

SERVICE DATE – APRIL 17, 2019

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. NOR 42161

AMEROPAN OIL CORPORATION

v.

CANADIAN NATIONAL RAILWAY COMPANY

Digest:¹ The Board grants Illinois Central Railroad Company and Canadian National Railway Company's motion to dismiss the complaint filed by Ameropan Oil Corporation.

Decided: April 16, 2019

On December 17, 2018, Ameropan Oil Corporation (Ameropan) filed a complaint against Canadian National Railway Company (CN). Among other things, Ameropan alleges that CN reduced rail service to Ameropan's facilities from five days per week to two days per week. (Ameropan Compl. 3.) Ameropan argues that the alleged reduction in rail service constitutes a violation of 49 U.S.C. §§ 11101(a), 11101(c), and 10702(2). (*Id.* at 5.) In response, on January 28, 2019, CN and its subsidiary, Illinois Central Railroad Company (IC), filed a motion to dismiss Ameropan's complaint for lack of jurisdiction.² (CN Mot. to Dismiss 1.) The Board will grant the motion to dismiss.

BACKGROUND

Ameropan's complaint states that "for many years," CN has provided rail service five days per week to Ameropan's facilities in Chicago, Ill., where Ameropan stores, receives, and distributes asphalt. (Ameropan Compl. 2, 3.) Ameropan alleges that, effective November 3, 2018, CN reduced service to Ameropan's facilities from five days per week to two days per

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 Policy Statement on Plain Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

² The motion to dismiss explains that IC is the entity that provides the transportation at issue and CN is IC's corporate parent. (CN Mot. to Dismiss 1 n.1.) Ameropan has filed a petition for leave to amend its complaint to dismiss CN as a defendant and to name IC as a defendant. However, as explained further below, the Board lacks regulatory authority over the transportation at issue regardless of the party named as the defendant and will deny Ameropan's petition for leave to amend as moot. Because the complaint has not been amended, the defendant will be referred to as "CN" throughout this decision.

week. (Id. at 3.) According to Ameropan, the only notice CN gave of this reduction in service was an email dated October 24, 2018, stating that CN would be reducing service to Ameropan to two days per week without any additional explanation or justification. (Id. at 3-4.) Ameropan claims that this reduction in service harms Ameropan by reducing the amount of asphalt it can receive and distribute, resulting in lost business and profits; potentially increasing the amount of demurrage charges assessed to Ameropan by CN; and exposing Ameropan to penalties for failing to meet CN's minimum annual volume requirements. (Id. at 4.)

Ameropan argues that the reduction in service constitutes a failure to provide adequate rail service in violation of 49 U.S.C. § 11101(a); a failure to provide adequate notice of a change in common carrier service terms as required by 49 U.S.C. § 11101(c); and an unreasonable practice in a matter related to transportation and service in violation of 49 U.S.C. § 10702(2). (Id. at 5.)

In its motion to dismiss, CN argues that 49 U.S.C. § 10709(c)(1) prohibits any challenges before the Board regarding transportation covered by a contract between a rail carrier and a purchaser of rail services. (CN Mot. to Dismiss 4-5.) CN claims that its rail service to Ameropan is provided pursuant to a rail transportation contract between the parties, titled "CN Confidential Transportation Master Agreement No. 543274-AA 0000" (the Master Agreement), and that § 10709(c)(1) therefore deprives the Board of jurisdiction over Ameropan's complaint.³ (Id. at 2, 4.) CN also states that Ameropan explicitly recognized and argued in a previous federal court proceeding that CN's rail service to Ameropan's Chicago facilities is governed by the Master Agreement. (Id. at 3-4.) Additionally, as noted above, the motion to dismiss explains that IC is the entity that provides the transportation at issue, and CN is IC's corporate parent. (Id. at 1 n.1.)

On February 6, 2019, Ameropan filed a reply in opposition to CN's motion to dismiss. Ameropan argues that the Master Agreement does not address the frequency of service to be provided to Ameropan and that § 10709 therefore does not apply in this case. (Ameropan Reply 4, Feb. 6, 2019.) According to Ameropan, because the frequency of service is not specified by contract, it is a common carrier service term subject to Board jurisdiction under §§ 11101(a), 11101(c), and 10702(2). (Id. at 5.) On February 6, 2019, Ameropan also filed a petition for leave to amend its complaint to dismiss CN as a defendant and to name IC as a defendant. (Ameropan Pet. 3.)

On February 25, 2019, CN filed a reply to Ameropan's petition for leave to amend and to Ameropan's reply. CN states that it does not object to Ameropan's petition for leave to amend. (CN Reply 1, Feb. 25, 2019.) CN, however, argues that even as amended, Ameropan's complaint fails to allege a matter within the Board's jurisdiction. (Id.) CN states that under § 10709(b), "a party to a rail transportation contract 'shall have no duty in connection with

³ CN provided a copy of the Master Agreement under seal, (CN Mot. to Dismiss, Ex. A), subject to a protective order, which was granted by the Board in a decision issued February 11, 2019.

services provided under such contract other than those duties specified by the terms of the contract.” (Id.)

On February 25, 2019, Ameropan filed a reply to CN’s February 25, 2019 reply.⁴ Ameropan states that the Master Agreement incorporated various tariff provisions but did not purport to adopt or negate the tariff provision regarding service frequency. (Ameropan Reply 1, Feb. 25, 2019.) Ameropan argues that Congress could not have intended for the requirements of § 11101(c) and other common carrier service protections to be negated by a contract unless the contract makes clear that party receiving rail service under the contract is voluntarily surrendering those protections. (Id. at 2.)

DISCUSSION AND CONCLUSIONS

Under § 10709(c)(1), a rail services contract “and transportation under such contract, shall not be subject to [49 U.S.C. Subtitle IV, Part A]”⁵ and “may not be subsequently challenged before the Board . . . on the grounds that such contract violates a provision of this part.” Thus, “[i]t is well settled that the Board’s authority does not extend to those movements conducted pursuant to transportation contracts.” *N. Am. Freight Car Ass’n v. Union Pac. R.R.*, NOR 42144, slip op. at 4 (STB served Dec. 21, 2015). Ameropan does not dispute that rail service to its Chicago facilities is provided pursuant to the Master Agreement but claims that § 10709 does not apply here. (Ameropan Reply 4-5, Feb. 6, 2015; Ameropan Reply 1, Feb. 25, 2019.) Specifically, Ameropan argues that the Board retains authority to enforce a particular common carrier service term unless the parties have a contract that explicitly adopts or negates that common carrier service term. (Ameropan Reply 1-2, Feb. 25, 2019.) Accordingly, Ameropan asserts that the Board maintains authority in this case to enforce common carrier service terms regarding frequency of service, because the Master Agreement “did not purport to either adopt or negate the [tariff] provision governing frequency of rail service.” (Id. at 1.)

Ameropan’s argument is not supported by the language of § 10709, and Ameropan does not explain how the language of the statute can be reconciled with its position. Nothing in § 10709 indicates that only those aspects of rail service explicitly addressed by the contract are removed from the Board’s regulatory authority. To the contrary, § 10709(b) states that “[a] party to a contract entered into under this section shall have no duty in connection with services provided under such contract other than those duties specified by the terms of the contract.” The natural reading of this provision is that common carrier duties do not apply to transportation provided under contract, even where those duties are not specifically addressed by the contract. In addition, § 10709(c)(1) exempts from the Board’s regulation “transportation” subject to a contract without specifying that it pertains only to the individual service terms addressed by a

⁴ While the Board’s regulations do not generally permit “replies to replies,” 49 C.F.R. § 1104.13(c), in the interest of having a more complete record, the Board will accept both CN’s February 25, 2019 reply to Ameropan’s February 6, 2019 reply and Ameropan’s February 25, 2019 reply to CN’s February 25, 2019 reply.

⁵ 49 U.S.C. Subtitle IV, Part A contains the statutory provisions Ameropan claims CN has violated: 49 U.S.C. §§ 11101(c), 11101(a), and 10702(2).

contract, as Ameropan claims.⁶ Similarly, § 10709(f) states that, where a rail carrier enters into a contract, that carrier “remains subject to the common carrier obligation . . . with respect to rail *transportation* not provided under such a contract” (emphasis added). It does not state that the rail carrier remains subject to the common carrier obligation with respect to those “service terms” not provided for by the contract, such as frequency of service. In other words, if the movement is subject to a contract, the common carrier service terms do not apply to the movement in question. Cf. Parrish & Heimbecker, Inc.—Pet. for Declaratory Order, 4 S.T.B. 866, 871 (STB served May 26, 2000) (“The Staggers Act thus effectively created two separate classes of rail service—common and contract carriage. Carriers that entered into rail transportation contracts functioned as contract carriers with respect to their contract services and as common carriers with respect to their other services.”)

Ameropan’s interpretation is also inconsistent with Congress’s purpose in enacting the statute. Congress passed the predecessor to § 10709, the former 49 U.S.C. § 10713, “to clarify the status of contract rate and service agreements in an effort to encourage carriers and purchasers of rail service to make widespread use of such agreements.” Kan. City Power & Light Co. v. Union Pac. R.R., NOR 42095, slip op. at 2 n.5 (STB served July 27, 2006) (quoting S. Rep. No. 96-470, at 24 (1979)); see also H.R. Rep. No. 96-1430, at 100 (1980) (“[rail] service provided under [a] contract is exempt . . . from all regulation and all of the requirements of the Interstate Commerce Act.”). Ameropan’s interpretation of the statute would result in significant uncertainty and discourage the use of contracts by inviting parties to seek enforcement of common carrier terms whenever they believe a contract contains ambiguity with respect to a particular service term.

For these reasons, the Board concludes that, for purposes of § 10709, where transportation is provided pursuant to a contract, the Board lacks regulatory authority over the terms and conditions related to that transportation, whether or not explicitly addressed in the contract.⁷ Indeed, pursuant to § 10709(b), “a party to a contract entered into under [that] section shall have no duty in connection with services provided under such contract other than those specified by the terms of the contract.” In this case, the transportation provided to Ameropan’s facility is provided pursuant to the Master Agreement. The Board therefore lacks regulatory

⁶ “Transportation” is defined broadly to include, inter alia, a “yard, property, facility, instrumentality, or equipment of any kind related to the movement of passengers or property, or both, by rail . . . and . . . services related to that movement, including receipt, delivery, elevation, transfer in transit, refrigeration, icing, ventilation, storage, handling, and interchange of passengers and property.” 49 U.S.C. § 10102(9). A particular service term governing “services related to [the] movement [of property],” would therefore, under § 10709(c)(1), not be subject to the Board’s regulatory authority under U.S. Code title 49, subtitle IV, part A.

⁷ The Board notes that, in the limited circumstances specified in 49 U.S.C. § 10709(g), a party may challenge a rail transportation contract before the Board and the Board may exercise regulatory authority over the transportation subject to the contract to alter the service terms of that transportation. However, the Board’s authority under § 10709(g) is not relevant in this case because Ameropan has not sought to challenge the Master Agreement.

authority over the terms and conditions of that transportation relating to frequency of service, which are the subject of Ameropan's complaint.

Because the Board's conclusion that it lacks regulatory authority over the transportation at issue is not based on the identity of the party named as the defendant, Ameropan's petition for leave to amend its complaint will be denied as moot. The motion to dismiss Ameropan's complaint will be granted.

It is ordered:

1. Ameropan's petition for leave to amend its complaint is denied as moot.
2. The motion to dismiss is granted.
3. This decision is effective on its service date.

By the Board, Board Member Begeman, Fuchs, and Oberman.