

SERVICE DATE – JULY 17, 2018

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. NOR 42146

AMERICAN FUEL & PETROCHEMICAL MANUFACTURERS

v.

BNSF RAILWAY COMPANY

Digest:¹ In this decision, the Board dismisses as moot a complaint filed by American Fuel & Petrochemical Manufacturers following a D.C. Circuit Court ruling vacating as moot the Board's underlying decision.

Decided: July 13, 2018

In a complaint filed on April 25, 2016, and amended on May 26, 2016, American Fuel & Petrochemical Manufacturers (AFPM) asserted that a price authority instituted by BNSF Railway Company (BNSF) on January 1, 2015, violated BNSF's common carrier obligation under 49 U.S.C. § 11101 and constituted an unreasonable practice in violation of 49 U.S.C. § 10702(2). The challenged BNSF price authority imposed per-carload rates for crude-oil transportation that were \$1,000 higher for movements inunjacketed (or general purpose) DOT-111 tank cars than for movements in other types of tank cars. (AFPM First Am. Compl., Ex. A at 5-7.) BNSF filed a motion to dismiss, arguing, among other things, that AFPM's complaint is a rate challenge that cannot be adjudicated under the common carrier or unreasonable practices provisions of the statute. (BNSF Mot. to Dismiss 2, 13 (citing Union Pac. R.R. v. ICC, 867 F.2d 646 (D.C. Cir. 1989)).)

In a decision served on February 8, 2017, the Board dismissed AFPM's complaint for failure to state reasonable grounds for investigation or action. 49 U.S.C. § 11701(b). AFPM sought judicial review of the Board's decision. However, between appellate briefing and oral argument, the use of unjacketed DOT-111 tank cars for crude oil transportation was phased out by statute.² Therefore, in an April 2, 2018 decision, the reviewing court concluded that, because the challenged conduct "is no longer occurring and the petition before us seeks only declaratory and injunctive relief, not damages, this dispute is no longer embedded in any actual controversy

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 Decision, EP 696 (STB served Sept. 2, 2010).

² See Fixing America's Surface Transportation Act, Pub. L. No. 114-94, § 7304, 129 Stat. 1312, 1596-97 (2015) (setting phase-out deadline of January 1, 2018).

about the [petitioner's] particular legal rights and thus is moot.” Am. Fuel & Petrochem. Mfrs. v. STB, No. 17-1112, slip op. at 2 (D.C. Cir. Apr. 2, 2018) (internal quotations and citation omitted). And because the case became moot “through happenstance,” the court also vacated the Board’s decision. Id., citing to N. Cal. Power Agency v. Nuclear Regulatory Comm’n, 393 F.3d 223, 225 (D.C. Cir. 2004) (“[I]f happenstance or the actions of the prevailing party ended the controversy, vacatur remains the standard form of relief.”). The court’s mandate was issued on May 31, 2018.

Because the court vacated the Board’s decision dismissing AFPM’s complaint, the complaint remains pending before the Board. However, for the same reason discussed by the court, AFPM’s complaint no longer presents a case or controversy for the Board to resolve. As a result, the complaint is moot. See, e.g., CF Indus., Inc. v. Ind. & Ohio Ry.—Pet. for Declaratory Order, FD 35517 et al., slip op. at 3-4 (STB served June 21, 2013); Harbison-Walker Refractories Co. v. Chi. Southshore & S. Bend R.R., FD 33593, slip op. at 1 (STB served Dec. 17, 1998).

Accordingly, the complaint will be dismissed.

It is ordered:

1. AFPM’s complaint is dismissed as moot.
2. This decision is effective on its service date.

By the Board, Board Members Begeman and Miller.