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SERVICE DATE - NOVEMBER 15, 2000

SURFACE TRANSPORTATION BOARD

DECISION

STB Docket No. 42050

SOUTH-TEC DEVELOPMENT WAREHOUSE, INC., AND R.R. DONNELLEY & SONS COMPANY–PETITION FOR DECLARATORY ORDER–ILLINOIS CENTRAL RAILROAD COMPANY

Decided: November 13, 2000

This declaratory order proceeding arises out of a court action in Illinois Central Railroad v. South-Tec Development Warehouse, Case No. 97 C 5720, filed in the United States District Court for the Northern District of Illinois. In the court proceeding, Illinois Central Railroad Company (IC) filed an action to collect from South-Tec Development Warehouse, Inc. (South-Tec), $160,170 in unpaid demurrage charges in connection with shipments of paper that stopped in transit at South-Tec's warehouse facility between September 1994 and December 1995. Subsequently, South-Tec filed a third-party complaint against the ultimate receiver of the goods, R.R. Donnelley & Sons Company (Donnelley), seeking indemnification against the demurrage charges.

Donnelley, joined by South-Tec, moved to stay the court proceedings and refer certain issues to the Board. The court, on July 15, 1999, granted the stay request and referred the following questions for our consideration: (1) whether IC's demurrage rate is unreasonable; (2) whether the method by which IC calculated the demurrage charges is unreasonable; and (3) whether the practice by which IC's demurrage charges accrue is discriminatory with respect to shippers such as Donnelley.

By decision served on February 8, 2000, a declaratory order proceeding was instituted in response to petitions filed by South-Tec and Donnelley (collectively, petitioners), and a procedural schedule was set for the submission of written statements. In accordance with the schedule, petitioners filed a joint opening statement; IC filed a reply; and South-Tec and Donnelley filed separate rebuttal statements. We will grant the declaratory order, in part, as discussed below.

BACKGROUND

In 1991, arrangements were made for IC rail shipments of paper between several paper mills and Donnelley's printing plant in Mattoon, IL, to be routed through South-Tec's warehouse in Kankakee, IL. According to petitioners, although the traffic would be unloaded at South-Tec's facility and then later reloaded for delivery to Donnelley's plant, IC charged the paper

mills a single-line, through rate[1] so that it could obtain traffic that had been moving in direct service to Mattoon on another rail carrier. A separate warehousing agreement was entered into between South-Tec and Donnelley covering storage of the paper at South-Tec's facility.

All of the shipments were rolls of paper transported in boxcars. Once the shipments arrived in Kankakee, South-Tec would unload the paper, store it in its warehouse, and then release the rail cars. Later, South-Tec would reload the paper onto other rail cars for transport to Donnelley under bills of lading created by South-Tec.

This arrangement apparently worked well for a while, but in September 1994, boxcars arriving at South-Tec's warehouse began to be unloaded in an untimely manner. When the problem persisted, IC assessed demurrage charges on South-Tec pursuant to its demurrage tariff (Freight Tariff 9000-F), but South-Tec refused to pay. In early 1996, IC embargoed South-Tec's warehouse for future rail shipments. When South-Tec still refused responsibility for demurrage, Donnelley agreed to assume future demurrage charges, but did not pay the charges that had already accrued. IC then filed suit in an effort to collect the demurrage charges that had accrued from September 1994 to December 1995. South-Tec filed its third-party complaint against Donnelley, claiming that Donnelley was responsible for the past demurrage charges.

Petitioners assert that they cannot be assessed demurrage charges because they are not parties to the line-haul transportation arrangements between IC and the paper vendors. In the alternative, they seek findings that IC's assessment of demurrage charges was "unreasonable" not because of the level of the charges, but simply by virtue of the fact that they were applied to petitioners;[2] that IC's demurrage tariff does not apply to a "storage-in-transit" point such as South-Tec's facility; and that application of IC's demurrage tariff is discriminatory with respect to Donnelley. South-Tec also argues that it was not the actual consignee of any of the shipments for which IC seeks demurrage, but rather was Donnelley's agent, and therefore may not be held liable for demurrage charges on shipments destined for Donnelley.

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[1] To obtain the through rate, IC required the vendors to include the following notation on their bills of lading: "Car to stop at South-Tec Warehouse, Kankakee, IL. Freight charges cover shipment to ultimate destination." IC also required that the bills of lading from Kankakee to Mattoon should read: "This is to certify that product previously moved in I.C.R.R. roadhaul to Kankakee, IL. Freight charges paid on inbound movement to Kankakee." See IC memo dated July 16, 1991, in Petitioners' Exhibit No. 5 and in Exhibit C to IC's reply.

[2] Neither South-Tec nor Donnelley denies that IC's rail cars were unreasonably detained, nor do they address the reasonableness of the rate IC used to calculate demurrage or the amount of demurrage charged. Instead, petitioners challenge only whether, under the governing transportation arrangements, IC could assess demurrage for equipment delays at South-Tec's warehouse. Thus, petitioners essentially do not press either of the rate reasonableness issues that the court referred.

Under 5 U.S.C. 554(e) and 49 U.S.C. 721, we may issue a declaratory order to terminate a controversy or remove uncertainty. We can resolve each of the questions that the court referred to us; in that regard, we find that there is a sufficient record before us to determine that IC could properly assess demurrage for South-Tec's undue delay of rail cars at the Kankakee warehouse, but that South-Tec's liability depends on whether or not it was acting as Donnelley's agent in its handling of the shipments. Because of deficiencies in the record, however, we can not resolve the agency question, which was raised by the parties, but which was not referred by the court. As the court is better suited than we are to decide the fact-bound agency issue, we will not delay resolution of the court proceedings to attempt to develop the record on the relationship between Donnelley and South-Tec; rather, to assist the court, we will provide our views on the factors that may have a bearing on that determination.

DISCUSSION AND CONCLUSIONS

Demurrage is a charge that both compensates rail carriers for the expenses incurred when rail cars are detained by shippers and encourages the prompt return of rail cars to the rail network by serving as a penalty for undue car detention. See Chrysler Corp. v. New York Central R. Co., 234 I.C.C. 755, 759 (1939). Except as to traffic covered by a transportation contract under 49 U.S.C. 10709, demurrage is subject to the Board's regulation under 49 U.S.C. 10702, which requires railroads to establish reasonable rates and transportation-related rules and practices. Moreover, under 49 U.S.C. 10746, rail carriers must compute demurrage charges in a way that will facilitate freight car use and distribution and promote car supply.

A. Application of the Demurrage Tariff Was Proper.

Petitioners' principal arguments revolve around their claim that the demurrage charges, while not necessarily unreasonable per se, should not have been applied to cars held at South-Tec's Kankakee warehouse. We do not agree.

Item 2060-A of IC's tariff provides that demurrage "will be billed to the consignor at origin, the consignee at destination and the party for whom the car is held if enroute." Petitioners do not dispute that, at least on its face, this tariff language could apply to South-Tec (and to Donnelley if South-Tec acted as Donnelley's agent), but they claim that they cannot be liable for demurrage here because rail service was performed under transportation arrangements between IC and the originating paper vendors who paid the line-haul freight charges. However, the fact that neither Donnelley nor South-Tec paid the line-haul charges does not alleviate South-Tec's (and possibly Donnelley's) responsibility for demurrage to IC when loading was delayed at South-Tec's facility.[3] R. Franklin Unger, Trustee of the Indiana Hi-Rail Corporation,

[3] Petitioners claim that IC's assessment of demurrage at Kankakee is an unreasonable attempt by IC to increase revenues, but there is nothing in the record to support this allegation. It (continued...)

Debtor–Petition for Declaratory Order–Assessment and Collection of Demurrage and Switching Charges, STB Docket No. 42030 (STB served June 14, 2000), slip op. at 6. Both parties were integral to the transportation movements; under the tariff, South-Tec appears to have been "the party for whom the car[s were] held if enroute;" and making South-Tec (or Donnelley, if South-Tec is its agent) liable here under the terms of IC's tariff would advance demurrage's primary objective of providing economic deterrents to undue car detention. See Exemption of Demurrage From Regulation, Ex Parte No. 462 (STB served Mar. 29, 1996), slip op. at 1; see also generally Car Demurrage Rules Nationwide, 350 I.C.C. 777 (1975).[4]

Petitioners also argue that IC's demurrage charges do not apply on their face because the tariff does not expressly provide for the collection of demurrage at a "storage-in-transit" point such as South-Tec's warehouse. Petitioners do not explain, however, why the "party for whom the car is held if enroute" language in the tariff is not broad enough to embrace South-Tec. Moreover, IC points out that South-Tec was not just a storage-in-transit point essential to the transportation, but was in fact identified on the bills of lading as the consignee of the shipments to its Kankakee warehouse. In those circumstances, once South-Tec accepted the shipments, it

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[3](...continued)
does not appear that the demurrage charges were imposed by IC for any reason other than to promote the efficient utilization of rail cars and to compensate it when its cars are kept out of circulation.

[4] Petitioners' related argument that IC's demurrage tariff does not apply because the traffic moved under contracts pursuant to 49 U.S.C. 10709 is likewise without merit. Petitioners do not reference any contracts for the involved traffic that would have been filed with the Interstate Commerce Commission (ICC), as required at the time by former 49 U.S.C. 10713 (predecessor of 49 U.S.C. 10709), nor do any such contracts appear to have existed. Instead, the transportation arrangements between IC and the paper vendors were conducted pursuant to rate quotations for exempt boxcar traffic handled pursuant to 49 CFR 1039.14, but, although boxcar traffic was exempted from ICC/Board regulation, in many respects service matters relating to boxcar transportation, like the assessment of demurrage, are not exempt. 49 CFR 1039.14(b)(1). Thus, absent other obstacles, IC could properly apply its demurrage tariff to Donnelley or South-Tec should either unduly detain IC's cars.

Further, because the involved traffic did not move under section 10709 contracts, IC's unilateral adjustment on August 12, 1994, of its method to calculate the demurrage charges did not, as petitioners argue, absolve South-Tec of demurrage liability. Regardless of whether demurrage charges were established by tariff publication or exemption, IC was not required to consult with Donnelley or South-Tec or obtain their consent. See Wilson Fertilizer & Grain Company–Petition for Declaratory Order–Certain Rates and Practices of Indiana Hi-Rail Corporation, No. 41671 (STB served Jan. 30, 1998), slip. op. at 7-8, citing Railroads Per Diem, Mileage, and Demurrage and Storage Agreement, 1 I.C.C.2d 924, 935 (1985). In any event, IC claims to have provided notice of this change to its customers (see Petitioners' Exhibit No. 8).

(or Donnelley, if South-Tec was acting as Donnelley's agent) became liable for the demurrage charges.

B. Application Of The Tariff to Donnelley Was Not Discriminatory.

Petitioners also argue that IC's tariff, even if otherwise applicable, is unreasonable and discriminatory as to Donnelley because it could result in Donnelley being liable for more than one demurrage charge — one at Kankakee and another at Mattoon — on a single shipment from the paper vendor to Donnelley. But demurrage is a charge imposed for the undue detention of rail cars. If a car is detained more than once while a single shipment is being hauled, a separate demurrage charge may be assessed for each delay. Indeed, it is well settled that demurrage may be charged on cars held for reconsignment,[5] and yet in a reconsigment situation it is quite possible that further demurrage could be incurred at the ultimate destination. Thus, if IC's boxcars were unreasonably detained at Kankakee and at Mattoon, the tariff would provide for IC to impose a demurrage charge for the delay at each location and the party deemed responsible for each delay would be liable to pay the charge.[6] Such a practice comports with the purpose of imposing demurrage charges and is not unreasonable or discriminatory.

C. The Agency Question.

Even if it were responsible for the undue detention of IC's boxcars at its Kankakee facility, South-Tec disclaims liability for demurrage on the theory that it was not the true consignee, but rather Donnelley's agent, citing Ametek, Inc.— Petition for Declaratory Order, No. 40663, et al. (ICC served Jan. 29, 1993) (Ametek), aff'd sub nom. Union Pacific R. Co. v. Ametek, Inc., 104 F.3d 558 (3d Cir. 1997) (UP/Ametek). While it admits that it was named as consignee on some of the bills of lading, South-Tec claims that it was listed as such without its permission, and that at all times the true consignee — and the party ultimately responsible for any demurrage charges found owing — was Donnelley because Donnelley's facility was the ultimate destination.[7] South-Tec states that it was merely handling the goods on behalf of

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[5] Turner, Dennis & Lowry Lumber Co. v. Chicago, M. & St. P. Ry. Co., 2 F.2d 291 (1924), aff'd, 271 U.S. 259 (1926).

[6] Donnelley argues that it cannot be held responsible for the delay of rail cars at South-Tec's Kankakee warehouse because it was not notified when the shipments arrived at Kankakee. Whether or not such notice was required may depend on the terms of the warehousing agreement between Donnelley and South-Tec, but even if a lack of notice might absolve Donnelley of liability, it would not absolve South-Tec.

[7] South-Tec submits copies of bills of lading for shipments from vendors to Kankakee which identify the consignee in various ways. E.g., one consignor noted "Ship To: Red Book
(continued...)

Donnelley and that IC was aware of this at all times because IC was the party that approached Donnelley and proposed routing the paper traffic via South-Tec's Kankakee warehouse. IC, for its part, disputes such knowledge.[8]

It is well-settled that an agent for a disclosed principal (the shipper or receiver of the goods) is not liable to a third party for acts within the scope of its agency. Middle Atlantic Conference v. United States, 353 F. Supp. 1109, 1120-21 (D.D.C. 1972) (Middle Atlantic). Ametek and other cases have held that demurrage charges do not apply to agents acting for the principal parties to the transportation, provided that the agency relationship is disclosed. See Ametek at 6, 13-16. Here, the record is unclear and in dispute over the principal issue that South-Tec raises in its individual defense: whether South-Tec was Donnelley's agent and, if it was, whether IC knew, or should have known, that fact.

Further, IC's primary collection theory as to South-Tec — that South-Tec was the consignee of the shipments delivered to Kankakee rather than an undisclosed agent — can neither be proved nor disproved on this record. Even though rail cars arriving at South-Tec moved under bills of lading that routinely named South-Tec as the consignee, the bills of lading submitted by South-Tec were written in various ways, most naming Donnelley as the ultimate destination and title owner of the shipments, with some shown as going to Donnelley "in care of" South-Tec. Moreover, even when rail cars were later loaded and shipped from South-Tec to Donnelley under bills of lading that South-Tec created naming itself as the consignor, South-Tec did so pursuant to the explicit instruction of IC's July 16, 1991 memorandum to Donnelley, which implemented the arrangement under which IC's through rate would be applied to shipments from the paper vendor consignors to Donnelley at Mattoon, and under which

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[7](...continued)
c/o Donnelley, Mattoon," and "Ship to: South-Tec Warehouse, R.R. Donnelley, Mattoon." Another consignor noted "sold to" and "ship to" "Donnelley, Mattoon, routing: c/o South-Tec. Warehouse." There were several other variations on other bills of lading. See Petitioners' Exhibit No. 3.

[8] IC asserts that South-Tec knew that IC would hold South-Tec liable for demurrage under IC's tariff if rail cars were delayed at South-Tec's warehouse. According to IC, its representative met with a representative of South-Tec in 1991 to provide a copy of IC's rules and tariffs and to explain how best to avoid incurring demurrage charges. South-Tec denies that any discussion of demurrage charges took place. IC admits that it proposed routing shipments ultimately destined for Donnelley through South-Tec's warehouse, but states that the details of South-Tec's responsibilities to Donnelley were contained in separate agreements between South-Tec and Donnelley to which IC was not a party and of which it had no notice. Therefore, IC argues that South-Tec cannot escape demurrage charges under the principle of agency because South-Tec never notified IC of its status as an agent.

additional freight charges would not be assessed for the transportation from Kankakee to Mattoon.

At the same time, neither South-Tec nor Donnelley provides a full description of the agreement between the parties as to how the shipments en route to Donnelley would be handled by South-Tec. Donnelley states in its rebuttal statement that it was not provided with any notice as to the arrival of the shipments at South-Tec, but it does not elaborate on whether such notice was expected or required under its agreement with South-Tec. There are also conflicting statements from IC and South-Tec concerning several matters, including whether South-Tec was advised and counseled by IC prior to the start of shipments as to its potential liability for demurrage, whether IC knew that South-Tec was an agent only, and whether Donnelley was notified of the backlog of rail cars at South-Tec's facility before the demurrage charges had accrued.

In light of this lack of information, it is not possible for us to determine whether South-Tec was indeed an agent of Donnelley. Because the court did not expressly refer this matter to us, because the courts are the primary authority on matters such as agency, and because the result rests largely on questions of fact, we find that the court is better suited to develop the record on this point and determine the nature of the relationship between South-Tec and Donnelley.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. The petition for declaratory order is granted to the extent specified above and this proceeding is discontinued.

2. This decision will be effective 30 days after the service date.

3. A copy of this decision will be mailed to:

United States District Court for the
Northern District of Illinois, Eastern Division
(Attn: District Judge George M. Marovich)
(Re: No. 97 C 5720)
U.S. Courthouse
219 South Dearborn St.
Chicago, IL 60604

By the Board, Chairman Morgan, Vice Chairman Burkes, and Commissioner Clyburn.

Vernon A. Williams
Secretary