

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNION PACIFIC RAILROAD COMPANY : CIVIL ACTION  
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: :  
v. : :  
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: :  
FMC CORPORATION, et al : NO. 99-CV-200

MEMORANDUM

**Padova, J.**

**February 3, 2000**

Plaintiff Union Pacific Railroad Company ("Union Pacific") filed suit against FMC Corporation and FMC Wyoming Corporation (collectively "FMC") seeking to collect unpaid demurrage tariffs. In the instant Motion, FMC requests the Court stay all proceedings and refer<sup>1</sup> three questions to the Surface Transportation Board ("STB") for resolution, pursuant to the doctrine of primary jurisdiction. Union Pacific opposes this Motion on the grounds that the issues presented in this case are not within the STB's primary jurisdiction, and therefore, a stay and referral is unnecessary. For the reasons that follow, the Court will grant Defendant's Motion and stay the instant proceedings to permit Defendant to petition the STB for

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<sup>1</sup>The term "referral" as used herein describes the procedure by which the district court stays further action in a case "so as to give [the party] a reasonable opportunity within which to apply to [the STB] for a ruling." Reiter v. Cooper, 507 U.S. 258, 268 n.3 (1993).

resolution of the three herein-identified issues.

**I. BACKGROUND**

Union Pacific is a rail carrier subject to the jurisdiction of the STB, pursuant to 49 U.S.C. § 10101, et seq. FMC, a chemical manufacturer, operates a number of manufacturing and mining facilities in the United States, including a processing plant in Pocatello, Idaho ("Pocatello Plant"). The Surface Transportation Board is the administrative agency charged with expert skill and knowledge of the interstate transportation industry, including rail carriers. F.P. Corp. v. Ken Way Transp., Inc., 821 F. Supp. 1032, 1036 (E.D.Pa. 1993)(referring to the Interstate Commerce Commission, the STB's predecessor); see also 49 U.S.C.A. § 10501 (West 1999).

Through this lawsuit, Union Pacific is seeking payment of demurrage tariffs<sup>2</sup> that FMC allegedly owes. Between September 1997 and October 1998, Union Pacific delivered rail cars to the Pocatello Plant. During this period of time, FMC detained a substantial number of rail cars at the Pocatello Plant beyond the "free time" allowed by Union Pacific's demurrage tariff, Freight Tariff UP 6004. In accordance with Freight Tariff UP 6004, Union

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<sup>2</sup>Demurrage is a charge assessed by railroads against shippers or receivers for their failure to load or unload cars within the specified time prescribed by the applicable tariffs. Union Pacific R.R. Co. v. Ametek, Inc., 104 F.3d 558, 559 n.2 (3d Cir. 1997). Railroads charge shippers and receivers demurrage fees if the shipper or receiver detain freight cars on the rails beyond a designated number of days. Id. Demurrage tariffs serve to compensate the railroad for the use of its cars, and penalize shippers who unduly detain the cars. Iversen v. United States, 63 F. Supp. 1001, 1005 (D.D.C.), aff'd, 327 U.S. 767 (1946).

Pacific assessed demurrage charges against FMC totaling \$1,068,692.00, of which \$953,217.00 remains outstanding. Although FMC does not dispute Union Pacific's arithmetic calculation of the outstanding demurrage charges or its asserted dates for the placement and release of the rail cars, FMC contends that it need not pay these demurrage tariffs for two reasons.

First, FMC argues that Union Pacific failed to give proper notice of the imposition of the demurrage rates, in violation of 49 U.S.C. § 11101 (1994)<sup>3</sup> and 49 C.F.R. § 1300 (1998)<sup>4</sup>. FMC

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<sup>3</sup>49 U.S.C. § 11101 provides in pertinent part:

(b) A rail carrier shall also provide to any person, on request, the carrier's rates and other service terms. ...

(c) A rail carrier may not increase any common carrier rates or change any common carrier service terms unless 20 days have expired after written or electronic notice is provided to any person who, within the previous 12 months ---

(1) has requested such rates or terms under subsection (b); or

(2) has made arrangements with the carrier for a shipment that would be subject to such increased rates or changed terms.

49 U.S.C.A. § 11101 (West 1999). A railroad's response to a request for rates must be in writing or electronic form. 49 U.S.C.A. § 11101(b) (West 1999).

As of September 1, 1997, Union Pacific was providing common carrier transportation and services to FMC's facilities. Therefore, section 11101(c) governs Union Pacific's relationship with FMC.

<sup>4</sup>Pursuant to its power to craft regulations implementing section 11101, 49 U.S.C.A. § 11101(f) (West 1999), the STB adopted the following disclosure requirements:

**§ 1300.2 Disclosure requirement for existing rates**

(a) A rail carrier must disclose to any person , upon

asserts that although it requested information about Union Pacific's rates pursuant to sections 11101(b) and 1300.2(a), Union Pacific failed to include information about demurrage tariffs in its response. Therefore, any new imposition of demurrage fees would constitute a "change in service terms" that, pursuant to sections 11101(c) and 1300.4(a), requires written or electronic notice and the elapse of 20 days prior to the assessment of any charges. Since it is undisputed that no written notice was provided, FMC argues that the demurrages were improperly imposed. Second, and in the alternative, FMC argues that even if Union Pacific gave appropriate notice to FMC, it is unreasonable to apply the demurrage tariff to cars that were

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formal request, the specific rate(s) requested ..., as well as all charges and service terms that may be applicable to transportation covered by the rate(s).

**§ 1300.4 Notice requirement**

(a) A rail carrier may not increase any rates or charges, or change any service terms (except for changes that are equivalent to rate reductions), unless 20 days have expired after written or electronic notice has been provided to all persons who, within the previous 12 months:

- (1) Have formally requested under § 1300.2 ... of this part the affected rates or service terms; or
- (2) Have made arrangements with the carrier for a future shipment that would be subject to the increased rates or changed service terms.

49 C.F.R. §§ 1300.2(a), 1300.4(a) (1998). A formal request is one that "clearly notifies the railroad that the requester seeks not only immediate information but also notification of any future increases in the rate(s) involved or changes in pertinent service terms." Id.

already placed or en route as of the date that Union Pacific began imposing the rates.

Union Pacific argues that it need not give FMC special written notice of the demurrage tariffs. Union Pacific contends that FMC only requested information about applicable transportation rates, not demurrage tariffs. Therefore, according to Union Pacific, the notice requirements in sections 11101(c) and 1300.4(a) do not apply in this case. Furthermore, Union Pacific argues that even if sections 11101(c) and 1300.4(a) do apply, its assessment of demurrage fees does not constitute a "change in service terms" as that term is used in those sections, especially since the fees had previously been imposed at FMC's other facilities. Lastly, Union Pacific asserts that any applicable notice requirement was satisfied because FMC had advance notice of the impending assessment of demurrage tariffs for the Pocatello site on September 1, 1997, both orally and by experience since it had been subject to demurrage charges at its other sites.

## **II. DISCUSSION**

FMC contends that this case presents three issues that it believes the Court should refer to the STB under the doctrine of primary jurisdiction:

1. Did Union Pacific comply with applicable STB regulations when it began to apply demurrage charges as of September 1, 1997, on cars delivered to FMC at the Pocatello site where no such charges had been imposed previously?

a. Does the application of demurrage charges where none were previously assessed constitute either an increase in rates or change in terms of service under the applicable regulations?

b. Is a carrier required under the applicable regulations to disclose demurrage rates and terms in response to a request for freight rates?

2. If it is determined that Union Pacific did comply with the disclosure requirements of the regulations, as of what date was Union Pacific permitted to begin assessing demurrage ("Start Date")?

3. Is it unreasonable for Union Pacific to apply its demurrage tariff to cars "placed" prior to the Start Date and to cars en route as of the Start Date?

FMC argues that these issues fall within the primary jurisdiction of the STB because they involve the interpretation of STB regulations, and a determination of the reasonability of the practice of applying newly imposed demurrage tariffs to rail cars that are already placed or en route to their destinations.

Union Pacific opposes referral of any questions to the STB on the grounds that the regulatory notice provisions clearly do not apply and that no special agency expertise is necessary to determine the factual and legal questions presented by this case. In the alternative, should the court decide to refer the third question to the STB, Union Pacific asks that the demurrage charges relevant to that question be segregated and that the case proceed as regarding the remaining demurrage charges.

A. Doctrine of Primary Jurisdiction

Courts developed the doctrine of primary jurisdiction to

avoid conflicts between the courts and administrative agencies charged with particular regulatory duties. United States v. Western Pacific R.R. Co., 352 U.S. 59, 63 (1956). The doctrine of primary jurisdiction applies to claims that are originally cognizable in a federal court. Id. at 64. Primary jurisdiction comes into play when judicial enforcement of a claim requires the resolution of issues which, under the regulatory scheme, have been placed within the special competence of an administrative body. Id. In such a case, the court should suspend the case pending referral of such issues to the administrative body.<sup>5</sup> Id.

No fixed formula exists for applying the doctrine of primary jurisdiction. Id. In every case, the question is whether the reasons for the existence of the doctrine are present and whether the purposes it serves will be aided by its application in the particular litigation. Id.; Consolidated Rail Corp. v. Certainteed Corp., 835 F.2d 474, 478 (3d Cir. 1987). In general, a court should refer a matter to an administrative agency for resolution if it appears that the matter involves technical or policy considerations that are beyond the court's ordinary

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<sup>5</sup>Referral of an issue to an administrative agency does not deprive the court of jurisdiction. Reiter, 507 U.S. at 267. The court has the discretion to either retain jurisdiction, or if the parties would not be unfairly disadvantaged, to dismiss the case. Id. Furthermore, the court retains exclusive jurisdiction to enforce or set aside in whole or part any order of the STB arising out of the referral. 28 U.S.C. § 1336 (1994); Ametek, 104 F.3d at 561.

competence and within the agency's particular field of expertise, or where there is the possibility of contradictory rulings from the agency and the court. MCI Communications Corp. v. AT&T, 496 F.2d 214, 220 (3d Cir. 1974).

Questions of tariff construction, Certainteed, 835 F.2d at 477, or the reasonableness of rules, regulations, and practices, Baltimore & O.R. Co., et al. v. Brady, 288 U.S. 448, 456 (1933), fall within the expertise of the STB. Courts have also referred the issue of the applicability of a tariff where the words in a tariff are used in a peculiar or technical sense that is within the special expertise of the administrative agency, and where extrinsic evidence is necessary to determine their meaning or proper application, "so that the inquiry is essentially one of fact and of discretion in technical matters." Western Pacific, 352 U.S. at 66. However, if the STB has already construed the particular tariff at issue, or has clarified the factors underlying it, then no referral is necessary. Certainteed, 835 F.2d at 477.

Although courts need not refer questions of whether a rule or practice is applicable or has been violated, Bartlett & Co., Grain v. Union Pacific R.R. Co., 528 F. Supp. 1234, 1238 (W.D.Mo. 1981)(citing Baltimore & Ohio Ry. Co. v. Brady, 288 U.S. 448, 456 (1933)), the salient concern remains whether the case presents issues that require the agency's expert and specialized knowledge

to resolve, or in which uniformity is desirable. Western Pacific, 352 U.S. at 63-64.

B. Analysis

The Court begins its analysis with the third question that FMC presents for referral to the STB, in which FMC challenges the general reasonability of the practice of imposing the tariff on cars that are already placed or en route. The Court concludes that the issue of the reasonability of a railroad's practice falls squarely within the primary jurisdiction of the STB. Ametek, Inc. v. Panther Valley R.R. Corp., No. 40663, 1993 WL 24033, at \*1 (I.C.C. 1993). Therefore, the Court agrees that the STB should be given the opportunity to resolve this issue in the first instance.

While the remaining two questions do not present issues for which referral is compelled, the Court finds that they implicate the purposes behind the doctrine of primary jurisdiction and thus should also be referred to the STB for resolution. See MCI, 496 F.2d at 220. The first question is whether Union Pacific was required to give FMC written or electronic notice of the demurrage tariffs under 49 U.S.C. § 11101 and 49 C.F.R. § 1300. The second question involves the date upon which Union Pacific could begin assessing the tariff. Because these questions involve the proper interpretation of the regulatory terms "rates" and "change of service terms" as used in sections 11101 and 1300,

they implicate the twin concerns of uniformity and consistency. Furthermore, the interpretation of such terminology likely involves specialized industry considerations or customary uses, an area that is within the STB's field of expertise.

**III. Conclusion**

For the above reasons, the Court grants Defendant's Motion. Because FMC is granted leave to raise all three questions before the STB, the Court declines Union Pacific's invitation to segregate the demurrage charges implicated solely by the third question and proceed on the remaining charges. Rather, the Court will stay the instant proceedings, pending Defendant's submission of the three above-stated questions to the Surface Transportation Board for resolution. An appropriate order follows.

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O R D E R

**AND NOW**, this day of February, 2000, upon consideration of Defendant's Motion for Stay and Referral to the Surface Transportation Board (Doc. No. 23), and Plaintiff's Response thereto (Doc. No. 28), **IT IS HEREBY ORDERED** that Defendant's Motion is **GRANTED**. It is **ORDERED** that the Clerk of Court mark this action closed for statistical purposes and place the matter in the Civil Suspense File so as to give Defendant a reasonable opportunity within which to apply to the Surface Transportation

Board for a ruling as to the following three questions:

1. Did Union Pacific comply with applicable Surface Transportation Board regulations when it began to apply demurrage charges as of September 1, 1997, on cars delivered to FMC at the Pocatello site where no such charges had been imposed previously?
  - a. Does the application of demurrage charges where none were previously assessed constitute either an increase in rates or change in terms of service under the applicable regulations?
  - b. Is a carrier required under the applicable regulations to disclose demurrage rates and terms in response to a request for freight rates?
2. If it is determined that Union Pacific did comply with the disclosure requirements of the regulations, as of what date was Union Pacific permitted to begin assessing demurrage ("Start Date")?
3. Is it unreasonable for Union Pacific to apply its demurrage tariff to cars "placed" prior to the Start Date and to cars en route as of the Start Date?

It is **FURTHER ORDERED** that the Court shall retain jurisdiction, and that the case be restored to the trial docket when the action is in a status so that it may proceed to final disposition. This order shall not prejudice the rights of the parties to this litigation.

BY THE COURT:

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John R. Padova, J.