

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. NOR 42148

NORTH COAST RAILROAD AUTHORITY AND NORTHWESTERN PACIFIC RAILROAD
COMPANY v. SONOMA-MARIN AREA RAIL TRANSIT DISTRICT

Digest:¹ The Board denies the request of North Coast Railroad Authority and Northwest Pacific Railroad Company for a preliminary injunction in this proceeding.

Decided: October 20, 2016

On October 4, 2016, North Coast Railroad Authority (NCRA) and Northwest Pacific Railroad Company (NWPCo) (together Petitioners) filed a petition requesting an emergency declaratory order and preliminary injunctive relief to prevent Sonoma-Marín Area Rail Transit District (SMART) from interfering with freight rail operations over portions of the Northwestern Pacific Railroad Line.² (Pet. 2, 4-5, 10-11.) NCRA, the public agency created to preserve freight operations, holds the exclusive right to conduct freight operations. (Pet. 3.)³ NWPCo is the freight operator. (Pet. 2.)⁴ SMART, a public agency created in 2003 and authorized to provide commuter passenger service over portions of the line, holds the exclusive right to operate passenger service, including the right to dispatch over the line. (Pet. 2-3.)⁵

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. Policy Statement on Plain Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

² The parties also refer to the Northwestern Pacific Railroad Line as the Northwestern Pacific Line. For purposes of this decision, we will refer to it as the Line.

³ In 1996, NCRA acquired Board authority to lease and operate the Line. North Coast R.R. Auth.—Lease & Operation Exemption—California N. R.R., FD 33115 (STB served Sept. 27, 1996).

⁴ See N.W. Pac. R.R.—Change in Operators Exemption—N. Coast R.R. Auth., FD 35073 (STB served Aug. 24, 2007).

⁵ In 2004, SMART obtained Board authority to acquire the real estate and rail facilities and trackage to the Healdsburg and Lombard segments of the Line. Sonoma-Marín Area Rail Transit Dist.—Acquis. Exemption—N.W. Pac. R.R. Auth., FD 34400 (STB served March 10, 2004). SMART retains the residual common carrier obligation over portions of the Line, including the segment at issue here. See id.; see also Sonoma-Marín Area Rail Transit Dist.—Acquis. Exemption—in Marin Cty., Cal., FD 35732, slip op. at 2 n.2, 3 (STB served July 15, 2013).

According to Petitioners, SMART recently began using its dispatching authority to prohibit the movement of certain freight on the Line. (Pet. 4, 6.) On October 5, 2016, the Board issued an order requiring replies to the petition on an expedited schedule and scheduling a conference call with parties, counsel, and Board staff.

On October 6, 2016, SMART filed a reply to the petition noting that it was not “waiving its right to file a more detailed response to the [October 4] Petition.” (Reply 2 n.1.) SMART contends that there is no reason for the Board to issue a declaratory order because it is not impermissibly interfering with Petitioners’ movements. SMART acknowledges that it has refused to allow onto the Line tank cars loaded with liquid petroleum gas (LPG) that are not being moved directly to a customer or shipper destination, but are instead intended for temporary storage, on the ground that NCRA does not have a contractual right to store such cars on the Line. SMART argues that because the Board typically does not get involved in contractual disputes, there is no reason for it to do so in this instance. (Reply 2.)

On October 7, 2016, the Board issued an order: noting that the case raises a number of legal issues that have not been fully briefed; instituting a proceeding; stating it will issue another order specifying issues for further briefing; and scheduling a second conference call for October 11, 2016. The two conference calls with Board staff focused on the facts of the dispute and included representatives of both parties. The calls clarified some facts regarding the Petitioners’ request for preliminary injunctive relief.

BACKGROUND

The Line consists of three segments: the Willits Segment, the Healdsburg Segment, and the Lombard Segment. (Pet. 2-3.) In 2011, NCRA and SMART entered into an Operating and Coordination Agreement (Agreement) for the Line. (Pet., Williams Decl. para. 1.) The Agreement gives SMART dispatching authority over the Lombard and Healdsburg segments and a portion of the Willits Segment. (Pet., Williams Decl., Ex. A at 4.) The Agreement also contains a provision dealing with hazardous materials, which states in part:

Neither Party shall use, generate, transport, handle or store Hazardous Materials on the Subject Segments other than as may be used by the Party in its operations in the normal course of business or, in the case of NCRA, as may be transported by NCRA in its capacity as a common carrier by rail and in all events in accordance with Applicable Laws.

(Id. at 11.) Finally, the Agreement contains a provision subjecting disputes to arbitration. (Id. at 19.)

Beginning on July 28, 2016, NWPCo began transporting loaded LPG tank cars to, and storing them at, the Schellville rail yard on the Lombard Segment. (Pet. 2, 5.) For about two

months, SMART dispatchers issued track warrants for these movements.⁶ By late September, 80 loaded LPG tank cars were stored at the Schellville yard. However, according to Petitioners, on approximately September 21, 2016, SMART began to limit its issuance of track warrants and on October 2, 2016, SMART denied a track warrant for 12 LPG tank cars destined for Schellville and six grain cars destined for Petaluma, thus prohibiting those cars from proceeding. (*Id.* at 6.) As clarified on the two conference calls, the six grain cars have since been allowed to proceed, but the 12 loaded LPG cars have remained sitting on the track at an interchange with the California Northern Railroad. NWPCo also has a voluntary hold on an additional 30 loaded LPG tank cars bound for the Schellville yard. According to the October 11 conference call, the 12 loaded LPG cars at the California Northern interchange and the 30 additional loaded LPG tank cars on voluntary hold are the only cars that remain part of the dispute over which Petitioners seek preliminary injunctive relief. Other traffic can move (and has continued to do so), but for any traffic to pass the California Northern interchange point, NWPCo must move the 12 LPG cars about a mile onto a siding on the California Northern tracks, move the other traffic past the interchange point, and then move the 12 loaded LPG cars back to the interchange point, which, Petitioners claim, is inefficient and expensive.

DISCUSSION AND CONCLUSIONS

Under 49 U.S.C. § 1321(b)(4),⁷ the Board may issue an appropriate order, such as a preliminary injunction, when necessary to prevent irreparable harm. A party seeking a preliminary injunction must establish that (1) there is a likelihood that it will prevail on the merits of any challenge to the action sought to be preliminarily enjoined, (2) it will suffer irreparable harm in the absence of a preliminary injunction, (3) other interested parties will not be substantially harmed by a preliminary injunction, and (4) the public interest supports the granting of the preliminary injunction. *See, e.g., Wash. Metro. Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977); *Va. Petroleum Jobbers Ass'n v. Fed. Power Comm'n*, 259 F.2d 921, 925 (D.C. Cir. 1958); *Am. Chemistry Council v. Ala. Gulf Coast Ry.*, NOR 42129, slip op. at 4 (STB served May 4, 2012). A preliminary injunction is an extraordinary remedy and will generally not be granted unless the requesting party can show that it faces unredressable actual and imminent harm that would be prevented by an injunction. *Am. Chemistry Council*, NOR 42129, slip op. at 4. That showing has not been made here, so the request for preliminary injunction will be denied.

Petitioners seek a preliminary injunction prohibiting SMART's use of its dispatching function as a "preclearance requirement for freight operations." (Pet. 7.) Petitioners interpret the dispatching function as being limited to the control of the movement of trains and allege that recently, SMART has unilaterally asserted a contrary interpretation and begun using its

⁶ The Board has explained that a track warrant control system is a verbal authorization system using radio, phone, or other electronic transmission from a dispatcher. *See CSX Transp., Inc.—Joint Use—Louisville & Ind. R.R.*, FD 35523, slip op. at 3 n.8 (STB served Apr. 10, 2015).

⁷ Formerly 49 U.S.C. § 721(b)(4). *See* Pub. L. No. 114-110, § 3(a)(5), 129 Stat. 2228, 2228.

dispatching function to prohibit the movement of certain freight—specifically, the transportation of hazardous materials—and the storage of additional cars containing hazardous materials at Schellville. (Pet. 4-5.) Petitioners argue that the “preclearance authority” asserted and exercised by SMART for this traffic is a form of “regulation that is preempted under 49 U.S.C. § 10501(b).” (Pet. 8-9.)

Petitioners argue that in the absence of a preliminary injunction, they are likely to suffer, and already have suffered, irreparable harm. (Pet. 9-10.) Citing SMART’s assertions about limiting track warrants and its October 2 denial of the track warrant for the 12 LPG cars, Petitioners state that they are uncertain when, and if, they will be able to discharge their common carrier rights and obligations with respect to those cars. They also claim that customers of the railroad are uncertain whether they can rely upon rail service. (*Id.* at 9.) Finally, Petitioners assert that they have suffered, and will suffer, irreparable harm from SMART’s interference with their operations. (*Id.* at 10.)

As noted, the two conference calls with Board staff and the parties clarified that the dispute over which Petitioners seek preliminary injunctive relief is now limited to the treatment of the 12 LPG tanker cars currently on the track near NWPCo’s interchange with the California Northern Railroad and the additional 30 loaded LPG tank cars also bound for the Schellville yard that NWPCo currently has on voluntary hold. There is no evidence that the 12 cars are preventing access to the line through the interchange with California Northern. Rather, recently, with some effort, NWPCo was able to move other cars on the line after pushing the 12 cars about a mile onto the California Northern to a siding, moving other cars through the interchange, and then pushing the 12 cars back into place on the Lombard Segment.

Based on the factual information presented in the pleadings and clarified on the conference calls, Petitioners have not met their burden to show that they will be irreparably harmed in the absence of a preliminary injunction pending a final Board determination in this proceeding. First, although it requires extra work, traffic can move past the California Northern-NWPCo interchange point on the Lombard Segment, so other interstate commerce is not being blocked. Second, Petitioners have not shown that there are no feasible alternatives for storage of the 12 loaded LPG cars pending a final Board determination. The only traffic at issue is the 12 LPG cars on the line and the 30 LPG cars being held elsewhere. The cars on the line are creating an inconvenience, but they are not interfering with the interstate rail network. Here, Petitioners have provided no evidence that they face harm, other than inconvenience and associated monetary losses (which they have not shown to be unrecoverable). In these circumstances, potential monetary or economic loss by itself does not constitute irreparable harm. See *Seminole Elec. Coop. v. CSX Transp., Inc.*, NOR 42110, slip op. at 4 (STB served Dec. 22, 2008) (citing *Consol. Rail Corp.—Aban.—Between Corry & Meadville, in Erie & Crawford Ctys., Pa.*, AB 167 (Sub-No. 1129) (ICC served Oct. 5, 1995)).

In sum, Petitioners have not shown that a preliminary injunction is currently necessary. Because Petitioners have failed to satisfy the requirement that they demonstrate irreparable harm in the absence of a preliminary injunction, we need not address their arguments about likelihood of success on the merits, harm to other parties, or public interest considerations here. See *Am. Chemistry Council*, NOR 42129, slip op. at 5; *Seminole Elec. Coop.*, NOR 42110, slip op. at 4

(citing Wash. Metro. Area Transit Comm'n v. Holiday Tours, 559 F.2d 841 (D.C. Cir. 1977)). This case raises a number of novel issues relating to the common carrier obligation, and, as the Board noted in the October 7 decision, it will issue a further order shortly specifying issues for further briefing by both parties. Further briefing will give the Board the information it needs to consider the merits of the petition.

Finally, Petitioners contend that SMART is interfering with their ability to comply with Federal Railroad Administration (FRA) regulations that require the expedited movement of hazardous materials. But Petitioners do not claim that FRA has found them to be in violation of FRA regulations. Because FRA has primary responsibility over railroad safety and is charged with enforcing and interpreting its own regulations, we will not order the 12 LPG tank cars to be moved based on Petitioners' contentions. To ensure that FRA is aware of the situation with the 12 LPG cars, a copy of this decision will be served on the FRA Office of the Chief Counsel.

It is ordered:

1. Petitioners' request for preliminary injunctive relief is denied.
2. A copy of this decision will be served on the Federal Railroad Administration Office of the Chief Counsel.
3. This decision is effective on its service date.

By the Board, Chairman Elliott, Vice Chairman Miller, and Commissioner Begeman. Commissioner Begeman partially concurred with a separate expression.

COMMISSIONER BEGEMAN, partially concurring:

Although North Coast Railroad Authority (NCRA) and Northwestern Pacific Railroad Company (NWPCo) may not have overcome the legal hurdles for obtaining a preliminary injunction, I do not think the Board's determination is sufficient given the potential rail and public safety concerns at stake while this dispute remains pending. Without the additional action that I think is needed in today's decision, the Board is suggesting that it is ok to leave 12 loaded hazmat cars (i.e., liquid petroleum gas (LPG)) sitting at an active interchange point until a future decision can be made resolving the overall dispute. But that is not ok with this Board Member. We need to consider more than merely *whether* it is possible for traffic to move past the interchange point. We should also consider *how* it is possible for the traffic to move past the LPG cars and *if* those passing movements, performed over an indefinite period, are in the public interest.

As today's decision explains, the only way for traffic to move and service to be provided is for NWPCo to move the 12 LPG cars about a mile onto a siding. NWPCo will then move the traffic past the interchange point and move the 12 loaded LPG cars from the siding back to the

interchange point. I disagree with the majority's conclusion that this is merely "extra work" and "an inconvenience...." I am very concerned about NWPCo's indefinite undertaking of "pushing the 12 cars about a mile" and then back into place on the line each and every time it needs to provide rail service to its customers. This strikes me as a recipe for a serious accident. I fully recognize that other federal agencies have far more expertise on some of these concerns, and I would welcome their prompt input.

Instead of merely denying a preliminary injunction, I believe the Board should direct Sonoma-Marine Area Rail Transit District (SMART) to show cause why moving the 12 LPG cars into the Schellville yard is contrary to the public interest versus having the cars moved back and forth indefinitely from the interchange point. NCRA and NWPCo should respond as well. At the same time, the Board should direct NWPCo to continue to keep the other 30 loaded LPG tank cars bound for the Schellville yard on "voluntary hold." The Board should ask the Federal Railroad Administration and perhaps the Pipeline and Hazardous Materials Safety Administration to quickly weigh in on this matter. And the Board could take these actions without prejudicing the parties or making a finding on the merits before the parties have completed the administrative record.

I have fully agreed with the Board's earlier actions on this case in quickly reaching out to the parties and holding two technical conferences almost immediately after the case was filed. I commend the Board staff for taking a more hands-on approach than is typical. And I hope that NCRA and SMART, both public entities, will work more cooperatively on behalf of those they serve.