

36817
EB

SERVICE DATE – JANUARY 31, 2007

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 34337

MICHAEL H. MEYER, TRUSTEE IN BANKRUPTCY FOR CALIFORNIA
WESTERN RAILROAD, INC.

v.

NORTH COAST RAILROAD AUTHORITY, d/b/a NORTHWESTERN PACIFIC
RAILROAD

Decided: January 30, 2007

In a decision served on July 27, 2005, the Board denied a complaint for damages filed by Michael H. Meyer, the trustee in bankruptcy for California Western Railroad, Inc. (CWR), against “North Coast Railroad Authority (NCRA), d/b/a Northwestern Pacific Railroad (NWP).” CWR had claimed that NWP was liable for damages that CWR sustained as a result of NWP’s failure to provide service. In our decision, however, we found that NCRA had not violated its common carrier obligation at 49 U.S.C. 11101(a). We also dismissed as moot a related petition for partial revocation in STB Ex Parte No. 346 (Sub-No. 25B), Rail General Exemption Authority—Lumber or Wood Products—Petition for Partial Revocation.

In a decision served on November 18, 2005, the Board reopened this proceeding “[t]o ensure that Mr. Meyer has an opportunity to fully express his position.” On January 3, 2006, the trustee filed his opening statement in support of his complaint. NCRA filed a reply on January 12, 2006, and the trustee filed a statement in rebuttal on January 17, 2006. Having reviewed these materials, we will deny the complaint.

BACKGROUND

CWR operated a 40-mile line of railroad between Fort Bragg and Willits, CA, from August 1996 until November 25, 1998.¹ CWR's primary shipper on this line was Georgia Pacific Corporation (Georgia Pacific), which operated a lumber mill at Fort Bragg until 2002. CWR transported lumber for Georgia Pacific.

CWR connected to the national rail system only at Willits, where it joined a line operated by NWP pursuant to a lease from NCRA, the owner of the line.² NCRA's line ran south to Schellville, CA, where it connected to the California North Coast Railroad Company, which, in turn, connected to the Union Pacific Railroad Company.

On November 25, 1998, the Federal Railroad Administration (FRA), after finding unsafe conditions and widespread noncompliance with Federal railroad safety laws and regulations, issued an emergency order requiring operations to cease over the NWP line between Arcata, CA, and Schellville/Napa Junction, CA.³ Accordingly, the line was embargoed via filings with the Association of American Railroads on December 3, 1999, and February 21, 2001. The FRA emergency order remains in effect as to the portion of the NWP line at issue here.

The emergency order had the effect of preventing any rail traffic that might originate on the CWR from being transported over the national rail system. Georgia Pacific, the sole freight shipper on CWR's line, closed its mill on August 8, 2002. CWR filed for bankruptcy on December 3, 2002.

POSITIONS OF THE PARTIES

The trustee asserts that the Chairman and President of CWR repeatedly requested that NCRA's Board of Directors and its contract operator restore the interchange at Willits and rehabilitate the line to Schellville so that service could be resumed. To support his claim, the trustee provides verified statements from Mr. John Mayfield, former Chairman of CWR, and Mr. Gary Milliman, former President and CEO of CWR.

¹ CWR's line was ultimately sold pursuant to Board authorization, and with the approval of the bankruptcy court, in Mendocino Railway—Acquisition Exemption—Assets of The California Western Railroad, STB Finance Docket No. 34465 (STB served Apr. 9, 2004).

² See North Coast Railroad Authority—Lease and Operation Exemption—California Northern Railroad Company, Northwestern Pacific Railroad Authority and Golden Gate Bridge, Highway and Transportation District, STB Finance Docket No. 33115 (STB served Sept. 27, 1996).

³ Emergency Order No. 21, Notice No. 1, 63 FR 67976 (Dec. 9, 1998).

Both state that they asked NCRA to authorize the repair of the line. According to Mr. Meyer, before the line was shut down per the FRA emergency order, CWR had been tendering an average of 60 carloads of lumber shipments per month for interchange at Willits. He characterizes this as an ongoing request for service that did not disappear when the line was shut down.

Mr. Meyer argues that the verified statements demonstrate that CWR made a reasonable request for service that triggered NCRA's common carrier obligation. The trustee further alleges that, by failing to repair the line, NCRA violated its common carrier obligation at 49 U.S.C. 11101(a) to provide service upon reasonable request, its obligation at 49 U.S.C. 10742 to provide facilities for the interchange of traffic, and its obligation at 49 U.S.C. 10744 not to prevent the continuous carriage of freight.

Mr. Meyer maintains that, although the line was twice embargoed, both embargoes expired after being in effect for one year, without any steps taken to address the conditions cited by the FRA or to seek abandonment or discontinuance authority from the Board. According to Mr. Meyer, the minutes of an NCRA Board of Directors meeting on November 18, 1998 indicate that it would not have cost more than \$100,000 to restore the interchange at Willits and to resume operations. The trustee also maintains that NCRA had sufficient funds from Federal disaster assistance and other state sources to repair the line. The trustee argues that the traffic on the line (which he estimates at 350 carloads of freight each month in 1997) was sufficient to justify rehabilitation.

The trustee therefore asks the Board to find that NCRA has breached its statutory duties. Mr. Meyer seeks damages in the amount of \$132,000 to compensate for CWR's lost net revenue from freight rail operations.

In response, NCRA argues that the trustee has failed to produce documentation or evidence that CWR ever requested that NWP resume freight operations. In support of this claim, NCRA attaches a verified statement from Mr. John Darling, who identifies himself as the former manager of Northwestern Pacific Railway Company LTD (NWPY).⁴ Mr. Darling states that, although he received a request from Mr. Milliman to repair tracks to accommodate CWR's 1999 summer passenger excursion service, at no time did he or any other officer of NWPY receive a request to restore freight service for CWR or any shipper. NCRA also submits a verified statement from Mr. Allan Hemphill, the Chairman of NCRA, who states that he knows of no occasion when Mr. Mayfield

⁴ The record indicates that NWPY assumed operations over the line in 1998. It did so first as a contract operator for NCRA and then as a lessee, replacing NCRA and the Northwestern Pacific Railroad Authority (NWPRA) (a joint powers agency, of which NCRA was a founding member), which had previously operated over the line. In our prior decisions in this proceeding, we did not distinguish between NWPY and NWPRA, referring to them collectively as NWP.

raised with the Board of Directors of NCRA the issue of interchanging Georgia Pacific cars.

NCRA further argues that, even if CWR had requested that NWP resume operations, such a request would have been unreasonable due to maintenance concerns and problems dating back to 1990. Those problems included the 32 non-operational grade crossings identified in the FRA order. NCRA contends that Mr. Meyer's estimate of the repair costs is merely speculation and states that the cost to restore the line to Class 1 operating condition, as required by the FRA order, would be \$23 million. To support this figure, NCRA relies on a verified statement from Mr. David Anderson, the project manager of an engineering team that completed a condition assessment of the entire NWP line in 2005.

Finally, NCRA asserts that the trustee has failed to establish actual and certain damages. NCRA argues that Mr. Meyer relies only on 8-year-old recollections and approximations of carloads interchanged rather than introducing any documentation or business records.

DISCUSSION AND CONCLUSIONS

A complainant has the burden of showing that it is entitled to relief.⁵ The trustee has not met that burden here. To prove a violation of the common carrier obligation at 49 U.S.C. 11101(a), the trustee must show that the carrier failed to provide service upon reasonable request. See, e.g., CSX Transportation, Inc.—Abandonment—Between Bloomingdale and Montezuma, in Parke County, IN, Docket No. AB-55 (Sub-No. 486), et al., slip op. at 10 (STB served Sept. 13, 2002). A reasonable request is one that is specific as to the volume, commodity, and time of shipment. See, e.g., LI Acquisition Corp.—Abandonment Exemption—In Montgomery County, PA, Docket No. AB-405 (Sub-No. 1X), et al., slip op. at 9 (ICC served Aug. 23, 1994) (LI Acquisition); The Atchison, Topeka and Santa Fe Railway Company—Abandonment Exemption—In Lyon County, KS, Docket No. AB-52 (Sub-No. 71X), slip op. at 6 (ICC served June 17, 1991) (Atchison).

Mr. Meyer has presented testimony from officers of CWR stating that they made numerous requests that NCRA repair the line and restore service. But their testimony, presented 8 years after the time in question, is unsupported by any documentation and is flatly denied by NCRA's witness. It is also contradicted by the trustee's earlier statement to the Board that it would have been pointless to request service when the line was down.⁶ And CWR offers no testimony (in fact, no evidence at all) to support the trustee's

⁵ See, e.g., 5 U.S.C. 556(d) (“Except as provided by statute, the proponent of a rule or order has the burden of proof”).

⁶ Reply filed Feb. 17, 2005, at 9.

contention that there was a continuing demand for service at the time of the FRA order. In short, Mr. Meyer has submitted no contemporaneous evidence or documentation of a demand for service. Rather, the testimony he advances simply consists of recollections of conversations during 1999 that are contradicted by NCRA's sworn testimony.

Furthermore, where this agency has found illegal cessations of service, the requests for service have typically come from shippers located on the line who previously had used the carrier's services. See Atchison at 6; LI Acquisition at 9. Significantly, there is no evidence on the record here that Georgia Pacific, the sole shipper on CWR's line, ever requested service following the FRA order. CWR—a railroad, not a shipper—never generated any freight. It carried traffic tendered by Georgia Pacific, traffic which CWR interlined with NWP. Georgia Pacific evidently never complained about NWP's failure to repair the line, asked NWP to restore service, or otherwise expressed any interest in a resumption of rail service to its Fort Bragg plant.

NWP's original cessation of service was compelled by order of the FRA, which found that the line was unsafe and directed that operations cease. The issue is whether NWP then should have repaired the line. The trustee claims CWR asked NWP to fix it. But NCRA credibly responds that any request to repair the line was made only in connection with the summer passenger excursion service. We continue to have some general jurisdiction over passenger rail service that is provided between a place in a state and a place in the same state if it is part of the interstate rail network. 49 U.S.C. 10501(a)(2)(A). And, the line was part of the interstate rail network with respect to freight service, as discussed above. But there is no evidence on the record that the summer passenger excursion service was provided as part of the interstate rail network,⁷ and thus failure to accommodate such a service could not serve as the basis for a section 11101(a) violation here. The trustee does not even argue that Georgia Pacific, the only shipper actually tendering freight on the CWR line for carriage by CWR and NWP, ever made a request for restoration of rail service. Absent any indication by Georgia Pacific, or by any other shipper which had tendered or could tender freight for carriage, of interest in the resumption of rail service, NCRA's decision not to expend public funds to reopen the line is manifestly reasonable. The record before us is devoid of any such indication.⁸

⁷ Magner-O'Hara Scenic Ry. v. ICC, 692 F.2d 441, 442, 444 (6th Cir. 1982); Fun Trains, Inc.—Operation Exemption—Lines of CSX Transp., Inc., STB Finance Docket No. 33472 (STB served Mar. 5, 1998); Napa Valley Wine Train, Inc.—Pet. for Declaratory Order, 7 I.C.C.2d 954, 955, 965-67 (1991).

⁸ Georgia Pacific participated in this proceeding through a verified statement from Mr. Robert Handegard, General Sales Manager—Western Lumber, which was attached to Mr. Meyer's rebuttal. In that statement, Mr. Handegard merely estimates the volume of lumber Georgia Pacific was shipping at the time of the FRA order, but remains silent regarding the cessation of service. Georgia Pacific does not indicate that it

(continued...)

The trustee's allegation that NCRA violated its obligation at 49 U.S.C. 10742 to provide facilities for the interchange of traffic is similarly without merit. The trustee argues that NCRA failed to maintain an interchange with CWR to enable Georgia Pacific lumber shipments to be moved over the NWP line. Section 10742 states that a ". . . rail carrier . . . shall provide reasonable, proper, and equal facilities that are within its power to provide for the interchange of traffic between, and for the receiving, forwarding, and delivering of . . . property to and from, its respective line and a connecting line of another rail carrier"

NCRA did not violate that provision. There is no reason why NCRA should have been expected to pay the cost of restoring the line merely to provide interchange with CWR, when Georgia Pacific provided no assurances that it would provide traffic and, in fact, exhibited no interest in moving any traffic.⁹ Georgia Pacific presumably would have expressed its desire that NCRA repair the track, and could have been expected to do so vigorously, if it really wanted to continue to ship traffic over the line. The shipper did not do so.

The trustee's allegation that NCRA violated its obligation at 49 U.S.C. 10744 by preventing the continuous carriage of freight likewise fails. This provision states that a ". . . rail carrier . . . may not enter a combination or arrangement to prevent the carriage of freight from being continuous from the place of shipment to the place of destination whether by change of time schedule, carriage in different cars, or by other means. . . ." But Mr. Meyer does not allege with any specificity that NCRA entered into any such combination or arrangement, and there is no indication in the record that such a combination or arrangement existed. When Georgia Pacific ceased tendering traffic to CWR, it had no traffic to tender to NCRA, which cannot now be found liable for failing to continually carry traffic that was never tendered.

If, as the trustee's witnesses say, freight service was desperately needed and repeatedly sought, we cannot understand why no party brought the matter to our attention in a timely way. In fact, no party involved with this line took any sort of action for a full 6 years, until just before the estate was to close, and even then, all that the trustee sought was monetary damages from NCRA. This tactic is not appropriate. Cf. Groome & Associates, Inc. and Lee K. Groome v. Greenville County Economic Development Corporation, STB Docket No. 42087 (STB served July 27, 2005), at 11 (a party "may not

(...continued)

requested or desired rail service after the shut-down of the line or that its business was harmed in any way by the lack of rail service.

⁹ See, e.g., Minnesota Northern Railroad, Inc. v. Canadian National Railway Company, STB Docket No. 42080, slip op. at 5 (STB served Mar. 18, 2005).

lie low when a rail line is damaged and out-of-service and then, much later, file a complaint seeking damages for failure to serve.”).

Because the trustee has not proven any violation by NCRA of 49 U.S.C. 11101(a) or any other statutory provision, we find no basis for granting the trustee’s requested relief. Mr. Meyer’s complaint will therefore be denied.

This decision will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. The complaint is denied.
2. This decision is effective on the date of service.

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

Vernon A. Williams
Secretary