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February 6, 2019

ENTERED
Office of Proceedings
February 6, 2019
Part of
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By e-filing

Ms. Cynthia T. Brown, Chief
Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, S.W.
Washington, DC 20024

Re: Docket No. NOR 42161, *Ameropan Oil Corporation v. Canadian National
Railway Company*

Dear Ms. Brown:

Hereby transmitted is a Reply in Opposition to Motion to Dismiss the Complaint for
filing with the Board in the above referenced matter.

Very truly yours,



Thomas F. McFarland
Attorney for Complainant

TMcF:kl:\1827\efSTB2

cc: All parties of record

BEFORE THE
SURFACE TRANSPORTATION BOARD

AMEROPAN OIL CORPORATION,	)	
	)	
<u>Complainant,</u>	)	
v.	)	DOCKET NO.
	)	NOR 42161
ILLINOIS CENTRAL RAILROAD	)	
COMPANY, ^{1/}	)	
	)	
<u>Defendant.</u>	)	

REPLY IN OPPOSITION TO MOTION TO DISMISS THE COMPLAINT

AMEROPAN OIL CORPORATION
3301 South California Avenue
Chicago, IL 60608

Complainant

THOMAS F. McFARLAND
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Attorney for Complainant

DUE DATE: February 19, 2019

^{1/} The caption in the Complaint mistakenly named Canadian National Railway Company (CN), parent company of Illinois Central Railroad Company (IC), as the defendant. Ameropan Oil Corporation (AOC) has sought leave from the Board to amend the Complaint to dismiss CN with prejudice and to name IC as defendant.

BEFORE THE
SURFACE TRANSPORTATION BOARD

AMEROPAN OIL CORPORATION,	)	
	)	
<u>Complainant,</u>	)	
v.	)	DOCKET NO.
	)	NOR 42161
ILLINOIS CENTRAL RAILROAD	)	
COMPANY,	)	
	)	
<u>Defendant.</u>	)	

REPLY IN OPPOSITION TO MOTION TO DISMISS THE COMPLAINT

Pursuant to 49 U.S.C. § 1104.13(c), AMEROPAN OIL CORPORATION (AOC) hereby replies in opposition to a Motion to Dismiss the Complaint (Motion), filed on behalf of CANADIAN NATIONAL RAILWAY COMPANY (CN) and its wholly-owned subsidiary, ILLINOIS CENTRAL RAILROAD COMPANY (IC) on January 28, 2019.^{2/}

BACKGROUND

IC recently reduced the rail service that it holds itself out to provide at AOC's Chicago terminal from five days per week to two days per week. AOC receives interstate rail shipments of liquid asphalt at that terminal in which IC participates. AOC's Complaint, filed on December 17, 2018, assails that reduction of rail service as (1) a failure to provide adequate rail service on

^{2/} See note 1, *supra*. In a decision served February 1, 2019, the Board tolled the date for filing an Answer to the Complaint until further order of the Board. That action does not affect the date for filing this Reply in Opposition to the Motion to Dismiss.

reasonable request in violation of 49 U.S.C. § 11101(a); (2) implemented without required prior notice in violation of 49 U.S.C. § 11101(c); and (3) an unreasonable practice in regard to transportation and service in violation of 49 U.S.C. § 10702(2). A cease and desist order and damages are sought.

IC's Motion is based on a contention that the number of days that it provides service to AOC is contained in a contract in accordance with 49 U.S.C. § 10709, and that, accordingly, the Board does not have jurisdiction over the allegations in the Complaint.

AOC's Complaint named the wrong defendant, i.e. CN instead of its subsidiary, IC (*see* note 1 *supra*). The Motion contains a perfunctory motion to dismiss on that basis (Motion at 7). Concurrently, AOC is filing a Petition for Leave to amend the Complaint to voluntarily dismiss CN as a defendant with prejudice, and to name IC as the defendant, as the real party in interest.

PREFACE

Motions to dismiss are generally disfavored. *BNSF Ry. Co. -- Terminal Trackage Rights -- Kansas City Southern Ry. Co., et al.* 2018 WL 2045087 at *5 (Docket No. FD 32760 [Sub-No. 46], decision served May 4, 2018 at 5). When reviewing a motion to dismiss, the Board views all alleged facts in the light most favorable to the complainants. (*Id.*), citing *Consumers Energy Co. v. CSX Transp., Inc.*, 2015 WL 3746984 at *1 (Docket No. NOR 42142, decision served June 15, 2015; and *Montana v. BNSF Ry.*, 2011 WL 531860 at *2 (Docket No. 42124, decision served Feb. 16, 2011).

ARGUMENT

I. The Subject Matter Of The Complaint Is Not Contained In A Contract

IC contends that the number of days that it will provide service to AOC (the “Service Provision”) is contained in its Master Agreement No. 542374-AA-0000, including attached Schedule 1 (Master Agreement). When the Board reviews the Master Agreement, it will search in vain for a provision regarding the number of days on which service will be provided. The absence of such a provision is fatal to IC’s Motion.

If the Service Provision was included in the Master Agreement as contended by IC, there would have had to have been a contract amendment when the Service Provision was reduced from five days to two days per week. There was no such contract amendment.

Section 2(B) of the Master Agreement provides that the particulars of each movement shall be as specified in Schedule 1. Schedule 1 provides for freight rates per car, escalation, routing, and optional service fees (e.g. demurrage charges). The Service Provision is not included in the particulars in Schedule 1. The absence of the Service Provision in the transportation particulars in Schedule 1 is strong evidence that IC and AOC did not intend that the Service Provision be included in the Master Agreement.

Section 2(H)(a) of the Master Agreement provides that the Parties may agree at any time to add, modify or “delete origins, destinations, including applicable rates and conditions.” (Revised Schedule 1). The Service Provision under consideration was not included in that Section because that Provision is not included in Schedule 1.

The Motion contains a scholarly argument that the Board does not have jurisdiction to adjudicate the lawfulness of provisions that are contained in contracts established in accordance

with 49 U.S.C. § 10709. (Motion 4-6). But that is not the issue raised by the Complaint, Motion, and this Reply. Instead, the controlling issue is whether or not the Service Provision is contained in the Master Agreement. IC assumes that it is, treating this matter solely in the second paragraph on page 2 of the Motion.

It is apparent that IC's argument does not establish that the Service Provision is contained in the Master Agreement. Thus, IC argues that the Master Agreement provides that it is the entire agreement between the parties regarding their obligations for the provision of rail service in respect of the traffic subject to the Master Agreement. (Motion at 2; Section 2(N) of the Master Agreement). That does not mean that the Service Provision is included in the Master Agreement. On the contrary, it means that it is not so included because it is not specified in the agreement of the parties.

II. The Service Provision Is A “Service Term” Within The Meaning Of That Phrase In 49 U.S.C. § 11101(c)

Among the subject matter contained in 49 U.S.C. § 11101(c) are “common carrier service terms”. The statute provides that a rail carrier may not change any common carrier service term without providing at least 20 days of prior notice to affected shippers.

The number of days per week on which rail service is to be provided clearly is a “service term” within the meaning of 49 U.S.C. § 11101(c). Thus, inasmuch as the Service Provision involved in this case is not covered by a Section 10709 contract, it clearly is a “common carrier service term” properly subject to Board jurisdiction under 49 U.S.C. § 11101(c), 11101(a), and 10702(2).

That being the case here, IC's Motion should be denied.^{3/}

CONCLUSION AND REQUESTED RELIEF

WHEREFORE, for the reasons stated, the Motion should be denied.

Respectfully submitted,

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Complainant



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DUE DATE: February 19, 2019

^{3/} This Reply is not the proper vehicle to respond to numerous IC mischaracterizations of the relief sought in AOC's Complaint, such as the preposterous claim that AOC seeks service on call every weekday regardless of actual traffic (Motion at 3-4). AOC will address those issues in the evidentiary phase of this proceeding after the Motion is denied.

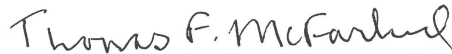
CERTIFICATE OF SERVICE

I hereby certify that on February 6, 2019, I served a copy of this Reply in Opposition To Motion To Dismiss The Complaint by e-mail and first-class, U.S. mail on the following:

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