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SERVICE DATE – NOVEMBER 27, 2017

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 36131

UTAH CENTRAL RAILWAY COMPANY, LLC V. KENCO LOGISTICS SERVICES, LLC;
KENCO GROUP; AND SPECIALIZED RAIL SERVICE, INC.—PETITION FOR
DECLARATORY ORDER

Decided: November 27, 2017

Upon referrals from the United States District Court for the District of Utah, Northern Division, Utah Central Railway Company, LLC (UCRY), filed this case with the Board on June 27, 2017. UCRY requests that the Board issue a decision in its favor regarding unpaid demurrage charges assessed to Kenco Logistics Services, LLC, and Kenco Group (collectively “Kenco”); and Specialized Rail Service, Inc. (SRS).

On February 6, 2017, UCRY filed a complaint in federal district court against SRS for \$85,530 in unpaid demurrage charges. (UCRY Pet. 2 & Ex. A.) Those charges were assessed in 17 invoices dated November 2013 through September 2016. (UCRY Pet., Ex. A at 3, 15.) Likewise, on February 27, 2017, UCRY filed a complaint in federal district court against Kenco for \$106,980 in unpaid demurrage charges. (UCRY Pet. 3 & Ex. B.) The fees assessed to Kenco were from 10 invoices dated from March 2015 through October 2016. (UCRY Pet., Ex. B at 3, 10.) The demurrage charges at issue for both Kenco and SRS arise from Local Freight Tariff PRC6004-3 (covering the period from April 10, 2014 to October 31, 2015) and Freight Tariff No. PRC1000 (covering the period from November 1, 2015 to the present). (UCRY Pet., Ex. A at 2, 11; UCRY Pet., Ex. B at 2-3, 7.) On April 17, 2017, upon motions in their respective cases by Kenco and SRS, and agreed to by UCRY, the presiding judges ordered these matters to be referred to the Board. (UCRY Pet., Exs. C & D.)

UCRY requests an order finding that: (1) UCRY has properly assessed and is entitled to collect certain unpaid demurrage charges against SRS and Kenco; (2) UCRY’s demurrage rates and charges are reasonable and consistent with the purposes set forth in 49 U.S.C. § 10746; (3) the manner in which UCRY calculated its demurrage charges against SRS and Kenco are reasonable and serve the purposes set forth in § 10746; (4) the rules and/or practices pursuant to UCRY’s assessment of demurrage charges against SRS and Kenco are reasonable and serve the purposes set forth in § 10746; (5) UCRY is not responsible for and did not contribute to any backup, accumulation or stacking of rail cars ordered by respondents and delivered to UCRY by Class I railroads for delivery to the respondents; (6) all rail cars for which demurrage charges were assessed against the respondents were subject to UCRY’s demurrage rates and charges; (7) UCRY’s switching services did not constitute a violation of § 11101; and (8) UCRY is

entitled to service charges as set forth in the relevant tariffs for all demurrage charges which respondents have failed to pay. (UCRY Pet. 4-5.)

On September 14, 2017, SRS and Kenco, respectively, filed individual replies. Both parties incorporated the other's reply stating that many of the issues raised are equally applicable. (SRS Reply 3; Kenco Reply 3.) SRS asserts that UCRY is not entitled to assess, impose, or collect demurrage charges. (SRS Reply 2.) Moreover, SRS denies the fact, amount, reasonableness, and calculation of the alleged demurrage charges. (*Id.* at 2.) SRS states that UCRY improperly charged SRS demurrage where SRS was not at fault for any delay in releasing cars; rather, the delay was a result of bunching, stacking, breakdowns in UCRY's equipment, UCRY's inability to handle cars coming from the Class I line, and failure to switch cars as agreed upon. (*Id.* at 2-3.) SRS raises numerous additional defenses, including that the statute of limitations, 49 U.S.C. § 11705, bars all charges accrued prior to February 6, 2014. (*Id.* at 5.)

Kenco asserts defenses similar to SRS's, including that UCRY failed to meet its burden of proof. (Kenco Reply 4.) Kenco states that the demurrage charges are unreasonable because UCRY bunched cars and failed to provide sufficient switching services. (Kenco Reply 7-11.) Kenco requests that the Board issue an order finding that (1) UCRY's demurrage charges were not properly assessed and are unreasonable and inconsistent with the purposes set forth in 49 U.S.C. § 10746; (2) the method and manner by which UCRY assessed demurrage against Kenco was unreasonable and inconsistent with the purposes set forth in § 10746; (3) UCRY's switching services were insufficient and violated, at a minimum § 11101; and (4) Kenco is not liable to UCRY in any respect for demurrage. (Kenco Reply 12.)

The "Board favors the resolution of disputes through the use of mediation and arbitration procedures, in lieu of formal Board proceedings, whenever possible." 49 C.F.R. § 1109.1. Kenco states that it earlier contacted the Board's Rail Customer and Public Assistance Program inquiring about possible mediation. (Kenco Reply 12.) In an effort to explore whether this matter can be resolved informally, the parties are requested to consider participating in Board-sponsored mediation under 49 C.F.R. pt. 1109, or in the alternative, submitting to arbitration under 49 C.F.R. pt. 1108.

It is ordered:

1. The Board directs the parties to confer on the possibility of mediation or arbitration, and, by December 12, 2017, either (1) file a joint pleading confirming that they agree to participate in Board-sponsored mediation, (2) file a joint notice to submit to arbitration pursuant to 49 C.F.R. § 1108.3(a)(2), or (3) indicate that they have not agreed to mediate or arbitrate and that the case should proceed.

2. This decision is effective on its date of service.

By the Board, Scott M. Zimmerman, Acting Director, Office of Proceedings.