

**Before the Surface Transportation Board
Washington, D.C. 20423**

FORESIGHT COAL SALES LLC,	)	244377
SUGAR CAMP ENERGY, LLC,	)	244379
WILLIAMSON ENERGY, LLC,	)	
Complainants,	)	ENTERED
v.	)	Office of Proceedings
	)	September 19, 2017
	)	Part of
CSX TRANSPORTATION, INC.,	)	Public Record
Defendant.	)	

CONSOLIDATION COAL COMPANY,	)	
Complainant,	)	Docket: NOR 42156
v.	)	
	)	
CSX TRANSPORTATION, INC.,	)	
Defendant.	)	

MOTION TO STAY BRIEFING TO ALLOW FOR DISCOVERY

Complainants, Foresight Coal Sales, LLC (“Foresight”), Sugar Camp Energy, LLC (“Sugar Camp”), Williamson Energy, LLC (“Williamson Energy”), and Consolidation Coal Company (“Consolidation Coal”), by counsel, respectfully request an order that briefing on the motions to dismiss filed by CSX Transportation, Inc. (“CSXT”) be stayed until a later date established by a procedural schedule allowing for discovery. In support of this motion, Complainants state as follows:

Summary of argument

On August 31, 2016, CSXT filed identical Motions to Dismiss the Complaints filed in Docket Nos. NOR 42155 and NOR 42156. The sole basis for the Motions to Dismiss is CSXT’s argument that 49 U.S.C. § 10709 deprives the Board of jurisdiction to hear the Complaints.

CSXT derives support for its argument not from any of the allegations of the Complaints but instead exclusively from materials outside the pleadings, including a declaration from Russ A. Epting. Although CSXT has called its filing a motion to dismiss, it should properly be characterized as a motion for summary judgment. Complainants should be allowed to conduct discovery in order to fully respond to CSXT's evidentiary showing. Thus, briefing on CSXT's Motions to Dismiss should be stayed while the parties conduct discovery, and CSXT's Motions to Dismiss should be briefed according to a procedural schedule, which will include provisions governing dispositive motions.

Standard of Review

The Board's jurisprudence on how to evaluate a motion to dismiss is well-settled. "The Board may dismiss a complaint if the complaint 'does not state reasonable grounds for investigation and action.' 49 U.S.C. 11701(b). We have stated frequently that motions to dismiss are disfavored and rarely granted." *Entergy Arkansas, Inc. & Entergy Services, Inc. v. Union Pac. R.R. Co. & Missouri & N. Arkansas R.R. Co., Inc.*, STB Docket No. 42104, 2009 WL 5150691, at *3 (STB served Dec. 30, 2009). "Dismissal for failure to state a claim is a disfavored request and rarely granted. It is not warranted even though the court believes the plaintiff is unlikely to prevail on the merits." *Nat'l Grain & Feed Ass'n v. Burlington N. R.R. Co., et al.*, 40169, 1990 WL 288197, at *5 (I.C.C. May 23, 1990) (internal citations omitted).

"While reviewing a motion to dismiss, the Board will view the alleged facts in a light favorable to the complainant." *Union Pac. Corp., Union Pac. R.R. Co. & Missouri Pac. R.R. Company—Control and Merger—Southern Pac. Rail Corp., S. Pac. Transp. Co., St. Louis Sw. Ry. Co., Spcsl Corp., & the Denver & Rio Grande W. R.R. Co.*, STB Docket No. FD 32760, Decision No. 108, 2017 WL 1788756 (STB served May 5, 2017).

Argument

A. Because CSXT has asserted that 49 U.S.C. § 10709 applies, a fact-sensitive inquiry is required

CSXT asks the Board to make factual assumptions and consider factual statements that are beyond the factual allegations of the Complaints in order to draw legal conclusions concerning the applicability of 49 U.S.C. § 10709 (“Section 10709”). However, this is not the appropriate stage of this proceeding in which to draw such conclusions.

First, the mere use of the words “contract” or “agreement” does not automatically require the application of 49 U.S.C. § 10709, particularly when viewing those words in a light most favorable to Complainants. For instance, even tariffs can accurately be characterized as “contracts” or “agreements” between a carrier and a shipper. *See Tempel Steel Corp. v. Landstar Inway, Inc.*, 211 F.3d 1029, 1030 (7th Cir. 2000) (“Today carriers adopt standard contractual terms, which some call “tariffs” out of habit, but which have no effect apart from their status as contracts.”); *Saacke N. Am., LLC v. Landstar Carrier Services, Inc.*, 5:11CV107-RLV, 2012 WL 6590487, at *7 (W.D.N.C. Dec. 18, 2012) (“The term “tariff” is commonly used to refer to “common carrier pricing arrangements” or “published rates”.... [A] tariff simply refers to a carrier's standard contract terms”).

As a result, courts frequently struggle with the question of whether Section 10709 is applicable.

How one identifies a § 10709 contract is not exactly clear. *Sompo II*, 540 F.Supp.2d at 495 (“Courts have ... noted that there is little guidance on how to identify a § 10709 contract.”) (collecting cases); *Babcock*, 557 F.3d at 146 (“We note the difficulties faced by the district courts in the absence of a simple statutory or regulatory test for identifying a § 10709 contract.”)

Chartis Seguros Mexico, S.A. de C.V. v. HLI Rail & Rigging, LLC, 3 F. Supp. 3d 171, 183 (S.D.N.Y. 2014).

The Board is also keenly aware that whether a contract falls within the scope of Section 10709 is a highly fact-sensitive inquiry that necessarily requires a case-by-case approach. During a rulemaking that was initiated in an effort to aid in the interpretation of the term “contract” as used in Section 10709, the Board noted as follows:

While Congress expressly removed all matters and disputes arising from rail transportation contracts from the Board's jurisdiction, 49 U.S.C. 10709(c), the statute provides no clear demarcation between a contract and common carriage rate. Agency precedent offers little guidance. The issue of whether a rate is a contract or common carriage rate has been examined on a case-by-case basis in light of the parties' intent.

Interpretation of the Term "Contract" in 49 U.S.C. 10709 Rail Transp. Contracts Under 49 U.S.C. 10709, STB Docket Nos. EP 669 & EP 676, 2008 WL 657934, at *1 (STB served Mar. 12, 2008). After declining to adopt the proposed rule, the Board then instituted “a separate rulemaking proceeding to consider imposing a requirement that each carrier provide a full disclosure statement when it seeks to enter into a rail transportation contract under section 10709.” *Id.* at *3.

After receipt of comments and consideration on this new rulemaking proceeding, the Board again determined that the best course was to continue evaluating the applicability of Section 10709 on a case-by-case basis. “[W]e will refrain from creating a bright line rule and will instead continue our current practice of deciding whether a disputed rail rate is a section 10709 rail transportation contract or a common carriage rate on a case-by-case basis.” *Rail Transp. Contracts Under 49 U.S.C. 10709*, STB Docket No. EP 676, 2010 WL 234709, at *1 (STB served Jan. 22, 2010). This case-by-case approach requires an analysis of, among other things, the parties’ intent. *E.I. Dupont De Nemours & Co. v. CSX Transp., Inc.*, STB Docket No. 42099, 2007 WL 4466694, at *4 (STB served Dec. 20, 2007).

B. Because CSXT presents materials outside the pleadings, discovery should proceed and further briefing should not occur until the time for dispositive motions in accordance with a procedural schedule.

CSXT's bare assertion that there is a rail transportation contract under 49 U.S.C. § 10709 does not make it so. *E.I. Dupont De Nemours & Co. v. CSX Transp., Inc.*, STB Docket No. 42099, 2007 WL 4466694, at *5 (STB served Dec. 20, 2007) (evaluating evidence specific to the agreement at issue and denying CSXT's motion to dismiss upon finding that contract was not within the scope of 49 U.S.C. § 10709). At a minimum, Complainants should be entitled to discovery related to Mr. Epting's declaration and to obtain from CSXT copies of the actual documents that CSXT asserts are transportation contracts within the scope of 49 U.S.C. § 10709. Additional discovery concerning the negotiations leading up to such contracts and the intent of the parties is also relevant and proper. *See Union Pac. R.R. Co.--Petition for Declaratory Order*, STB Docket No. Finance 35021, 2007 WL 1437360, at *2 (STB served May 16, 2007) ("We cannot, however, issue a blanket declaratory order as to the nature of Option 2 agreements, as we have no evidence of the facts surrounding the execution of each particular Option 2 agreement."). Clearly, based on CSXT's Answers to the Complaints, there are a great deal of factual disputes. The very purpose of discovery is to allow the parties an opportunity to obtain information pertinent to disputed facts.

The Board (by its predecessor) has previously identified a proper framework for dealing with early summary judgment-type motions such as those filed by CSXT here. Under that framework, the Board should allow discovery to proceed in order to fully develop factual disputes:

Granting a motion to dismiss requires that all factors be viewed in the light most favorable to complainant. Moreover, as a general rule, motions to dismiss prior to the submission of evidence ... are denied to ensure that participants have a full and fair opportunity to meet their burden of proof. A number of BN's arguments in support of its motion to dismiss rely on factual responses to the complaint. These are matters that should be more fully developed. BN will have the opportunity to counter NGFA's evidentiary showing with its own evidence.

Nat'l Grain & Feed Ass'n v. Burlington N. R.R. Co., et al., 40169, 1990 WL 288197, at *4 (I.C.C. May 23, 1990) (internal citation omitted) (footnote omitted). *See also Garden Spot & N. Ltd. P'ship & Indiana Hi-Rail Corp. - Purchase & Operate - Indiana Rail Rd. Co. Line Between Newtom & Browns, Il Archer-Daniels-Midland Co., Reinbold Grain Co., Siemer Grain Co., & Willow Hill Grain, Inc. v. Indiana Hi-Rail Corp.*, 31593, 1992 WL 389440, at *2 (I.C.C. Dec. 23, 1992) (denying motion to dismiss, noting that “[u]nder the procedural schedule already established, [defendant] will have ample opportunity to rebut [complainant]'s allegations.”).

Conclusion

CSXT should not be permitted to short-circuit the course of these proceedings by precluding discovery with a perfunctory and conclusory statement that Section 10709 applies here.

For the reasons discussed herein, the Board should stay any further briefing on CSXT's Motions to Dismiss until such time as determined by a procedural schedule that allows for discovery prior to the briefing of dispositive motions.

Respectfully submitted,



Bradley D. Hasler, IN atty no. 22384-49
BINGHAM GREENEBAUM DOLL LLP
2700 Market Tower, 10 W. Market Street
Indianapolis, IN 46204-4900
Telephone: (317) 635-8900
Facsimile: (317) 236-9907
bhasler@bgdlegal.com

Attorney for Complainants,
Foresight Coal Sales, LLC
Sugar Camp Energy, LLC
Williamson Energy, LLC
Consolidation Coal Company

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on September 19th, 2017, a copy of the foregoing was sent to the following by US Mail, postage prepaid, and by electronic mail, addressed to the following:

Raymond A. Atkins
Matthew J. Warren
Marc A. Korman
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, DC 20005

