above on which Sanimax seeks confirmation, **if** the Board decides that the November 2 exemption revocation decision does not make UP financially liable for pre-November 2 conduct:

³ In its later *Landgraf* case, the Supreme Court pointedly did not overrule *Bradley*. See 511 U.S. at 260.

- With regard to pre-November 2 discovery, the Court in *Landgraf* took note of litigants’ “diminished reliance interests in matters of procedure.... [T]he fact that a new procedural rule was instituted after the conduct giving rise to the suit does not make application of the rule at trial retroactive.” *Landgraf*, 511 U.S. at 275. Pretrial discovery is a *procedural* matter. It is governed by the Board’s Rules of Practice in 49 C.F.R. Part 1114 Subpart B, and by the Federal Rules of Civil Procedure in federal court litigation. Thus, *Landgraf* expressly confirms that Sanimax is entitled to discovery on UP’s pre-November 2 conduct, however the Board may rule on UP’s Petition with regard to the retroactive application of its November 2 decision.
- More generally, as to Sanimax’s right to develop and rely upon the record concerning, and make use of, UP’s pre-November 2 actions as one piece of the argument why UP’s behavior *now*, post-November 2, violates the railroad’s common carrier obligations, the Court in *Landgraf* described the scope of disfavored retroactivity as follows:

[A] new statute [or decision] would have retroactive effect [if] it would impair rights a party possessed when he acted, increase a party’s liability for past conduct, or impose new duties with respect to transactions already completed.

511 U.S. at 280. Sanimax’s making appropriate use in its argument of UP’s pre-November 2 conduct impairs no rights UP possessed at the time (UP’s past activities were never immune from observation and comment); would not increase liability for past conduct as the point is to help support Sanimax’s complaint about UP’s *current* conduct; and would not impose new duties with respect to

pre-November 2 conduct because, again, the point would be to explain the scope of UP's *current* common carrier obligations.

Conclusion

In reply to UP's November 22, 2021 Petition with regard to retroactivity, Sanimax states:

- The primary relief sought by Sanimax is a Board order for UP to stop violating its statutory common carrier obligations and to restore five-days-per-week scheduled service at Sanimax's plant. That is *prospective* relief and is unaffected by UP's Petition, or any decision the Board may make in response, whatever that may be. Sanimax also renews its demand for pre-November 2, 2021 damages (along with post-November 2 damages), if the Board agrees they are allowable under applicable retroactivity principles.
- If the Board adopts UP's position that the November 2, 2021 decision in this case does not apply to make UP liable for its pre-November 2 conduct, the Board should nevertheless confirm that:
 - o Sanimax may conduct discovery with respect to UP's pre-November 2 conduct, and
 - o Sanimax may develop and rely upon the record concerning and make appropriate reference to UP's pre-November 2 conduct, including the unilateral service reduction to three days per week in the summer of 2020, in demonstrating why UP's post-November 2 conduct violates its common carrier obligations.

Respectfully submitted,

Date filed: December 9, 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 December 9, 2021, I served a copy of Sanimax USA LLC's Reply to Union Pacific Railroad Company's Petition for Clarification or, in the Alternative, Reconsideration by first class mail and email to UP's attorneys at the following addresses:

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/s/ Richard F. Riley, Jr.

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