

SURFACE TRANSPORTATION BOARD

DECISION

STB Docket No. 42075

ENGELHARD CORPORATION — PETITION FOR DECLARATORY ORDER —  
SPRINGFIELD TERMINAL RAILWAY COMPANY AND CONSOLIDATED RAIL  
CORPORATION

Decided: September 24, 2004

This matter involves two questions that were referred to the Board by the United States District Court for the District of Massachusetts by order dated May 22, 2002, in Engelhard Corp. v. Springfield Terminal Ry. and Consolidated Rail Corp., Civil Action No. 01-10829-RGS. The Board instituted a declaratory order proceeding on April 1, 2003, to address the following questions concerning Freight Tariff RIC 6007-L, "Mileage Allowances and Rules Governing the Handling of and the Payment of Mileage also Charges on Cars of Private Ownership" (Tariff 6007), the most recent version of industry-wide mileage allowance provisions applicable to privately owned tank cars:

- (a) Does a cause of action involving a disputed failure to pay car mileage allowances under Tariff 6007 arise 1 month and 10 days after the end of the month in which the obligation is incurred, or 4 months after the date on which a railroad refuses to pay or act on a claim, or on the occurrence of some other date or event?
- (b) Is a railroad obligated to pay compensation under Tariff 6007 only to the owner of a car's reporting mark, or does Item 180 of such tariff permit the owner of the mark to assign the right to payment to a lessee of a car?

PRELIMINARY PROCEDURAL MATTER

Engelhard Corporation (Engelhard) filed its opening statement on May 16, 2003. On June 30, 2003, Consolidated Rail Corporation (Conrail) and Springfield Terminal Railway Company (Springfield Terminal) (jointly, Defendants) each filed a reply. Engelhard filed its rebuttal on July 30, 2003.

On August 18 and August 20, 2003, Springfield Terminal and Conrail each filed requests to reply to Engelhard's rebuttal. On August 22, 2003, Engelhard filed a letter with the Board opposing Springfield Terminal's and Conrail's requests as impermissible replies to a reply. Under the Board's rules at 49 CFR 1112.2, a reply to a rebuttal is not permitted. Therefore, the Defendants' requests will be denied.

## BACKGROUND

Engelhard supplies kaolin clay mined in Georgia to customers engaged in paper manufacturing at facilities located in the northeastern United States. Engelhard's customers arrange and pay for the rail transportation of the kaolin clay, and Engelhard supplies private rail equipment, including tank, hopper, and sparger cars that it owns or leases. With respect to the tank cars, the railroads compensate Engelhard for use of its owned or leased tank cars based on private car mileage allowances published in Tariff 6007, which contains the national allowance system for privately owned tank cars. Both Defendants are signatories to Tariff 6007.

The dispute before the district court involves the non-payment of car mileage allowances for movement of privately owned tank cars over a 155-mile line of railroad (the Line Segment) between Selkirk, NY, and Barber, MA. The Line Segment is a relatively short, intermediate portion of the much longer route that Engelhard's cars take in their rail journey from the Georgia origin of the kaolin clay to the customers' facilities throughout the Northeast. Apparently, mileage allowance payments have been made for miles traveled by the cars from Georgia to reach the beginning of the Line Segment at Selkirk, and also payments have been made for miles traveled after leaving the Line Segment at Barber to the destinations. But for the travel of Engelhard's cars over the 155-mile-long Line Segment itself, proper mileage allowance payments apparently have not been made in many cases. The amount in dispute in the court case exceeds half a million dollars. Engelhard Court Decision, 193 F. Supp.2d at 387.

Conrail owns the Line Segment. Since 1990, operations over it have been governed by a haulage agreement between Conrail and Springfield Terminal which, among other things, designated Barber, MA, as the interchange point between Conrail and Springfield Terminal. The two railroads apparently disagree on which of them is responsible under the terms of the haulage agreement for paying mileage allowances for movements of Engelhard's cars over the Line Segment. According to Engelhard, with respect to movements over the Line Segment, Conrail has refused to pay any mileage allowances, while Springfield Terminal has paid mileage allowances for some movements but not for others.

Engelhard filed its original complaint in the district court on May 15, 2001, and amended it on November 14, 2001. Conrail and Springfield Terminal filed a motion to dismiss mileage claims they viewed as time-barred, and claims based on state law. On April 2, 2002, the district court issued a decision, Engelhard Corp. v. Springfield Terminal Ry. and Consolidated Rail Corp., 193 F. Supp.2d 395 (D. Mass. 2002) (Engelhard Court Decision), dismissing the state law-based claims of the amended complaint as preempted by the Interstate Commerce Act (id. at 390), and holding that the 2-

year statute of limitations of 49 U.S.C. 11705(c)<sup>1</sup> applied to Engelhard's federal claims under the Interstate Commerce Act (id. at 390-91). Additionally, the court found that the two issues set forth above come within the primary jurisdiction of the Board and therefore should be referred to the Board for determination (id. at 391-92).

## DISCUSSION AND CONCLUSIONS

The court referred to the Board two questions, which will be addressed in turn.

### 1. When does a cause of action involving a disputed failure to pay car mileage allowances arise?

Tariff 6007 provides a procedure for auditing mileage allowances and submitting claims. Item 182(2)(A) sets forth the time frame in which the private car owner must file its claim for mileage allowance with the railroad when a claim for mileage allowance discrepancies arises.<sup>2</sup> Under Item 182(2)(A), the railroad has 4 months from the date the claim is presented to accept it in whole or in

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<sup>1</sup> While section 11705(c) refers only to the filing of complaints before the Board, Judge Stearns concluded that its statute of limitations applies to section 11704(b) actions before a federal district court as well, citing Aluminum Ass'n, Inc. v. Atchison, Topeka & S.F. Ry., 746 F. Supp. 207, 213 n.8 (D.D.C. 1990). Engelhard Court Decision, 193 F. Supp.2d at 390.

<sup>2</sup> Tariff 6007, Item 182(2)(A) provides:

A private car owner must, within twenty-four (24) months from the last day of the month the completed cycle was reported, present any claim for mileage allowance discrepancies, including incorrect rates or omissions, to the applicable rail carrier in the prescribed AAR format, as published in AAR Circular No. OT-3 Series in The Official Railway Equipment Register. Claims not presented in the required format will not be processed. The railroad receiving the claim must within the four (4) months from the date on which the claim was presented allow it in whole or in part, or decline it. The private car owner may reissue its claim, if applicable within four (4) months from the last day of the four (4) months' period allowed the railroad which handled the claim prior to reissuance. The railroad receiving the reissue claim must within four (4) months from the date of [sic] which the reissued claim was presented allow it in whole or in part or decline it. If the railroad fails to handle the original or reissued claim within the prescribed time limits, it will constitute a valid claim as last presented and must be honored by the railroad to which presented. Claim for amounts of \$25.00 per car per cycle or less shall not be issued. The \$25.00 limit is not applicable where no miles were reported for the railroad cycle.

part or to decline the claim. If the railroad declines or takes no action on the claim within the 4-month period, the private car owner may reissue the claim within 4 months of the last day of the 4-month period that the railroad initially had to handle the claim. The railroad then has 4 months from the date of the reissued claim to take action.

Therefore, under the procedures of Tariff 6007, a cause of action would arise when the private car owner is informed that it will not receive compensation for its car movements or 4 months from the date the claim was submitted, whichever occurs first, if the private car owner takes no additional action. If the private car owner timely resubmits its claim to the railroad, the cause of action arises when the private car owner is notified of the railroad's action on the resubmitted claim or when the period for the railroad to reply has expired, whichever occurs first.

The procedure outlined in Tariff 6007 is similar to our regulatory procedures in 49 CFR 1005 for loss and damage claims under 49 U.S.C. 11706, where our regulations lay out a process for resolving disputes over loss and damage claims before a party brings a formal action. If the statute of limitations began to run prior to the railroad declining the claim, the wronged party could be left without an adequate legal remedy. But a cause of action for loss and damages does not accrue until the railroad declines the claim. See 49 U.S.C. 11706(e); Star-Kist Foods, Inc. v. Chicago, R. I. & Pac. R.R., 586 F. Supp. 252 (N.D. Ill. 1984). Under similar reasoning, in a claim for car hire a cause of action for mileage allowance should not accrue until the railroad has denied the claim.

Defendants argue that a claim for non-payment of mileage allowances should be found to accrue upon delivery or tender of delivery under 49 U.S.C. 11705(g) because, they assert, a mileage allowance payment "relates to the shipment of property."<sup>3</sup> The purpose of section 11705(g), however, is to fix one date on which causes of action between a shipper and a carrier with respect to a specific shipment accrue. Fixing one date prevents a situation where one party's claim arising out of a specific shipment would be time barred but the other party's claim would not. See Pennsylvania R.R. v. Carolina Portland Cement Co., 16 F.2d 760, 761 (4th Cir. 1927). This approach makes sense for claims of the type that are known at or shortly after the time of delivery, such as freight charges and demurrage, and thus these are the types of claims to which section 11705(g) historically has been found to apply. Indeed, the cases cited by Defendants in support of their argument that section 11705(g) should apply here (Conrail Reply at 6-8; Springfield Terminal Reply at 5-6) all deal with demurrage claims.

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<sup>3</sup> Section 10705(g) provides:

A claim related to a shipment of property accrues under this section on delivery or tender of delivery by the rail carrier.

Section 11705(g), however, has apparently never been applied to private tank car mileage allowance payments, which is not surprising, as private tank car mileage allowance payments are different in nature from the kinds of claims to which section 11705(g) has been found to apply. Historical industry practice has been to treat mileage allowance payments as a discrete commercial transaction (provision of private rail equipment), separate from the rail shipment of property. Indeed, the whole informal dispute resolution process set up in Tariff 6007 is premised on the concept that providing private equipment is a separate commercial transaction from the haulage of freight. Mileage allowances are not even reported to the car owner until 1 month and 10 days from the end of the month in which they are earned (Tariff 6007, Item 180(2)), and then a lengthy claims process can ensue that might not even begin for 24 months (Tariff 6007, Item 182(2)).

Defendants argue, alternatively, that if we find that the mileage allowance does not fall under section 11705(g), then the statute of limitations should begin to run 1 month and 10 days after the end of the month in which the obligation to pay the mileage allowance accrued. In support of this contention, they argue that, under Tariff 6007, Item 180(2),<sup>4</sup> Engelhard would have received the mileage allowance report by that time and should have known that it was not paid for the movement at issue. However, while Engelhard would know that it had not yet been paid for the movement 1 month and 10 days after the end of the movement cycle, it could not know under the tariff that it would be refused payment for the movement and, therefore, must take further action on any mileage allowance claim, until Conrail or Springfield Terminal actually declined its submitted claims. Defendants' interpretation would force car owners immediately to file court actions to recover car allowances before the tariff's mechanism for informal dispute resolution began, thereby making the provisions of the tariff meaningless.

We conclude that, based on Tariff 6007, a claim accrues, for purposes of the statute of limitations, when the private car owner is informed that it will not receive compensation for its car movements or 4 months from the date the claim was submitted (or resubmitted as explained above), whichever occurs first.

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<sup>4</sup> Tariff 6007, Item 180(2) provides:

Mileage allowance must be reported to the car owner (person or company, at a single address, to whom the reporting marks are assigned) within one (1) month and ten (10) days from the last day of the month in which it is earned including payment for cars on hand at the end of that month.

2. Is a railroad obligated to pay compensation only to the owner of a car's reporting mark, or does Item 180 of Tariff 6007 permit the owner of the mark to assign the right to payment to a lessee of a car?

Although rail carriers no longer “file” their tariffs with the government, Tariff 6007 is the product of a series of industry-wide negotiations that were intended to resolve long-standing disputes about private tank car mileage allowances. In 1986, the Board’s predecessor agency, the Interstate Commerce Commission (ICC), found that the most recent of these negotiated agreements is consistent with applicable statutory requirements and adopted (or “prescribed”) it. Thus, the negotiated agreement has regulatory effect. See Investigation of Tank Car Allowance System, 3 I.C.C.2d 196 (1986), supplemented, 7 I.C.C.2d 645 (1991). Although Tariff 6007 corresponds to the terms of the negotiated agreement that the ICC had prescribed, and although railroads that are signatories to Tariff 6007 are bound by its terms, many of the detailed administrative provisions of Tariff 6007 are not part of the negotiated agreement the ICC prescribed (set out at 3 I.C.C.2d 204-11).

The reporting marks on a private tank car govern to whom railroads should make mileage allowance payments. The owner of the car is not necessarily the person or company to whom the reporting marks are assigned. Tariff 6007, Item 180(1), makes clear that reporting marks can be assigned either to a car’s owner or to a lessee (“Upon written application reporting marks will be assigned to car owner or lessee. . .”). Item 180(3)(A) further provides that assigned reporting marks are to be submitted to The Official Railway Equipment Register for publication.<sup>5</sup> Thus Tariff 6007, by its terms, permits assignment of the right to receive mileage allowance payments to a lessee.

Apparently Engelhard did not always follow all of the instructions of Tariff 6007 with regard to notification. But it asserts that the fact that it has pursued claims for unpaid mileage allowances with Defendants over the years, and that Defendants have sometimes paid allowances as a result, indicates that the parties had agreed that literal compliance with Item 180 of Tariff 6007 was not necessary. If Engelhard can make a convincing showing that the parties did indeed have such an understanding, that

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<sup>5</sup> Tariff 6007, Item 180(3)(A) is as follows:

3. Mileage allowance for the use of tank cars will be paid only to the person or company at a single address, to whom the reporting marks are assigned provided cars are properly equipped and marked with the assigned reporting marks and car number, and providing [sic] further that:
  - A. The marked capacities and assigned reporting marks are properly submitted, not later than the date of the installations of cars in service, to The Official Railway Equipment Register for publication in the next succeeding issue.

...

could supersede the procedural provisions of Tariff 6007 because those provisions regarding the mechanics of assigning reporting marks are not part of the negotiated agreement that the ICC prescribed and thus they do not have regulatory effect. See Capitol Materials Inc. — Petition for Declaratory Order — Certain Rates and Practices of Norfolk Southern Ry., STB Docket No. 42068, slip op. at 6 (STB served Apr. 12, 2004) (an understanding of the parties may supersede particular tariff provisions). Therefore, the court may determine that the course of dealing between Engelhard and the Defendants was such that Engelhard should be allowed to pursue mileage allowance claims despite the lack of literal adherence to the requirements of Tariff 6007 Item 180 in some instances.

We find:

1. For purposes of the statute of limitations, a cause of action involving a disputed failure to pay car mileage allowances arises when the private car owner is informed that it will not receive compensation for its car movements or 4 months from the date the claim was submitted, whichever occurs first, if the private car owner takes no additional action. If the private car owner timely resubmits its claim to the railroad, the cause of action arises when the private car owner is notified of the railroad's action on the resubmitted claim or the period for the railroad to reply has expired, whichever occurs first.

2. Tariff 6007 permits the owner of a car's reporting marks to assign the right to receive mileage allowance payments to a lessee of the car; and the court, if appropriate, may find that the tariff's notification requirements have been altered by a course of dealing between the parties.

It is ordered:

1. This decision will be effective on its service date.

2. A copy of this decision will be served on:

Honorable Richard G. Stearns  
(RE: Civil Action No. C.A. 01-10829-RGS)  
United States District Court  
for the District of Massachusetts  
One Courthouse Way - Suite 2300  
Boston, MA 02210

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

Vernon A. Williams  
Secretary