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SERVICE DATE – NOVEMBER 3, 2023

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. NOR 42171

SANIMAX USA LLC

v.

UNION PACIFIC RAILROAD COMPANY

Digest:¹ The Board denies UP's motion to dismiss and sets a procedural schedule for the submission of damages evidence.

Decided: November 2, 2023

In a complaint filed on November 6, 2020, Sanimax USA LLC (Sanimax) alleges that Union Pacific Railroad Company (UP) failed to provide adequate rail service in violation of 49 U.S.C. § 11101(a), failed to provide adequate notice of a change in common carrier service terms as required by 49 U.S.C. § 11101(c), and engaged in an unreasonable practice in a matter related to transportation and service in violation of 49 U.S.C. § 10702(2). Sanimax asserts that UP's reduction in service from five days per week to three days per week and service problems such as failing to supply railcars on scheduled service days, providing late service, and placing railcars on the incorrect tracks at Sanimax's facility, are the bases of the alleged statutory violations. This decision denies UP's motion to dismiss the complaint as moot and sets a procedural schedule for the submission of damages evidence.²

BACKGROUND

This proceeding began on November 6, 2020, when Sanimax filed a complaint against UP alleging violations of § 11101(a), § 11101(c), and § 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

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 The parties designated certain information contained in this decision as confidential in their pleadings. While attempting to avoid references to confidential information in its decisions, the Board reserves the right to rely upon and disclose such information in decisions when necessary. In this case, the Board determined that it could not adequately present its findings without referring to certain information designated as confidential.

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 permit the Board to consider the complaint. On March 8, 2021, UP replied in opposition to Sanimax's request for partial revocation, and, on March 22, 2021, Sanimax filed a motion for leave to file a surreply, along with a tendered surreply.

On November 2, 2021, the Board issued a decision denying UP's motion to dismiss the complaint, granting Sanimax's request for partial revocation of the commodity exemptions, and setting a procedural schedule to govern the complaint proceeding.³ Sanimax USA LLC v. Union Pac. R.R. (Nov. 2 Decision), NOR 42171 (STB served Nov. 2, 2021).

On November 23, 2021, UP filed a petition for clarification or, in the alternative, reconsideration of the November 2 Decision, seeking "clarification on whether the exemption revocation applies to [UP]'s service provided to Sanimax before November 2, 2021, the date the decision was issued." (Pet. 1.) On December 9, 2021, Sanimax replied to UP's petition, emphasizing that the primary relief it seeks is prospective (i.e., for the Board to order UP to provide five-days-per-week service) but also requesting damages for violations, including those incurred prior to the partial revocation. (Sanimax Reply 1-2, Dec. 9, 2021.) On December 13, 2021, the Association of American Railroads (AAR) filed a reply in support of UP's petition and a request for leave to intervene "for the limited purpose of submitting these reply comments on the legal effect of a revocation of an exemption." (AAR Reply 1.)

On February 25, 2022, the Board granted UP's petition in part and clarified that, pursuant to the partial revocation, the Board will consider whether the issues raised in Sanimax's complaint warrant relief (including damages) prospectively from November 2, 2021, the date the commodity exemptions were partially revoked.⁴ Sanimax USA LLC v. Union Pac. R.R. (Feb. 25 Decision), NOR 42171, slip op. at 4-5 (STB served Feb. 25, 2022). The Board also stated that the partial revocation left the parties free to develop a full record regarding prospective liability and relief, which may include arguments based on, and discovery into, events that occurred prior to the date of partial revocation, to the extent relevant. Id. at 4.

Pursuant to the parties' agreed procedural schedule, Sanimax filed opening evidence and arguments on March 2, 2022, UP filed opening evidence and arguments on April 1, 2022, and Sanimax filed its rebuttal on April 18, 2022.

In its opening brief and evidence, Sanimax argues that "the key remaining issue for the Board to decide is the amount of service UP will provide Sanimax going forward." (Sanimax Opening 3.) With respect to damages, Sanimax asserts that "[i]n order to reduce complexities and keep the focus on the prospective rail service relief that is Sanimax's primary need by far, Sanimax is holding its damages claim in abeyance at this time." (Id. at 17 n.14.) Furthermore, if the Board finds that UP violated the statute, "Sanimax requests the opportunity to submit

³ The Board also granted Sanimax's motion for leave to file a surreply.

⁴ The Board granted AAR's request to intervene for the limited purpose of accepting its reply comments into the record.

evidence as to damages at an appropriate future time and have the Board determine damages for the period beginning November 2, 2021.” (Id.)

Motion to Dismiss

On May 24, 2022, UP filed a second motion to dismiss. UP argues that Sanimax presented only a single claim for relief in its opening and rebuttal evidence, which was its request that the Board order UP to provide service to Sanimax five days per week. (UP Mot. to Dismiss 1.) UP states that, as of May 2022, it increased its service to Sanimax to that level and has committed to that service schedule for a specified period of time.⁵ (Id.) Accordingly, UP argues that Sanimax has received the relief it requested from the Board, and Sanimax’s complaint should be dismissed as moot. (Id.) With respect to damages, UP asserts that Sanimax waived its damages claim by not presenting damages evidence in its opening or rebuttal. (Id. at 2.) UP contends that the procedural schedule that the parties jointly proposed and the Board adopted did not contemplate bifurcation of damages. (Id. at 4.) Accordingly, UP argues that Sanimax was obligated to present its entire case in chief in its opening evidence and chose to do so in way that focused solely on its request for five-days-per-week service. (Id.)

On June 13, 2022, Sanimax replied in opposition to UP’s motion to dismiss. Sanimax argues that the Board should not dismiss its complaint because three unresolved issues remain. (Sanimax Reply 1, June 13, 2022.) First, Sanimax asserts that its request for five-days-per-week service is indefinite, and UP could revert to three-days-per-week service at the end of its commitment to provide increased service. (Id. at 3-5.) Second, Sanimax contends that its damages claim remains unresolved. (Id. at 5.) Sanimax argues that it held its damages claim in abeyance because it could not calculate damages until it knew if or when UP would restore adequate service. (Id. at 6.) According to Sanimax, its approach was designed to “promote efficient litigation and not waste Board resources.” (Id.) Sanimax also asserts that it did submit initial evidence of damages in its opening evidence. (Id. at 6-8.) Third, Sanimax contends that the Board must resolve whether the exemption will be reinstated. (Id. at 8.)

On June 23, 2022, UP filed a motion for leave to file a surreply, along with a tendered surreply.⁶ UP responds to Sanimax’s contention that UP could revert to three-days-per-week service at the end of its commitment by arguing that the Board has rejected a similar argument in the past. (UP Surreply 2-3.) UP cites CF Industries, Inc. v. Indiana & Ohio Railway, FD 35517

⁵ UP designates the terms of its service increase to Sanimax as confidential, a designation with which Sanimax “strongly disagrees” and urges the Board to reject. (Sanimax Reply 2 n.1, June 13, 2022.) Sanimax argues that “UP cannot seek to dismiss this case on the basis of actions that it refuses to disclose.” (Id.) UP does not address the issue in its surreply. The Board finds that it cannot adequately present its findings without referring to some of the service terms UP has agreed to provide to Sanimax, as such information is central to the resolution of UP’s second motion to dismiss.

⁶ 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”).

et al., slip op. at 4 (STB served June 21, 2013), a case in which the petitioner argued that the Board should not dismiss a proceeding, even after the respondents withdrew the tariff in dispute, because its efforts in developing the record would be futile if the respondents reinstated the tariff in the future. To address this concern, the Board stated that its dismissal would be without prejudice so that the petitioner could petition to reopen the proceeding based on substantially changed circumstances should the respondents reinstate the tariff. Id. The Board also stated that, should it reopen the proceeding, the record already developed could be incorporated to the degree relevant. Id.

UP also responds to Sanimax's assertion that it submitted initial evidence of damages in its opening evidence, arguing that the exhibit to which Sanimax refers in its reply was not characterized as initial evidence of damages and did not contain any workpapers or methodology descriptions. (UP Surreply 3.) With respect to the exemption, UP contends that the Board partially revoked the relevant commodity exemptions only to the extent necessary to consider the issues raised in Sanimax's complaint. (Id. at 4.) Accordingly, UP argues that the revocation terminates at the end of this proceeding. (Id.)

On June 29, 2022, Sanimax filed a reply to UP's motion for leave to file a surreply. Sanimax reiterates its opposition to dismissal of its complaint on mootness grounds and argues that a case is not moot unless it is impossible to grant relief. (Sanimax Reply 1-2, June 29, 2022.)

By decision served on May 24, 2023, the Board directed the parties to file a status report with the number of days per week UP is currently providing service to Sanimax, any commitments UP has made regarding future service frequency, and whether the parties have engaged in any further settlement discussions. Sanimax USA LLC v. Union Pac. R. R., NOR 42171, slip op. at 1-2.

On June 7, 2023, Sanimax and UP each submitted a status report. In its status report, UP states that it is currently providing service at the same frequency that it committed to in May 2022, that it has not made any further commitments regarding service frequency, but will provide advance notice of any changes to the current service frequency through December 31, 2023, and that there are no plans for formal future settlement discussions. (UP Status Rep. at 1-2.) Sanimax states in its status report that the actual service provided by UP has fallen short of the service frequency to which UP committed, that UP has not renewed its commitment to this service schedule, and that the parties have not engaged in any additional settlement discussions. (Sanimax Status Rep. 1-2.)

DISCUSSION AND CONCLUSIONS

A complaint is moot when there is no longer an active case or controversy for the Board to resolve. See Am. Fuel & Petrochemical Mfrs. v. BNSF Ry., NOR 42146, slip op. at 1-2 (STB served July 17, 2018) (dismissing a complaint as moot because the challenged conduct was no longer occurring and the complainant sought only injunctive relief); CF Indus., Inc., FD 35517 et al., slip op. at 3-4 (dismissing a complaint as moot because the respondents' withdrawal of the challenged tariff left no active case or controversy over its reasonableness). For the reasons

discussed below, the Board will deny UP's motion to dismiss this proceeding as moot, as it finds that both Sanimax's injunctive relief and damages claims remain unresolved.⁷

UP argues that Sanimax's claim for injunctive relief no longer presents an active case or controversy because UP has increased service to Sanimax. (UP Mot. to Dismiss 1.) Sanimax disagrees, arguing that its injunctive relief claim remains pending because UP has only committed to providing increased service for a limited period of time, after which UP could revert back to three-days-per-week service. (Sanimax Reply 3-5, June 13, 2022.) In its surreply, UP argues that this argument is unpersuasive, as the Board rejected a similar argument in the past. (UP Surreply 2 citing CF Indus., Inc., FD 35517 et al., slip op. at 4).

UP's arguments fail to demonstrate that Sanimax's injunctive relief claims are moot. Unlike the respondents' withdrawal of the tariff at issue in CF Industries, UP's commitment to provide increased service was for only a limited time. Although the Board acknowledged the risk that the respondents in CF Industries might adopt a similar tariff in the future, such an action was significantly more speculative because the tariff withdrawal in that case was open-ended. Here, UP's commitment to provide five-days-per-week service was for a finite and relatively short period of time, after which UP could decide to revert to the same practices that prompted Sanimax's complaint. Moreover, in its June 7, 2023 report, UP itself stated that it had not made any further commitments regarding service frequency. Accordingly, the Board finds that Sanimax's injunctive relief claim is not moot.

UP also contends that Sanimax's damages claim is waived because Sanimax did not present damages evidence in its opening or rebuttal. (UP Mot. to Dismiss 2, 4.) Sanimax, however, argues that it preserved its damages claim in its opening brief by requesting that the Board allow the submission of damages evidence after a liability determination. (Sanimax Reply 7, June 13, 2022.) Furthermore, Sanimax asserts that its approach to damages was practical and necessary since Sanimax could not properly calculate damages until it knew if or when UP would resume adequate service. (Id. at 6.) Sanimax also argues that it submitted initial evidence of damages in its opening evidence. (Id. at 6-8.)

Regarding the issue of damages evidence, the Board rejects Sanimax's argument that it presented such evidence in its opening. Sanimax claims its argument is supported by Exhibit 10 of its opening evidence, in which Sanimax listed the costs of various truck shipments. (Sanimax Reply 6 & n.7, June 13, 2022.) However, as UP contends, Exhibit 10 is not characterized anywhere in the opening or rebuttal briefs as damages evidence and Sanimax does not present any damages calculations. (See UP Surreply 3.) Furthermore, Sanimax has not presented a theory of damages, as its opening and rebuttal briefs contain no arguments about the proper scope of damages in this case.

Nonetheless, the Board will allow Sanimax to present its damages claim based on the circumstances of this case. Although Sanimax did not present evidence of damages in its March

⁷ With respect to the exemption, the Board partially revoked the relevant commodity exemptions to the extent necessary to consider the issues raised in Sanimax's complaint, which are still pending at this time. Nov. 2 Decision, NOR 42171, slip op. at 7.

2, 2022 opening brief, as would usually be required unless the Board declares otherwise,⁸ that brief was due less than a week after the Board issued its February 25 Decision clarifying the period during which Sanimax could seek damages. Given that timing, to ensure that Sanimax has a full opportunity to present its case to the Board, and to ensure that the Board has a full record upon which to decide the case, the Board will reopen the record for the limited purpose of allowing Sanimax to supplement its opening and rebuttal briefs with damages arguments and evidence.⁹ That being said, the Board cautions the parties to this and other proceedings that the better practice would be for a party seeking to bifurcate a proceeding to file a motion with the Board, not simply to make a passing reference to such a request in a footnote. In the future, the Board may reject such a request on the basis that it was not pursued through a formal motion.

Accordingly, Sanimax will have 45 days from the service date of this decision to present arguments and evidence of damages allegedly incurred subsequent to November 2, 2021—the date the partial revocation took effect. UP will then have 30 days to respond.

It is ordered:

1. UP’s motion for leave to file a surreply is granted.
2. UP’s motion to dismiss is denied.
3. Sanimax shall present its damages arguments and evidence by December 18, 2023.
4. UP may respond to Sanimax’s damages arguments and evidence by January 17, 2024.
5. This decision is effective on its service date.

By the Board, Board Members Fuchs, Hedlund, Oberman, Primus, and Schultz. Board Members Fuchs and Schultz dissented with separate expressions.

⁸ See Cargill, Inc. v. BNSF Ry., NOR 42120, slip op. at 3 (STB served Apr. 8, 2011); DeBruce Grain, Inc. v. Union Pac. R.R., NOR 42023, slip op. at 5-6 (STB served Apr. 27, 1998).

⁹ Although Sanimax asks the Board to allow it to present damages evidence after the Board makes a finding of liability, the Board declines to adopt this approach, as it finds that proceeding under a unified record will result in a more efficient resolution of this case. See DeBruce Grain, Inc., NOR 42023, slip op. at 6. Furthermore, Sanimax’s argument—that it had “no way to calculate damages accurately until the Board ruled on UP’s liability” because it did not know when UP would resume the level of service that Sanimax deems adequate (Sanimax Reply 6, June 13, 2022)—is no longer relevant in light of UP’s service level increase. Based on Sanimax’s own reasoning, the Board finds that the relevant damages period extends from the date the partial revocation took effect—November 2, 2021—to the date UP increased its service level in May 2022. (Id. at n.11.) However, to the extent UP did not meet the commitments made in May 2022, Sanimax may present evidence of damages outside of this period.

BOARD MEMBER FUCHS, dissenting:

To promote efficiency and fairness, the Board typically requires a complainant to present its complete case—including damages evidence—in its opening statement.¹ Indeed, the procedural schedule adopted in this case—which was proposed jointly by UP and Sanimax—does not bifurcate liability and damages but instead provides for each party to file a single, comprehensive opening statement. Sanimax nevertheless chose to submit essentially no damages evidence. Now, more than a year and a half later, today’s decision (Decision) gives Sanimax another chance to submit the damages evidence it should have submitted in the first place. The Decision finds Sanimax’s opportunity to properly submit damages evidence was compromised by the proximity of the Board’s February 25 Decision to the shipper’s opening statement deadline, but this finding amounts to an excuse that Sanimax never raised and that the record does not support. The Decision supplies no convincing rationale for deviating from the Board’s well-established practice and adding to the burden of this proceeding, and the Board should have instead acted on the extensive record in this proceeding and determined whether UP has any liability.

Sanimax had a sufficient opportunity to submit damages evidence as part of its opening statement but chose a different course. The shipper never claimed that it had sought to focus on damages from past harms, only to be thwarted by the February 25 Decision clarifying that the Board will consider damages only from November 2, 2021 forward. In fact, Sanimax, in its opening statement, proactively identified future service as the “key remaining issue,” explicitly opted to “keep the focus on the *prospective* relief,” and unilaterally held its damages claims “in abeyance,” (Sanimax Opening 3, 17 n.14) (emphasis added)). However, Sanimax was well-positioned in its March 2022 opening statement to submit evidence on damages. In January 2022, more than a month before the deadline for its opening statement, Sanimax apparently already developed calculations as to the damages associated with UP’s service, (see UP Reply, Ex. 5 at 4, 8-12, April 1, 2022 (responding to UP’s interrogatory, Sanimax identified and described damages)), and the shipper seemingly could quickly apply the methodology—whatever its validity and data quality—to different time periods involved in this case. But Sanimax, by its own words, put its focus elsewhere.²

The Decision provides little reason to minimize Sanimax’s own statements and actions in this proceeding and infer that the timing of the February 25 Decision made the filing of damages evidence impractical. Though it was issued less than a week before the deadline for opening statements, the February 25 Decision in fact narrowed the allowable period for damages, thereby lowering the overall evidentiary burden for the shipper’s opening statement. Indeed, with or

¹ See, e.g., M&G Polymers USA, LLC v. CSX Transp. Inc., NOR 42123, slip op. at 9 (STB served Sept. 27, 2012); Duke Energy Corp. v. Norfolk S. Ry., 7 S.T.B. 89, 100 (2003).

² Months after it submitted its opening statement, Sanimax claimed it submitted initial evidence of damages. (Sanimax Reply 6-7, June 13, 2022.) Setting aside any apparent contradiction with Sanimax’s prior arguments, the shipper’s more recent claim supports the notion that it could and should have submitted a more complete presentation in its opening statement.

without the February 25 Decision, Sanimax was responsible for filing all of its damages evidence for events occurring November 2, 2021 forward, so the February 25 Decision should not have compromised the opportunity, or diminished the expectation, for the shipper to file such evidence. Even assuming the February 25 Decision complicated Sanimax's plans, the shipper could have requested—prior to submitting its opening statement—either an extension of time to submit damages evidence or a bifurcation of the proceeding, but it did not do so.

The structure of today's order—allowing Sanimax to submit additional damages evidence now, rather than after the Board makes a finding on liability—is inefficient and forecloses potential cost savings to the parties. Indeed, the structure runs counter to the request from Sanimax itself. In clarifying its belated request³ to brief damages “when the Board determines liability,” the shipper stated such “an approach is efficient and will allow Sanimax to present an accurate picture of damages.” (Sanimax Reply 7, June 13, 2022.) Both parties have now presented their complete cases on liability, and—if UP were to prevail on this issue—any additional briefing on damages would be completely unnecessary. While it would have been most efficient for the parties to present their complete cases, including damages evidence, in their opening statements, it is no longer possible for the Board to ensure unified presentations in this docket.⁴ After considering all the filings submitted under the procedural schedule originally agreed upon by the parties and set by the Board, I find the better course would have been to issue a decision on UP's liability, if any.⁵ I respectfully dissent.

BOARD MEMBER SCHULTZ, dissenting:

I respectfully dissent from the Board's decision (Decision). As discussed below, Sanimax has waived its damages claims, and even if it were to prevail, Sanimax would not be

³ When Sanimax unilaterally held its damages claims in abeyance, the shipper made a belated request to brief damages “at a later date” and if “the Board's resolution of this case permits it.” (Sanimax Opening 17 n.14.)

⁴ The Decision cites DeBruce Grain for the proposition that proceeding “under a unified record will result in a more efficient resolution of this case.” Decision 6 n.9 (citing DeBruce Grain, Inc. v. Union Pac. R.R., NOR 42023, slip op. at 6 (STB served Apr. 27, 1998)). However, DeBruce Grain involved a complainant that requested bifurcation *before* both discovery and opening statements, whereas the Decision comes *after* discovery, opening statements, and all other briefing set out in the procedural schedule set by the Board. In ruling against bifurcation, the Board in DeBruce Grain recognized that discovery on liability and damages might overlap, and indeed—in this case—discovery involved issues related to both liability and damages. (See e.g., UP Reply Ex. 4 at 4-8, Ex. 5 at 4-13, April 1, 2022; Sanimax Rebuttal Ex. 14 at 3-9, April 18, 2022.) Not only is this proceeding far from the efficient, unified record envisioned by the Board in DeBruce Grain, the Board's action in that case predominantly serves to reinforce the importance of parties' presenting liability and damages issues at the same time, yet now the Decision relaxes enforcement of that practice.

⁵ In issuing a decision on UP's liability, the Board would render UP's motion to dismiss moot.

entitled to any additional relief beyond what Union Pacific Railroad Company (UP) has already provided. Given that there is no longer an active case or controversy for the Board to resolve, I would find Sanimax’s complaint to be moot.

Damages. While the Decision finds that Sanimax’s damages claim remains unresolved, I would find that Sanimax has effectively waived its damages claim by failing to pursue this relief in its case in chief. In a decision served February 25, 2022, the Board stated that it would “consider relief, including damages, only from November 2, 2021.” Sanimax USA LLC v. Union Pac. R.R., NOR 42171, slip op. at 4 (STB served Feb. 25, 2022). Pursuant to the parties’ agreed procedural schedule, Sanimax filed its opening statement on March 2, 2022, in which Sanimax did not offer any evidence in support of its claim for damages. The Decision acknowledges as much.¹ Rather, in a footnote, Sanimax attempted to bifurcate this proceeding by holding its damages claim “in abeyance.” (See Sanimax Opening 17 n.14.) If Sanimax wanted to alter the procedural schedule to allow for a bifurcated proceeding, it should have filed a motion to that effect rather than assuming the Board would allow for this procedural change, as bifurcating a proceeding is a decision that can only be made by the Board. See Decision at 6 (“Only the Board can alter its procedures, not the parties.”). Thus, Sanimax should have included its full case in chief in its opening statement, including evidence pertaining to its damages claim. Sanimax failed to do so. For these reasons, I would find that Sanimax has waived this claim.

Prospective Service Relief. UP contends that its May 2022 commitment to provide five-day-a-week rail service for a certain period of time moots Sanimax’s claim. I agree, as there is no evidence to suggest that Sanimax is not currently receiving that level of service. In addition, even if Sanimax were to prevail, no further relief would be appropriate for the reasons discussed below.

First, Sanimax has requested “indefinite” five-day-a-week service, “subject to the Board’s determination of proper relief.” (Sanimax Reply 4, July 13, 2022.) When the Board grants prospective relief in fact-intensive situations such as the one presented in this case, the Board does not grant relief in perpetuity, but instead limits it to a reasonable time period. See, e.g., Final Offer Rate Rev., EP 755 et al., slip op. at 28-29 (STB served Dec. 19, 2022) (limiting rate prescriptions to two years and noting time limits in other rate cases); Reciprocal Switching for Inadequate Serv., EP 711 (Sub-No. 1) et al., slip op. at 29 (STB served Sep. 7, 2023) (proposing two-year term for reciprocal switching prescription unless necessary for prescription to be practicable). As discussed below, rail service performance is dynamic, and any Board prescription made on the basis of inadequate service must be time-limited and account for the circumstances at hand.

Further, Sanimax bases its claim and request for relief on UP’s history of unreliable service that assertedly necessitated five-day-a-week rail service to its facility—service that Sanimax admits could be performed in three days a week “in theory” but that requires additional days to provide a “margin for missed service.” (Sanimax Opening 1, 5.) Thus, Sanimax claims

¹ I concur with the majority in rejecting Sanimax’s claim that Exhibit 10 of its opening evidence supports its damages claim. See Decision at 5.

that it needs five-day-a-week rail service not because the nature of its business requires it, nor because its volume supports it. Instead, Sanimax needs additional days of service to compensate for UP's unreliable service.

These claims are highly fact-intensive. In making its decision on the merits, the Board must account for the circumstances surrounding Sanimax's complaint, which was filed nearly three years ago during a time of deteriorating rail service for many shippers that reached a peak in the spring of 2022. Since that time, however, rail service generally has improved, including service on UP's network. See Urgent Issues in Freight Rail Serv.—R.R. Reporting, EP 770 (Sub-No. 1), slip op. at 6 (STB served May 2, 2023) (noting that UP "has made some positive steps towards reducing network congestion," but also noting that UP was not yet meeting some performance targets); UP Serv. Progress Rep. 1, Urgent Issues in Freight Rail Serv.—R.R. Reporting, EP 770 (Sub-No. 1), Sep. 22, 2023 (demonstrating improvement in all performance metrics since April 2022, including performance in first-mile/last-mile service).

So even if UP were to reduce service in the future from five days a week to three, such a reduction would not necessarily amount to a recurrence of the violation alleged three years ago, as Sanimax asserts. (See Sanimax Reply 3-5, June 13, 2023 (arguing that the case is not moot because UP could revert back to three-day-a-week service, constituting a recurrence of the alleged common carrier violation).) Any future allegation of inadequate service by Sanimax—e.g., allegations that UP is in violation of its common carrier obligation by reverting back to three-day-a-week service—would require a fact-intensive inquiry by the Board, and a decision finding UP to have violated its common carrier obligation in this proceeding would not necessarily control in a later case. Cf. Shapiro v. U.S. Dep't of Justice, 40 F.4th 609, 615-16 (D.C. Cir. 2022) (finding a dispute incapable of repetition because dispute turned on "highly fact-specific" details rather than presenting "legal questions" likely to recur in future litigation, and stating that a legal controversy "so sharply focused on a unique factual context will rarely present a reasonable expectation that the same complaining party would be subjected to the same actions again" (quoting PETA v. Gittens, 396 F.3d 416, 422-24 (D.C. Cir. 2005); J.T. v. Dist. of Columbia, 983 F.3d 516, 524 (D.C. Cir. 2020))).

For these reasons I find Sanimax's complaint to be moot and respectfully dissent.