

50853
EB

SERVICE DATE – NOVEMBER 2, 2021

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. NOR 42171

SANIMAX USA LLC

v.

UNION PACIFIC RAILROAD COMPANY

Digest:¹ The Board grants Sanimax USA LLC's request to partially revoke the relevant commodity exemptions to permit its case against Union Pacific Railroad Company to proceed, denies Union Pacific's motion to dismiss Sanimax's complaint, and sets a procedural schedule.

Decided: November 1, 2021

On November 6, 2020, Sanimax USA LLC (Sanimax) filed a complaint against Union Pacific Railroad Company (UP), seeking a determination from the Board that UP's reduction in service from five days per week to three days per week constitutes a failure to provide adequate rail service in violation of 49 U.S.C. § 11101(a), a failure to provide adequate notice of a change in common carrier service terms as required by 49 U.S.C. § 11101(c), and an unreasonable practice in a matter related to transportation and service in violation of 49 U.S.C. § 10702(2). On November 30, 2020, UP filed an answer and a motion to dismiss Sanimax's complaint on the basis that the commodities at issue are exempt from Board regulation. At the request of the parties, the proceeding was stayed to allow them to engage in negotiations. On February 16, 2021, the parties informed the Board that they were unable to reach an agreement, and Sanimax filed a reply to UP's motion to dismiss, in which it also requested that the Board partially revoke the commodity exemptions to consider the complaint. On March 8, 2021, UP replied in opposition to Sanimax's request for partial revocation. On March 22, 2021, Sanimax filed a motion for leave to file a surreply and a surreply.² For the reasons discussed below, the Board will deny UP's motion to dismiss the complaint, grant Sanimax's request for partial revocation

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 Pol'y Statement on Plain Language Digs. in Decisions, EP 696 (STB served Sept. 2, 2010).

² Although a reply to a reply is not permitted, see 49 C.F.R. § 1104.13(c), in the interest of a complete record, the Board will accept this submission as part of the record. See City of Alexandria—Pet. for Declaratory Ord., FD 35157, slip op. at 2 (STB served Nov. 6, 2008) (allowing a reply to a reply “[i]n the interest of compiling a full record”).

of the commodity exemptions, and set forth a procedural schedule to govern the complaint proceeding.

BACKGROUND

Sanimax operates a facility in South St. Paul, Minn., where it processes animal waste and purifies byproducts for animal feed, pet food, yellow grease, soap, and industrial chemicals in a process known as “rendering.” (Sanimax Compl. 1, 3.) Sanimax’s facility operates continuously, with inbound raw materials arriving by truck typically between the middle of the day on Monday and the end of the day on Saturday each week. (Id. at 3.) UP, which provides exclusive rail service to Sanimax’s facility, transports the processed products to Sanimax’s customers. (Id.) Sanimax states that, prior to the service reductions, UP provided rail service five days per week, Sunday to Thursday, for approximately 10 years. (Id. at 5.)

Sanimax states that storage limitations at its facility require that Sanimax store inbound materials in the trucks’ trailers until processing; however, if inbound materials remain in trailers for more than six hours, the materials will decay in a manner that compromises product quality and creates noxious fumes that expose Sanimax to potential community complaints, litigation, and regulatory action. (Id. at 3-4.) Sanimax also indicates that it has limited space to store processed materials. (Id. at 4-5.) When storage capacity has been reached, Sanimax states that it must stop operations until it can secure outbound service. (Id., Ex. 1, V.S. Rawe ¶¶ 7, 23.) Sanimax claims that, although it experienced frequent service issues with UP in the past, five-days-per-week service provided Sanimax with enough margin for missed or incorrect service to “catch-up” on the remaining three or four service days. (Id. at 5-6.)

According to Sanimax, on July 17, 2020, UP sent an email proposing to provide three service days per week, to which Sanimax objected in a series of emails and teleconferences with UP. (Id., Ex. 2, V.S. Strickler ¶¶ 11-13.) Sanimax states that, on August 3, 2020, UP reduced service to Mondays, Wednesdays, and Fridays, without further consultation with Sanimax. (Id. at 7.) Following the initial service reduction, Sanimax alleges that UP agreed to change Sanimax’s service days to Sundays, Tuesdays, and Thursdays and to assign a dedicated crew. (Id. at 8.) Sanimax argues that these changes may mitigate some of the hardship posed by previous three-day-per-week service, but do not go far enough to mitigate the combined impact of UP’s service reduction and continued service failures. (Id. at 9.) Sanimax claims that, between August 3, 2020, and October 20, 2020, UP incorrectly placed rail cars on 30% of the scheduled service days³ and failed to provide any service at all on 14% of service days. (Id., Ex. 2, V.S. Strickler ¶ 15.) Sanimax also alleges that it incurred \$13,935.27 in additional costs to ship its processed products by truck in August 2020 alone and that, since August 3, 2020, UP has assessed Sanimax \$8,555.00 in demurrage charges. (Id., Ex. 2, V.S. Strickler ¶¶ 21-22.)

³ Sanimax states that its facility contains two tracks: (1) a loading track with five spots for three tanker railcars and two hopper railcars, and (2) a storage track that can store up to five railcars (a combination of tanker and hopper railcars) but that does not have the infrastructure for loading railcars. (Sanimax Compl. 6.) Sanimax asserts that “UP has regularly misplaced railcars ordered for the loading track . . . onto the storage track . . . and placed hopper railcars in a tanker loading position and vice versa.” (Id. at 7.)

On November 30, 2020, UP filed a motion to dismiss, arguing that Sanimax’s complaint fails to state a claim for which relief can be granted because the commodities UP transports from Sanimax’s facility are exempt from Board regulation pursuant to 49 U.S.C. § 10502 and 49 C.F.R. §§ 1039.10 and 1039.11.⁴ (UP Mot. to Dismiss 2-3.) Additionally, UP contends that no grounds exist to revoke the exemptions because UP lacks market power over the traffic at issue. (*Id.* at 4-5.) UP also asserts that “many of the service disruptions [Sanimax] experienced in 2020 were pandemic-related,” and that UP has since improved service and will continue to do so. (*Id.* at 5.)

On February 16, 2021, in reply to UP’s motion to dismiss, Sanimax requests that the Board grant partial revocation of the relevant commodity exemptions for purposes of this case. (Sanimax Reply 1.) Sanimax argues that the Board should do so without a formal petition, as the Board did in Granite State Concrete Co. v. Boston & Maine Corp. (Granite State), NOR 42083, slip op. at 7 (STB served Sept. 15, 2003). (Sanimax Reply 4.) In response, UP concedes that the Board may consider Sanimax’s revocation request “regardless of formalities,” but argues that Sanimax has not proven that regulation is necessary to carry out the rail transportation policy (RTP) at 49 U.S.C. § 10101 or that UP has market power over the transportation. (UP Reply 1.) In its surreply, Sanimax contends that its verified complaint contains the evidence necessary to support partial revocation. (Sanimax Surreply 2.)

DISCUSSION AND CONCLUSIONS

For the reasons discussed below, the Board will grant Sanimax’s request for partial revocation of the commodity exemptions, deny UP’s motion to dismiss Sanimax’s complaint, and set a procedural schedule to govern the complaint proceeding.

Partial Revocation

As the Board has exempted from regulation the commodities that UP transports from Sanimax’s facility, the threshold question is whether partial revocation of that exemption is warranted here. In the Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, 90 Stat. 31, as modified by the Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1895, Congress gave the Board’s predecessor, the Interstate Commerce Commission (ICC), broad authority to exempt persons, transactions, and services from regulation. The exemption provision, now codified at 49 U.S.C. § 10502, provides that the Board shall exempt a person, class of persons, or a transaction or service when it finds that the application of a provision of 49 U.S.C. subtitle IV, part A, is not necessary to carry out the RTP and either (a) the

⁴ Since January 2019, these commodities have been animal refuse (STCC 2014491), tankage (STCC 2014490), grease or inedible tallow (STCC 2014350), lard (STCC 2013190), and animal grease (STCC 2013945). (UP Mot. to Dismiss 2-3; *id.*, V.S. Sethe ¶ 1); see also Rail Gen. Exemption Auth.—Exemption of Grease or Inedible Tallow, 10 I.C.C.2d 453 (1994); Rail Gen. Exemption Auth.—Pet. of AAR to Exempt Rail Transp. of Selected Commodity Grps., 9 I.C.C.2d 969 (1993); Exemption from Regul.—Poultry, Meat & Dairy Prods., 1 I.C.C.2d 173 (1984).

transaction or service is of limited scope, or (b) the application in whole or in part of the provision is not needed to protect shippers from the abuse of market power. The Board may revoke an exemption (partially or completely) if it later determines that application of a provision of part A is necessary to carry out the RTP. See § 10502(d). While the agency has considered market power in some of its past exemption revocation decisions,⁵ the statute does not require such an analysis.⁶

a. Burden of Proof

Sanimax suggests that the Board should evaluate its request for partial revocation under the standard applicable to motions to dismiss. (Sanimax Reply 2 (“The assertions in UP’s Motion to Dismiss fail to meet this high bar that would preclude the Board from reaching the merits of Sanimax’s complaint.”).) UP argues that Sanimax, as the party seeking partial revocation, has the burden of proving that revocation is appropriate under § 10502(d). (UP Reply 4.) UP contends that although “the Board may view the factual assertions in Sanimax’s *complaint* in the light most favorable to Sanimax when considering [UP’s] motion to dismiss, the Board cannot view Sanimax’s *revocation request* in such a light.” (*Id.* at 5.)

The Board has held that the proponent of a revocation request has the burden of proof. See S. Plains Switching Ltd., FD 33753 (Sub-No. 1), slip op. at 3. Although Sanimax’s request for partial revocation was presented in response to UP’s motion to dismiss, see Granite State, NOR 42083, slip op. at 7, Sanimax has the burden of proof to show that partial revocation is warranted. For the reasons discussed below, the Board finds that Sanimax has met its burden.

b. Parties’ Arguments

Sanimax argues that partial revocation is necessary because UP lacks effective competition over the transportation at issue. (Sanimax Reply 5.) Sanimax contends that intramodal competition does not exist because UP is the only carrier that serves Sanimax’s facility. (*Id.*) With respect to intermodal competition, Sanimax acknowledges that it sometimes uses trucks for outbound service but argues that such transportation constitutes merely “a

⁵ See, e.g., WTL Rail Corp. Pet. for Declaratory Order & Interim Relief (WTL Rail Corp.), NOR 42092 et al., slip op. at 3 (STB served Feb. 17, 2006) (“[W]e have held that the extent of railroad market power is an essential issue in exemption revocation proceedings.”).

⁶ See Exclusion of Demurrage Regul. from Certain Class Exemptions, EP 760, slip op. at 6 (STB served Feb. 28, 2020). Moreover, the Board has decided exemption revocation cases without mentioning market power. See, e.g., Granite State, NOR 42083, slip op. at 7 (stating that “the Board may revoke an exemption when it finds that regulation is necessary to carry out the rail transportation policy of 49 U.S.C. § 10101”); S. Plains Switching, Ltd.—Acquis. Exemption—BNSF Ry., FD 33753 (Sub-No. 1), slip op. at 2 (STB served Sept. 15, 2006) (stating that revocation is appropriate “if we find that: regulation is necessary to carry out the rail transportation policy of [§] 10101; or revocation is necessary to ensure the integrity of the Board’s processes”).

stop-gap motor carrier alternative” that does not provide effective competition for UP.⁷ (Id.) Furthermore, Sanimax asserts that “the sunk costs of rail loading . . . equipment installed at the plant, the structural limitations on truck transportation at the . . . yard, and the rigid time constraints imposed by the decay of inbound organic materials make Sanimax captive to rail service for shipping enough outbound products to avoid a plant shutdown.” (Id.) Sanimax argues that it has no market recourse to correct for UP’s service reductions and service failures, which include a series of missed service and recovery days in February 2021 that placed Sanimax’s facility at risk of a shutdown. (Id. at 6; id., Ex. 1.)

Sanimax argues that the Board can fulfill the RTP at § 10101(2), “to require fair and expeditious regulatory decisions when regulation is required,” by granting partial revocation, as the Board did in Granite State, NOR 42083, slip op. at 7-8. (Sanimax Reply 4.) Sanimax also asserts that regulation is required to ensure that UP cannot “engage in unreasonable practices and violate its common carrier obligations with impunity.” (Id.)

In response, UP contends that rail carriers face “robust competition” for the commodities at issue. (UP Reply 10.) UP relies on data from the Federal Highway Administration’s Freight Analysis Framework (FAF) showing that “trucks dominate transportation in these markets” and a verified statement from UP General Director Chris Kankousky, who asserts that many customers consume Sanimax’s processed products (including biodiesel plants) and trucks and truck-to-railcar transportation can substitute for rail service. (Id. at 7-8, 10-11; id., V.S. Kankousky ¶¶ 3, 5.) UP argues that, unlike the proponent of revocation in Granite State, Sanimax “has failed to produce any specific (or verified) facts about its facility or situation that would suggest an island of market power in an otherwise competitive market.” (Id. at 11.) UP also asserts that the service issues Sanimax references do not justify revocation because UP “has regularly responded to Sanimax’s occasional requests for service corrections, typically addressing the issue by the next day.” (Id. at 13.)

Moreover, UP argues that Sanimax has not proven that regulation is necessary to carry out the RTP because Sanimax cites to § 10101(2) only for the purpose of asking the Board to consider its revocation request without a separate proceeding. (UP Reply 13.) According to UP, Sanimax does not argue that regulation is necessary to carry out the purpose of § 10101(2) and, moreover, that Sanimax cannot do so because the beginning clause of § 10101(2) (“to minimize the need for Federal regulatory control over the rail transportation system”) means that Sanimax’s revocation request would accomplish the opposite aim of the policy. (UP Reply 13.)

c. Regulation Is Necessary to Carry Out the RTP

The Board finds that partial revocation is necessary to carry out the RTP. The RTP promotes adequacy of rail service. See § 10101(4) (“to ensure the development and continuation of a sound rail transportation system . . . to meet the needs of the public”); WTL Rail Corp.,

⁷ Sanimax references 49 U.S.C § 10707(a), which defines “market dominance” as an “absence of effective competition from other rail carriers or modes of transportation for the transportation to which a rate applies.” (See Sanimax Reply 5.) However, this provision applies only in rate proceedings, and is not applicable here.

NOR 42092 et al., slip op. at 4. Here, the service issues raised by Sanimax, and supported by the verified statement of Todd Strickler, (see Sanimax Compl., Ex. 2, V.S. Strickler ¶¶ 6-10, 15-16, 20-22), warrant closer examination and further development of the record. UP does not dispute that Sanimax has experienced service issues and, although UP attributes the February 2021 service issues to an unusual combination of events involving frigid weather conditions and “the unofficial holiday weekend of Super Bowl Sunday,” (UP Reply 14), it does not provide much explanation for the earlier service issues, vaguely describing them as “pandemic related,” (UP Mot. to Dismiss 5). To be clear, the Board has not reached a decision on the merits of the issues raised in Sanimax’s complaint, including whether UP’s conduct violates § 11101(a), § 11101(c), or § 10702(2). However, partial revocation will allow this case to proceed to discovery and further evidentiary development and briefing by the parties so that the Board may evaluate the service issues raised by Sanimax in greater context.

The RTP also promotes competition among carriers and between carriers and other modes of transportation. See § 10101(4) (“to ensure the development and continuation of a sound rail transportation system with effective competition among rail carriers and with other modes); § 10101(5) (“to ensure effective competition”); see also WTL Rail Corp., NOR 42092 et al., slip op. at 3; Granite State, NOR 42083, slip op. at 7 & n.13. Although the Board has not made any determinations about the allegations in the complaint, it finds that partial revocation is necessary to examine the issues raised by Sanimax, and supported by the verified statement of Greg Rawe, (see Sanimax Compl., Ex. 1, V.S. Rawe ¶¶ 6-7, 10-14, 17, 23), regarding Sanimax’s dependency on rail due to the perishable nature of its materials and the structural limitations of its facility. UP disputes that these factors make Sanimax dependent on rail service, claiming that Sanimax may use trucks as an alternative. (UP Reply 12.) UP asserts that “trucks dominate transportation” in the markets for Sanimax’s products, (UP Reply 8), and that Sanimax may ship its products to biodiesel plants, whereas traditionally these products were used in soap manufacturing and as animal feed, (id., V.S. Kankousky ¶ 3). However, as UP acknowledges, the FAF analysis upon which UP relies does not distinguish between the specific commodities that Sanimax ships and other commodities.⁸ (UP Reply 10.) Moreover, Sanimax’s new market opportunities would not necessarily negate Sanimax’s dependency on rail service.

Finally, the RTP favors “fair and expeditious regulatory decisions when regulation is required.” § 10101(2). While denial of revocation might expedite the regulatory process by

⁸ UP’s FAF analysis aggregates traffic from all geographic locations into a single, national-level market share analysis for animal byproducts, but the partial revocation issues in this case are unique to Sanimax. Additionally, instead of describing actual transportation movements and market characteristics, the FAF relies on estimates from another estimated dataset, the U.S. Census Bureau’s and U.S. Department of Transportation Bureau of Transportation Statistics’ Commodity Flow Survey (CFS), see Freight Analysis Framework Version 5 (2021), <https://faf.ornl.gov/faf5/data/FAF5%20User%20Guide.pdf>, which itself relies on data imputation and proprietary modeling choices, see 2017 Commodity Flow Surv. Methodology at 3 (2020), <https://www2.census.gov/programs-surveys/cfs/technical-documentation/methodology/2017cfsmethodology.pdf> (stating that “[t]he primary objective of the 2017 CFS was to estimate shipping volumes”). Indeed, the Board recently expressed

denying any further inquiry into the matter, depriving Sanimax of the opportunity to present its case would not be appropriate given the allegations and evidence presented in the record to date.

UP contends that partial revocation here would contravene the RTP because it would not “minimize the need for Federal regulatory control over the rail transportation system.” (UP Reply 13); § 10101(2). However, § 10101(2) does not suggest that the Board should decline to regulate when it finds that “regulation is required,” as it does here, to consider the issues raised in Sanimax’s complaint. The overarching goals of the Staggers Rail Act, which codified the current RTP, were, among other things, to assist the rail industry in recovering financially so that it could remain viable, and to “provide a regulatory process that balances the needs of carriers, shippers, and the public.” Staggers Rail Act § 3, 94 Stat. at 1897. Although the conference report accompanying the Staggers Rail Act states that the agency “is charged with the responsibility of actively pursuing exemptions” in appropriate cases, H.R. Rep. No. 96-1430, at 104 (1980), it also explains that the agency is expected to review carrier actions after the fact, *id.* at 105, and the statute states that revocations are to be decided based on the RTP. Since the passage of the Staggers Rail Act, the rail industry has certainly become more viable. Given the nature of the service dispute at issue here and the issues raised regarding Sanimax’s dependence on UP’s service, it is important that the Board examine Sanimax’s claims and UP’s responses to determine if regulatory relief is appropriate in order to provide the balanced regulatory process envisioned in the Staggers Rail Act. See § 10101(2) (minimizing regulatory control while requiring fair and expeditious regulatory decisions when needed); § 10101(4) (ensuring a sound and competitive rail system that meets the needs of the public).

Motion to Dismiss

The Board may dismiss a complaint if it “does not state reasonable grounds for investigation and action.” 49 U.S.C. § 11701(b). Since UP’s motion to dismiss is predicated solely on the relevant commodities’ class exemptions, which the Board will partially revoke to the extent necessary to consider the issues raised in Sanimax’s complaint, UP’s motion to dismiss will be denied.

Procedural Schedule

In accordance with 49 C.F.R. § 1111.10(a), the parties have discussed procedural and discovery matters and have filed with the Board a proposed procedural schedule to govern future activities and deadlines in this case. The Board will adopt the procedural schedule agreed to by the parties:

January 31, 2022	Discovery ends.
March 2, 2022	Sanimax’s opening statement due.
April 1, 2022	UP’s opening statement due.
April 18, 2022	Sanimax’s rebuttal statement due.

concerns about relying on the CFS for rail volumes and distances. See Mkt. Dominance Streamlined Approach, EP 756, slip op. at 11-13 (STB served Aug. 3, 2020).

Mediation

Given that the parties have already attempted mediation, the Board will not initiate Board-sponsored mediation at this time. However, the Board strongly encourages the parties to consider renewed mediation and notify the Board if they are willing to participate in Board-sponsored mediation.

It is ordered:

1. Sanimax's motion for leave to file a surreply is granted.
2. Sanimax's request for partial revocation is granted to the extent necessary for the Board to consider the issues raised in the complaint.
3. UP's motion to dismiss is denied.
4. The parties shall comply with the procedural schedule as set forth in this decision.
5. This decision is effective on its service date.

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