

SERVICE DATE - SEPTEMBER 30, 2019

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. NOR 42164

OLIN CORPORATION

v.

UNION PACIFIC RAILROAD COMPANY

Digest:¹ This decision denies Union Pacific Railroad Company's motion to dismiss Olin Corporation's complaint and grants Olin Corporation's request to hold this proceeding in abeyance.

Decided: September 27, 2019

On July 8, 2019, Olin Corporation (Olin) filed a complaint against Union Pacific Railroad Company (UP) seeking, among other things, reparations with respect to charges assessed by UP for transportation of Olin's tank cars to and from rail car repair facilities. Olin states that its entitlement to the relief it seeks depends on the Board's ultimate determination of the lawfulness of the same UP charges at issue in North America Freight Car Association v. Union Pacific Railroad, Docket No. NOR 42144 et al. (NAFCA Proceedings). In the NAFCA Proceedings, five trade associations and individual shippers have filed complaints, which have been consolidated, against UP challenging the reasonableness of charges in UP Tariff 6004, Item 55-C (Item 55-C) assessed by UP for transporting empty tank cars to and from rail car repair facilities. Olin is a member of two of the trade association complainants, the Chlorine Institute and the American Chemistry Council.

In its complaint, Olin requests that the Board (1) find UP's implementation of Item 55-C, to the extent it imposes per-car charges for empty tank-car movements to and from repair facilities, is an unreasonable practice under 49 U.S.C. § 10702 and violates 49 U.S.C. §§ 11121 and 11122; (2) order UP to immediately rescind Item 55-C to the extent it imposes charges for movement of empty tank cars to and from repair facilities; (3) pursuant to 49 U.S.C. § 11704(b), order UP to pay reparations to Olin for the Item 55-C charges adopted by UP on or after July 8, 2017; and (4) grant to Olin any other relief the Board may deem proper based on the record and the Board's rulings in the NAFCA Proceedings. (Compl. 6-7.) Olin states that it does not intend to relitigate any determinations made by the Board in the NAFCA Proceedings and seeks relief,

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).

if any, in this proceeding after the Board has resolved the matters at issue in the NAFCA Proceedings. (*Id.* at 4-5; Olin Mot. 4.) Thus, concurrent with its complaint, Olin filed a motion to hold this proceeding in abeyance pending the outcome of the NAFCA Proceedings.² (Olin Mot. 1.)

On July 29, 2019, UP filed its answer to Olin’s complaint, a reply in opposition to Olin’s motion to hold the proceeding in abeyance, and a motion to dismiss Olin’s complaint without prejudice. In its motion to dismiss, UP notes that, in the NAFCA Proceedings, the Board twice consolidated later-filed complaints with the original proceeding, recognizing the importance of developing a robust evidentiary record. (UP Mot. 1 (citing N. Am. Freight Car Ass’n v. Union Pac. R.R., NOR 42144 et al. (STB served Mar. 31, 2017); N. Am. Freight Car Ass’n v. Union Pac. R.R., NOR 42144 et al. (STB served Oct. 5, 2017)).) UP alleges that Olin waited to file its complaint until after the close of the evidentiary record in the NAFCA Proceedings in order to avoid having to provide discovery that UP could use in those proceedings. (UP Mot. 1, 2, 6.) UP asserts that dismissing Olin’s complaint would “help discourage parties from engaging in the same type of strategic behavior . . . and would advance the Board’s interest in resolving disputes based on the best and most complete record possible.” (*Id.* at 7.)

On August 14, 2019, Olin replied to UP’s motion to dismiss, asserting that UP has provided no basis for dismissing Olin’s complaint. (Olin Reply 2.) Olin states that it was content with the state of the record in the NAFCA Proceedings and did not seek to relitigate issues raised in that proceeding. (*Id.* at 5.) Olin states that it chose to file its complaint to protect its interests in seeking reparations while not causing further disruptions to the Board’s ability to reach a timely decision in the NAFCA Proceedings. (*Id.*)

As discussed below, the Board will deny UP’s motion to dismiss this complaint and will hold this proceeding in abeyance pending the resolution of the NAFCA Proceedings.

DISCUSSION AND CONCLUSIONS

The Board may dismiss a complaint if it “does not state reasonable grounds for investigation and action.” 49 U.S.C. § 11701(b). Motions to dismiss are generally disfavored. Cent. Valley Ag Grinding, Inc. v. Modesto & Empire Traction Co., NOR 42159, slip op. at 4 (STB served July 25, 2018). While reviewing a motion to dismiss, the Board will view the alleged facts in the light most favorable to the complainant. *Id.* (citing Consumers Energy Co. v. CSX Transp., Inc., NOR 42142, slip op. at 1 (STB served June 15, 2015); Montana v. BNSF Ry., NOR 42124, slip op. at 3 (STB served Feb. 16, 2011)).

² Olin states that it is filing its complaint now, rather than after the resolution of the NAFCA Proceedings, in order to toll the running of the statute of limitations under 49 U.S.C. § 11705(c), which requires a complainant to seek relief within two years after the claim accrues. (Olin Mot. 3 & n.2.)

Viewing the allegations of the complaint in the light most favorable to Olin, the Board finds that the complaint states reasonable grounds for investigation and action. Olin's complaint raises the same challenge to UP's Item 55-C that is raised in the NAFCA Proceedings. The Board has previously determined that the original complaint in the NAFCA Proceedings raised reasonable grounds for investigation and action. See N. Am. Freight Car Ass'n v. Union Pac. R.R., NOR 42144, slip op. at 3 (STB served Dec. 21, 2015). Therefore, Olin's complaint does as well.

Rather than argue that it has satisfied the standard for dismissal under § 11701(b), UP argues that dismissal is appropriate because, by waiting to file its complaint until after the close of the evidentiary record in the NAFCA Proceedings, Olin has engaged in "gamesmanship that undermines the discovery process and the public interest in the Board's having a complete record on which to base its decisions." (UP Mot. 6.) UP, however, cites no authority that would support dismissal on those grounds. In the NAFCA Proceedings, the Board determined that consolidation of the complaints filed after the original complaint was appropriate under the standard governing consolidation³; however, the Board did not find that all tank car owners were required to file a complaint by a certain date.⁴ Moreover, UP has not shown that the discovery process in the NAFCA Proceedings was prejudiced by the timing of Olin's complaint. Indeed, UP suggests that discovery from Olin would add to the "overwhelming evidence that the challenged charges are lawful." (UP Mot. 2.) Nor has UP shown that it would be prejudiced in this proceeding by holding Olin's complaint in abeyance rather than dismissing it without prejudice. In any event, when this proceeding moves forward, UP would be entitled to raise any defenses it may have against Olin and could seek discovery as provided in 49 C.F.R. part 1114. The motion to dismiss therefore will be denied.

³ See N. Am. Freight Car Ass'n v. Union Pac. R.R., NOR 42144 et al., slip op. at 3-4 (STB served Oct. 5, 2017); N. Am. Freight Car Ass'n v. Union Pac. R.R., NOR 42144 et al., slip op. at 3-5 (STB served Mar. 31, 2017).

⁴ Responding to Olin's argument that it filed its complaint when it did to toll the running of the statute of limitations, UP cites Mobile Tank Car Services v. Southern Railway, NOR 40134 (ICC served July 1, 1988), for the proposition that prevailing complainants in unreasonable practices cases are not necessarily entitled to damages. (UP Mot. 7.) But, ultimately, the question here is not whether Olin had a good reason for filing its complaint when it did; the question is whether UP has satisfied the standard for dismissal. Mobile Tank Car Services does not show that no reasonable grounds exist for an investigation and action, particularly given the Board's contrary findings in the NAFCA Proceedings.

Given that the relief requested by Olin in this proceeding is contingent on determinations to be made by the Board in the NAFCA Proceedings,⁵ the Board finds it appropriate to hold this complaint proceeding in abeyance, pending the outcome of the NAFCA Proceedings.

It is ordered:

1. UP's motion to dismiss is denied.
2. Olin's request to hold this proceeding in abeyance is granted.
3. This decision is effective on its service date.

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

⁵ The Board notes that UP "does not concede Olin would have a viable claim even if [UP] does not prevail in the NAFCA [c]ase." (UP Mot. 7 n.14.)