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SERVICE DATE – NOVEMBER 28, 2012

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. NOR 42133

SIERRA RAILROAD COMPANY AND SIERRA NORTHERN RAILWAY
v.
SACRAMENTO VALLEY RAILROAD COMPANY, LLC, MCCLELLAN BUSINESS PARK,
LLC, AND COUNTY OF SACRAMENTO

Digest:¹ The Board finds that Sacramento Valley Railroad, McClellan Business Park, and the County of Sacramento are not interfering with Sierra Northern Railway's ability to provide rail service within the McClellan industrial park in McClellan, Cal.

Decided: November 26, 2012

On December 7, 2011, Sierra Railroad Company, a noncarrier, and its wholly owned subsidiary, Sierra Northern Railway, a Class III rail carrier (SERA) (collectively, Sierra), filed a complaint under 49 U.S.C. §§ 10702(2) and 10704(b), alleging that Sacramento Valley Railroad Company, LLC (SAV), McClellan Business Park, LLC (McClellan), and the County of Sacramento (County) (collectively, respondents) failed to maintain reasonable practices by interfering with SERA's common carrier obligation to provide service within the McClellan industrial park in McClellan, Cal., while at the same time failing to seek third party, or "adverse," discontinuance of SERA's operating authority.

By decision served on April 23, 2012, the Board denied respondents' motion to dismiss the proceeding in its entirety and deferred the determination as to respondents' motion to dismiss the County and McClellan as parties to the complaint until after opening evidence and replies were filed. Evidence and arguments were submitted pursuant to a procedural schedule agreed to by the parties.

For the reasons discussed below, Sierra's complaint will be dismissed and the request to dismiss McClellan and the County as parties to the complaint will be denied as moot.

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

BACKGROUND

In 1995, the McClellan Air Force Base was ordered by the Department of Defense to be closed. As portions of the base were vacated, the base properties, including seven miles of railroad tracks within the facility, were conveyed to the County. In 1999, the County selected McClellan to develop, manage, and acquire the majority of the acreage and improvements located within the base properties (McClellan Park). In 2001, the County determined that its interest in developing McClellan Park for commercial purposes would be aided by the introduction of common carrier rail service. The County chose the Yolo Shortline Railroad (Yolo) (now, SERA)² to render common carrier rail service within McClellan Park and entered into a license and operating agreement with Yolo in 2001 (2001 licensing agreement).³ Yolo was granted “the exclusive license . . . to occupy, maintain, repair and operate” the rail facilities in McClellan Park.⁴ First Yolo, then SERA, rendered rail service on the line from 2001 to 2008.

In 2007, McClellan notified SERA that it would not renew SERA’s 2001 licensing agreement, which by its terms could be renewed annually, and would extend invitations to bid for the rendering of rail service to McClellan Park. The contract subsequently was awarded to SAV,⁵ and SAV entered into a licensing and operating agreement with McClellan (2008 licensing agreement).

Sierra asserts that SERA remains a rail carrier authorized to provide service on the lines in McClellan Park and that none of the respondents has sought an adverse discontinuance of service from the Board to terminate SERA’s Board authority to operate on the track. Sierra asserts that, notwithstanding that SERA continues to be a rail carrier authorized by the Board to operate on the lines, respondents will not allow SERA onto the tracks to fulfill its common carrier obligation.⁶ Sierra alleges it is an unreasonable practice for respondents to “deny SERA the right to operate on McClellan’s seven miles of railroad tracks, on the one hand, and, on the

² See Sierra R.R.—Acquis. of Control Exemption—Yolo Shortline R.R., FD 34351 (STB served June 11, 2003). In 2003, Yolo was renamed the Sierra Northern Railway.

³ Yolo Shortline R.R.—Acquis. & Operation Exemption—Cnty. of Sacramento, Cal., FD 34018 (STB served Mar. 27, 2001).

⁴ See Sierra Open. at 7.

⁵ See Sacramento Valley R.R.—Operation Exemption—McClellan Bus. Park LLC, FD 35117 (STB served Feb. 14, 2008). SAV’s parent company, Patriot Rail Corporation (Patriot), and Sierra are currently involved in litigation before the U.S. District Court for the Eastern District of California, in Patriot Rail Corp. v. Sierra Railroad Co., No. 2:09-cv-00009-MCE-EFB (E.D. Cal.). Among other things, Sierra alleges that Patriot relied on proprietary financial and operating data received from Sierra to organize SAV and bid against Sierra for the right to provide service to McClellan Park.

⁶ Compl. ¶ 20.

other hand, fail to file a third-party or adverse discontinuance application” to terminate SERA’s operating authority over those tracks.⁷

Respondents dispute Sierra’s claims, asserting that they were under no obligation to seek an adverse discontinuance of SERA’s operating authority, but rather SERA was required to seek discontinuance authority pursuant to the 2001 licensing agreement and 49 U.S.C. § 10903. Respondents also argue that they have not blocked SERA’s access to McClellan Park.

DISCUSSION AND CONCLUSIONS

Under 49 U.S.C. § 10702(2), a rail carrier must establish reasonable rules and practices for the transportation and service that it provides. Whether a particular practice is unreasonable depends upon the facts and circumstances of the case. See Ark. Elec. Coop. Corp.—Petition for Declaratory Order, FD 35305, slip op. at 5 (STB served Mar. 3, 2011).

Sierra argues that respondents have failed to maintain reasonable practices by granting SAV “the sole and exclusive” right to operate on the line, while failing to seek adverse discontinuance of SERA’s operations on the line.⁸ Sierra asserts that respondents “have made it evident that they will not allow SERA on the line to enable it to fulfill its common carrier obligation,”⁹ citing the “exclusive occupancy and operating rights” contemplated under the 2008 licensing agreement with SAV.¹⁰ By McClellan’s terminating the licensing agreement with SERA and granting SAV the exclusive license to operate in McClellan Park, Sierra maintains that respondents intend for SAV to be the sole authorized carrier on the line, and “want to be rid of SERA,” without seeking adverse discontinuance of SERA’s operations on the line.¹¹

We find that Sierra has presented no evidence that respondents have interfered with or impeded SERA’s common carrier obligation to provide service to shippers at McClellan Park. Sierra cites only the terms of the 2008 licensing agreement to suggest that, by replacing SERA with SAV as the “exclusive” licensee to operate on the lines in McClellan Park, respondents intend to keep SERA off the line. But declining to renew SERA’s 2001 licensing agreement and entering into a purportedly “exclusive” 2008 licensing agreement with SAV does not, without more, amount to an unreasonable interference with SERA’s ability to operate at McClellan Park. That is because once SERA became a common carrier operating there, it remains so and continues to have an obligation to provide service on reasonable request under 49 U.S.C. § 11101 unless and until it discontinues those operations pursuant to discontinuance authority granted by the Board under 49 U.S.C. § 10903. McClellan may have intended to terminate SERA’s licensing rights and for SAV to be the exclusive operator, but only the Board may

⁷ Id. at ¶ 21.

⁸ See Sierra Open. at 5.

⁹ Id.

¹⁰ Id. at 4.

¹¹ Id. at 10.

authorize discontinuance of SERA's operations, notwithstanding the termination of the 2001 operating agreement or execution of an "exclusive" 2008 licensing agreement with another carrier. See Thompson v. Tex. Mexican Ry., 328 U.S. 134, 144-45 (1946); Smith v. Hoboken R.R., 328 U.S. 123, 130 (1946); City of Peoria—Adverse Discontinuance—Pioneer Indus. Ry., AB 878, slip op. at 5-6 (STB served Aug. 10, 2005) (City of Peoria). No party has sought Board authorization to discontinue SERA's operations; thus, both SERA and SAV are rail carriers authorized by the Board to operate on the lines in McClellan Park. Accordingly, if SERA were to receive a reasonable request for service today from a shipper at McClellan Park, it would have not only the right, but the common carrier obligation, to provide such service, notwithstanding the absence of a licensing agreement between McClellan and Sierra and the existence of a purportedly "exclusive" licensing agreement between McClellan and SAV. In short, termination of the 2001 license agreement and execution of the 2008 license agreement with SAV do not impair SERA's right to continue to operate there.

If respondents want SAV to be the only authorized rail carrier on the line, they may seek third-party, or "adverse," discontinuance of SERA's operations on the line under 49 U.S.C. § 10903; but they need not do so if they are content to have two carriers, SERA and SAV, authorized to provide common carrier service to McClellan Park. Similarly, if SERA wishes to terminate its own common carrier obligation to provide service to McClellan Park, it may seek authority to discontinue operations under § 10903, but the statute does not require it to do so under the circumstances presented here.¹²

Nor do we find any other evidence to support Sierra's claim that respondents have failed to maintain reasonable practices. Beyond the fact that McClellan has entered into an "exclusive" operating agreement with SAV, Sierra provides no evidence to support its allegation that respondents will not allow SERA on the lines in McClellan Park. Nothing in the record indicates that there have been any reasonable requests for SERA's rail service since SAV began operating there or that respondents have interfered with SERA's ability to solicit or respond to such requests. Rather, respondents state, and Sierra does not refute, that no shipper served by SAV has requested service from SERA. Respondents further indicate a willingness to allow SERA to operate on the line through an operational protocol with SAV.¹³

¹² Respondents contend that § 15.1 of the 2001 licensing agreement requires SERA to take steps to terminate the operating authority granted to its predecessor, Yolo, in Docket No. FD 34351. See Respondents' Reply at 8-9. The question whether SERA has a contractual obligation to seek discontinuance authority from the Board is properly for a court of competent jurisdiction to decide as a matter of state contract law. See, e.g., Pyco Indus., Inc.—Feeder Line Application—Lines of S. Plains Switching, Ltd., FD 34890, slip op. at 10 (STB served Sept. 8, 2008) (finding that interpreting the terms of a purchase and sale agreement was a matter for a court applying state contract law); City of Peoria, slip op. at 6 (the Board does not undertake to enforce contracts).

¹³ Respondents Reply at 7.

Because we find that Sierra has failed to show that respondents have engaged in what would amount to unreasonable practices under 49 U.S.C. § 10702(2) in any event, we need not determine whether the County or McClellan are rail carriers subject to the Board's jurisdiction. Respondents' motion to dismiss the County and McClellan as parties to the complaint will be denied as moot.

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

It is ordered:

1. Sierra's complaint is dismissed.
2. Respondents' motion to dismiss McClellan and the County as parties to the complaint is denied as moot.
3. This decision is effective on its date of service.

By the Board, Chairman Elliott, Vice Chairman Mulvey, and Commissioner Begeman.