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SURFACE TRANSPORTATION BOARD

DECISION

STB Docket No. 42107

RAILROAD SALVAGE & RESTORATION, INC., AND G.F. WEIDEMAN INTERNATIONAL, INC. − PETITION FOR INVESTIGATION AND FOR EMERGENCY RELIEF UNDER 49 U.S.C. 721(B)(4) − SECURITY DEPOSIT FOR DEMURRAGE CHARGES, MISSOURI & NORTHERN ARKANSAS RAILROAD COMPANY, INC.

Decided: June 30, 2008

In this decision, we grant the petition of Railroad Salvage & Restoration, Inc. (RSR) and G.F. Weideman International, Inc. (GFW) (collectively, petitioners) to enjoin the Missouri & Northern Arkansas Railroad Company, Inc. (MNA) from applying to petitioners the security deposit provisions of its newly adopted demurrage tariff. In a subsequent decision, we will consider petitioners' allegation that the application of these provisions to them would be an unreasonable practice.

BACKGROUND

MNA has adopted a new demurrage tariff, scheduled to become effective on July 1, 2008, that not only provides a new fee structure but also adopts new provisions pertaining to credit and security deposits. The latter provisions require all shippers served by MNA (or their agents) to apply for credit for payment of demurrage and storage charges and state that credit will be granted solely at the discretion of the carrier. If credit is denied and a shipper receiving multiple loads fails to pay accessorial charges[1] after written demand, the shipper is required to pay a security deposit of the higher of $10,000 or the amount of "existing past due accessorial charges" before it can receive a rail car from MNA for loading or unloading. The tariff provides further that a security deposit will no longer be required if the shipper is placed on the carrier's authorized credit list or pays all outstanding charges and gives assurance "to the satisfaction of the Carrier's credit office that future accessorial charges will be paid within the credit period prescribed in applicable tariffs."

In a letter dated June 1, 2008, MNA notified RSR of the new demurrage tariff and announced that the new tariff would become effective on July 1, 2008. The letter described the new tariff in general terms but neither mentioned the security deposit provision nor discussed RSR's account.

[1] These include demurrage charges.

The Petition.

By petition filed on June 18, 2008, RSR and GFW request: (1) an investigation into the lawfulness of the security deposit provisions in the new demurrage tariff; and (2) an order issued pursuant to 49 U.S.C. 721(b)(4) precluding MNA from applying those provisions to them pending completion of that investigation. Petitioners state that they are contesting MNA's attempt to assess four sets of demurrage charges − two of which are being litigated before the Board,[2] and two of which are not yet being litigated because MNA has not filed suit for collection. According to petitioners, the total amount at issue in the four sets of disputed demurrage charges is $399,530, of which $340,055 has been invoiced to RSR and $59,475 has been invoiced to GFW.[3] According to petitioners, MNA informed them in a telephone conference call on June 12, 2008, that they are subject to having to pay security charges under the new demurrage tariff in the full amount of these contested charges or else lose rail service.

Petitioners maintain that the traditional Holiday Tours[4] stay criteria have been met, i.e., that: (1) there is a strong likelihood that they will prevail on the merits of their challenge to the action sought to be stayed; (2) they will suffer irreparable harm in the absence of a stay; (3) other interested parties will not be substantially harmed; and (4) the public interest supports the granting of the stay.[5] Concerning the likelihood of success on the merits, petitioners argue that MNA cannot lawfully require them to pay a security deposit based on disputed demurrage charges that allegedly accrued before July 1, 2008, the effective date of the tariff requiring the deposit. Petitioners argue that any attempt to do so would be an impermissible attempt to apply a tariff retroactively. Petitioners also argue that use of the tariff to require petitioners to pay a security deposit in this situation would be an unreasonable practice under 49 U.S.C. 10702(2) because the purpose and effect of applying the tariff to them is to coerce them into paying charges that are being contested, citing Illinois Central Gulf R. Co. – Security Deposits, 358 I.C.C. 312 (1978) (Security Deposits).

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[2] The two proceedings before the Board, which have been consolidated, are: Railroad Salvage & Restoration, Inc – Petition for Declaratory Order – Reasonableness of Demurrage Charges, STB Docket No. 42102 (petition filed Oct. 5, 2007); and G.F. Weideman International, Inc. – Petition for Declaratory Order – Reasonableness of Demurrage Charges, STB Docket No. 42103 (petition filed Oct. 29, 2007).

[3] Of those amounts, in STB Docket No. 42102 RSR is challenging $199,265 in demurrage charges that allegedly accrued between January 2005 and August 2006 (and for one car in October 2006), and in STB Docket No. 42103 GFW is challenging $12,025 in demurrage charges that allegedly accrued between September 2006 and January 2007.

[4] See Washington Metro. Area Transit Comm'n v. Holiday Tours, Inc., 559 F.2d 841, 843 (D.C. Cir. 1977) (Holiday Tours); Virginia Petroleum Jobbers Ass'n v. Fed. Power Comm'n, 259 F.2d 921, 925 (D.C. Cir. 1958); Hilton v. Braunskill, 481 U.S. 770, 776 (1987).

[5] Under 49 U.S.C. 721(b)(4), the Board may issue an appropriate order to prevent irreparable harm. In determining whether to issue such an order, the agency applies the traditional stay criteria of Holiday Tours.

Petitioners maintain they would be irreparably harmed without an order from the Board restraining MNA from applying the security provisions so as to cut off their rail service. They explain that they are small, family held corporations of limited financial means that are involved in the receipt, sale, and distribution of salvaged rail and other track materials. Petitioners allege that they cannot afford to pay the disputed demurrage charges as a security deposit and that they cannot afford to have MNA cut off their rail service if they refuse to pay the deposit because they are "wholly rail dependent." According to petitioners, any cut-off of rail service would irreparably harm them because it would cause a permanent loss of customers. Petitioners also argue that an order restraining MNA would not substantially harm the carrier and would be in the public interest.

MNA's Reply.

On June 23, 2008, MNA filed a reply opposing petitioners' request for injunctive relief and stating that a separate response to petitioners' request for an investigation will be filed on or before July 8, 2008. MNA maintains that petitioners are not entitled to injunctive relief because they have not shown that they are likely to prevail on the merits. MNA argues that it is not applying the tariff retroactively, as it is neither changing the rates for demurrage that has already occurred nor revoking credit that was advanced in the past. MNA notes that the Board's predecessor, the Interstate Commerce Commission (ICC), approved basing future credit approval on past behavior in Security Deposits, supra. MNA asserts that it is not using the new tariff to coerce past payments but only to ensure that it is paid demurrage in the future.

MNA also maintains that petitioners have not shown a likelihood of success on the merits in the proceedings pending before the Board concerning previously incurred demurrage charges. As to those, MNA argues that the payments were not properly challenged because they were not timely brought and documented in the manner allegedly required under the tariff and that petitioners have admitted that they failed to comply with applicable tariff provisions for disputing demurrage.

MNA argues that petitioners have not shown that they will incur irreparable harm in the absence of injunctive relief. MNA reasons that any harm from payment of the security deposit would be self-inflicted, caused by their failure to observe the provisions of the demurrage tariff. MNA also contends that petitioners have not submitted financial information to verify that they cannot afford to pay the security deposit, and MNA argues that they are separate parties who are improperly aggregating their separate amounts that would be required as security deposits to claim a damage of about $400,000.

MNA claims that it would suffer substantial harm if it is kept from using the security deposit provisions to keep shippers like petitioners from evading their obligation to pay demurrage charges. MNA argues that the public interest would be harmed for the same reason.

DISCUSSION AND CONCLUSIONS

We will grant the requested injunctive relief because, on balance, we find that the Holiday Tours criteria weigh in favor of granting petitioners the emergency stay they seek.

Success on the Merits. The fundamental question underlying this petition is whether MNA can impose a security deposit provision that, in the aggregate, would require these two related small shippers to post a nearly $400,000 security deposit with MNA as a precondition for continued rail service. In deciding whether to grant emergency relief, we must act without the benefit of a fully developed evidentiary record and briefing on the issue.

Both parties have cited Security Deposits, but for opposite positions. Security Deposits stands for the proposition that a carrier cannot impose a security deposit requirement on a shipper without going through what were then the proper tariff filing procedures. It does not provide either the petitioners or the respondents with the weight to carry this prong of the Holiday Tours criteria.

More on point is the ICC's subsequent decision in Rail General Exemption Authority – Miscellaneous Agricultural Commodities – Petition of G&T Terminal Packaging Co., Inc., et al., to Revoke Conrail Exemption, Ex Parte No. 346 (Sub-No. 14A) (ICC served June 13, 1989) (G&T Terminal). There the ICC denied a request by a family of larger shippers—who the carrier claimed owed $2 million in outstanding demurrage charges—for injunctive relief from a letter-of-credit requirement in the amount of $50,000 per company to ensure future collection of demurrage. In doing so, the ICC articulated the following standard: "Security programs, to be lawful, must also be reasonable and established at a level based on past payment performance, while at the same time avoiding an undue financial burden on the shipper." G&T Terminal, slip op. at 3.

Here, application of MNA's new security deposit requirement would appear to place an undue financial burden on RSR and GSF. Petitioners allege, and MNA does not dispute, that they are small entities. Moreover, requiring a payment of this magnitude now from these small, rail-dependent shippers in the form of a security deposit of the amounts that are the very subject of the pending proceedings in STB Docket Nos. 42102 and 42103 ignores the fact that the amount is in dispute before the Board. Accordingly, based solely on the limited filings thus far and in view of the pending proceedings before us involving the disputed demurrage charges, we find that petitioners have met the first prong of the Holiday Tours test.

Irreparable Harm.

The undue financial burden weighs heavily in our analysis of the second Holiday Tours criterion as well. Petitioners allege, and MNA does not dispute, that they are completely dependent on rail service from MNA and would be irreparably harmed by the loss of business that would result from a loss of rail service—business that could well be irretrievably lost. Accordingly, we find that, on the pleadings so far filed, petitioners have met this criterion.

Harm to MNA.

In contrast, MNA's survival does not appear contingent on receiving a $400,000 security deposit from RSR and GFW. Indeed, while the procedural schedule has now been reinstated, MNA previously has joined with RSR and GFW in requesting that the Board stay the pending proceedings in STB Docket Nos. 42102 and 42103 to allow the parties to engage in settlement

negotiations regarding the underlying demurrage disputes. This, together with the fact that MNA permitted the demurrage charges to accrue for almost three years before bringing an action to collect the charges or putting the shippers on a cash basis, indicates that MNA has not heretofore felt a pressing need to collect these funds. Moreover, staying the effectiveness as to the petitioners of MNA's security deposit requirement would not seem to prejudice MNA's collection effort against petitioners.

Public Interest.

As discussed above, a substantial portion of the approximately $400,000 security deposit that MNA would now impose on petitioners is the subject of the pending proceedings before the agency in STB Docket Nos. 42102 and 42403. MNA's demand for immediate payment of the full amount at issue in those proceedings as a precondition for continued rail service is an inappropriate self-help measure for a matter that is before the Board and will be resolved in due course. Under these circumstances, we find that the public interest weighs in favor of staying the effectiveness as to petitioners of MNA's security deposit requirement.

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

It is ordered:

1. Under 49 U.S.C. 721(b)(4), MNA is enjoined from applying to petitioners the security deposit provisions of its new demurrage tariff until further order of the Board.

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

By the Board, Chairman Nottingham, Vice Chairman Mulvey, and Commissioner Buttrey.

Anne K. Quinlan
Acting Secretary