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SURFACE TRANSPORTATION BOARD

DECISION

Docket No. 41230

GS ROOFING PRODUCTS COMPANY, INC.,
BEAZER WEST, INC., D/B/A GIFFORD-HILL &
COMPANY, BEAN LUMBER COMPANY AND
CURT BEAN LUMBER COMPANY

v.

ARKANSAS MIDLAND RAILROAD AND
PINSLY RAILROAD COMPANY, INC.

Decided: March 5, 1997

The Board finds that carrier did not violate its duties under 49 U.S.C. 11101(a) in embargoing trackage on a branch line.

BY THE BOARD:

By complaint filed March 21, 1994,¹ GS Roofing Products Company, Inc. (GS Roofing), Beazer West, Inc. d/b/a/ Gifford-Hill & Company (Gifford-Hill), Bean Lumber Company (Bean), and Curt Bean Lumber Company (Curt Bean) (collectively the Shippers) allege that the Arkansas Midland Railroad (AMR) and AMR's parent corporation, Pinsly Railroad Company, Inc. (Pinsly), violated 49 U.S.C. 11101(a)² by failing to provide transportation or service

¹ The ICC Termination Act of 1995, Pub. L. 104-88, 109 Stat. 803 (ICCTA), abolished the Interstate Commerce Commission (ICC) and transferred certain rail functions and proceedings to the Surface Transportation Board (Board). Section 204(b)(1) of the ICCTA provides, in general, that proceedings pending before the ICC on January 1, 1996, shall be decided under the prior law, insofar as they involve functions retained by the ICCTA. This decision relates to a proceeding that was pending with the ICC prior to January 1, 1996, and to functions that are subject to Board jurisdiction pursuant to new 49 U.S.C. 11101. Thus, this decision applies the law in effect prior to the ICCTA, and citations are to the former sections of the statute, unless otherwise indicated.

² Old section 11101(a) provides, in pertinent part:

A common carrier providing transportation or service subject to the jurisdiction of the Interstate Commerce Commission . . . shall provide the transportation or service on reasonable request.

upon reasonable request over portions of the approximately 52-mile Norman Branch line³ in Arkansas⁴ that AMR had embargoed.⁵ They seek an award of damages in the amount of \$707,278.41, plus interest.⁶ On July 22, 1994, the Shippers filed their opening statement of facts and argument. On August 29, 1994, defendants AMR and Pinsly replied. On September 29, 1994, the Shippers filed their rebuttal statement. For the reasons discussed below, we find that AMR's failure to provide service between December 1993 and March 1994 was not unlawful; that there was no violation of section 11101(a); and that therefore neither AMR nor Pinsly is liable for damages.

BACKGROUND

AMR is a subsidiary of Pinsly, which owns other short line railroads in Arkansas and elsewhere.⁷ AMR purchased the Norman Branch line from what is now the Union Pacific Railroad Company (UP) in February 1992.⁸ The southern end of the Norman Branch connects with UP's main line at Gurdon, AR.

³ See Appendix A for a map of the Norman Branch line.

⁴ While the initial embargo was amended to include an additional line segment, for convenience we will simply refer to the "embargo" or the "embargoed line" in this decision.

⁵ An embargo is a notification to the railroad industry and affected shippers by a carrier that, in the carrier's opinion, a disability or interruption exists that temporarily prevents it from providing service or performing its duty as a common carrier. See ICC v. Chicago, Rock Island and Pac. R.R., 501 F.2d 908, 911 (8th Cir. 1974). As provided in the procedures of the Association of American Railroads (AAR) (AAR Circular TD-1, effective January 1, 1991), embargoes are issued by a railroad, through notice to the AAR, when the interference in operations or disability occurs. Embargoes, which do not require prior approval from the Board, allow carriers to cease operations immediately. Under Circular TD-1, embargoes may remain in effect for 1 year, unless canceled or amended by the carrier. During an embargo, the carrier's service obligation is temporarily excused, although the obligation is not extinguished until the carrier has received abandonment authority from the agency. Gibbons v. United States, 660 F.2d 1127, 1234 (7th Cir. 1981). The carrier may be liable for damages, but only if the embargo is found to be unreasonable.

⁶ The Shippers originally sought damages in the amount of \$760,528.16, plus interest, which represented approximately 25% of AMR's gross revenues for 1993. This figure was reduced in the Shippers' rebuttal statement.

⁷ The Shippers refer to the carrier as "AMR/Pinsly" because they allege that these companies are actually one and the same. However, the Shippers have not supported their position in this case. AMR and Pinsly are plainly separate corporate entities, and there is no basis on which to treat the two corporations as a single entity.

⁸ Arkansas Midland Railroad Company, Inc.--Acquisition and Operation Exemption--Missouri Pacific Railroad Company, Finance Docket No. 31999 (ICC served Mar. 6, 1992); Pinsly Railroad Company, Inc.--Continuance in Control Exemption--Arkansas Midland Railroad Company, Inc., Finance Docket No. 32001 (ICC served Mar. 6, 1992).

The principal shipper on the Norman Branch is International Paper Co. (IP), which is located on the southernmost portion of the line approximately 3 miles from the connection with UP. The Norman Branch also serves the five shippers located on the northern part of the line at Birds Mill, AR.⁹ The traffic generated by IP has been and continues to be steady. In contrast, the traffic generated by the other shippers, which is somewhat seasonal, declined 22% from 1992 to 1993.¹⁰

Condition of the Line. Prior to the sale to AMR, UP let the Norman Branch fall into substantial disrepair.¹¹ In December 1993, it was estimated that rehabilitation of the 49-mile northern portion would cost \$1.6 million, and that replacement of the most seriously damaged bridge components would cost between \$100,000 and \$120,000.¹² AMR spent \$650,000 on track improvements and repairs resulting from numerous derailments on the Norman Branch in 1992-1993, but track conditions on the line continued to deteriorate.¹³ Moreover, because of poor tie and ballast conditions and excessively worn rail, train speeds were restricted to 5 miles per hour (m.p.h.), requiring the use of two crews (instead of one, as AMR had anticipated) to meet daily

⁹ The five shippers include the four shippers who filed this action and Barksdale Lumber Company.

¹⁰ See the ICC Investigation Report dated February 10, 1994 (ICC Invest. Rept.). The ICC Invest. Rept., which was prepared in response to allegations by the Shippers that AMR had deprived them of essential rail service, was a principal basis for the ICC's decision not to "direct" service, but to authorize a substitute carrier to provide voluntary service over the embargoed portion of the line, with the approval of AMR, in Service Order No. 1516, discussed in more detail, infra. A copy of the narrative portion of the ICC Invest. Rept. is attached at Appendix B. The exhibits to the ICC Invest. Rept., which are lengthy, are not attached to this decision, but are available for review at the Board's, Office of Compliance and Enforcement, 1925 K Street, N.W., Room 780, Washington, DC 20423-0001.

¹¹ See, e.g., Request for the Rehabilitation of the Arkansas Midland Railroad, December 1992, submitted by the Arkansas State Highway and Transportation Department to the Federal Railroad Administration (FRA) at 6, 21-22 (stating that track, crossties, and roadbed were in poor condition and that maintenance had been deferred for several years); Verified Statement (V.S.) of John P. Levine, Vice President and Secretary of Pinsly at 3-5 (Attachment 1 to AMR's Statement of Facts and Argument).

¹² V.S. Levine at 5; November 24, 1993 Preliminary Inspection Report prepared by Osmose Wood Preserving Inc. (Osmose) (Attachment 3 to AMR's Statement of Facts and Argument).

¹³ Between February and December 1992, there were 17 derailments on the line. See ICC Invest. Rept. at 4-5.

service requirements.¹⁴ The poor condition of the track, as well as the decline in traffic, were largely responsible for AMR's system-wide 1993 pre-tax loss of approximately \$464,000.¹⁵

In 1993, in the face of worsening track conditions, declining carloads and revenues, and increasing losses, AMR sought assistance from the Federal and State governments, UP, and the Shippers.¹⁶ AMR received a commitment from the State of Arkansas to channel \$200,000 in Federal Assistance Grant funds to the rehabilitation of a portion of the line. However, that commitment was well short of the \$750,000 in assistance that AMR needed and had sought.¹⁷ Moreover, it was conditional, as it was directed at only the 20-mile portion in the middle of this marginal line, which it required be upgraded to what is known as FRA class 2 standards.¹⁸ UP agreed to increase AMR's portion of existing freight rates, but only by an amount that did not cover even the direct cost of operating the northern part of the line. AMR also discussed the sale of a portion of the line to one of the Shippers for net liquidation value (NLV), but the parties were not able to come to terms.¹⁹

The Embargo and its Aftermath. On December 3, 1993, a storm caused flooding, washouts, and landslides on the Norman Branch. On December 15, 1993, AMR notified the affected shippers and AAR that track conditions required it to embargo service to four

¹⁴ Id. at 5, 11; V.S. Levine at 4.

¹⁵ See AMR's Statement of Facts and Argument at 33.

¹⁶ V.S. Levine at 4-5.

¹⁷ See id. at 4-6; ICC Invest. Rept. at 5-6.

¹⁸ The FRA has adopted standards governing track safety. See 49 CFR part 213. Class 2 standards require that track be maintained at levels that permit operating speeds of up to 25 m.p.h. Class 1 standards require that track be maintained at levels that permit operating speeds of up to 10 m.p.h. Class 1 standards, because they represent the FRA's minimum safety levels, are the standards generally used to compute rehabilitation costs in abandonment cases (although carriers may use higher standards if they can justify them). See Southern Pacific Transp. Co.--Abandonment, 360 I.C.C. 138, 144 (1979). In certain limited circumstances, track owners may seek to be "excepted" from class 1 standards, as a result of which their maximum train speeds would be capped at less than 10 m.p.h. Because of the condition of excepted track, carriers operating over it are limited in the operations that they can conduct.

¹⁹ The offer was for only \$500,000, one-fifth the amount the shipper had offered UP for the same track in 1990. See letter dated November 19, 1993 to Tim Bean from Gary Hunter (Attachment 2 to AMR's Statement of Facts and Argument); letter dated January 13, 1994, to William K. Robbins from Gary Hunter (Attachment 6 to AMR's Statement of Facts and Argument); ICC Invest. Rept. at 19-21.

stations²⁰ located at or near the northern end of the line,²¹ thereby interrupting service to GS Roofing, Bean, and Curt Bean.²² On February 22, 1994, AMR embargoed an additional station to the south of the initially embargoed station due to track and bridge conditions, thereby interrupting service to Gifford-Hill.²³ However, AMR was able to continue to serve IP, which, as noted, is located on the southernmost portion of the line nearest the connection with UP, and was not affected by flooding.

Notwithstanding the embargo, AMR continued to try to resolve the problems on the line. AMR had secured commitments for rehabilitation (a commitment of 28,000 used relay ties from UP and a commitment of \$200,000 from Pinsly). Even with those additional resources, however, AMR still remained \$500,000 short of the \$1.6 million it believed was needed to rehabilitate the line.²⁴

On December 29, 1993, GS Roofing, the principal shipper on the embargoed line, filed a complaint with the ICC's Office of Compliance and Consumer Assistance (OCCA), alleging that the embargo had unlawfully deprived it of essential rail service. In response, OCCA assigned a special agent to make an on-site inspection of the Norman Branch.²⁵ The special agent reported that the general condition of the AMR track was poor and that the track was in need of significant and costly repairs.²⁶ Subsequently, the ICC, deferring to the primary jurisdiction of the FRA over railroad safety, requested that FRA inspect the northern portion of the line and provide a report on its condition. FRA's report, dated March 2, 1994 (FRA Report),²⁷ noted over 85 instances of non-compliance with FRA minimum track safety regulations and concluded that extensive rehabilitation would be necessary to bring the line up to FRA class 1 standards

²⁰ Amity, Rosboro, Glenwood, and Birds Mill, AR.

²¹ The reason given to the Shippers by the railroad was that, due to recent washouts and bridge problems, the track conditions made it no longer safe to operate over this portion of the line. See letter of December 15, 1993, attached to ICC Invest. Rept.

²² AMR Embargo No. 2-93.

²³ V.S. Levine at 6.

²⁴ Id. at 5.

²⁵ See Dardanelle & Russellville Railroad Company -- Authorized to Operate -- Lines of Arkansas Midland Railroad Company, Service Order No. 1516 (ICC served Mar. 28, 1994), slip op. at 1 (Service Order No. 1516).

²⁶ ICC Invest. Rept. at 9-11 (noting that AMR needed about 28,000 ties for rehabilitation, as well as extensive repairs to bridges, and that AMR would need about \$500,000 and 60-90 days to put the line back in service).

²⁷ A copy of the FRA Report is attached as Appendix C.

(10 m.p.h.). The FRA Report also concluded that, on certain segments of the line, there was a constant potential for failure and derailment.²⁸

Pinsly sent a proposal to each of the Shippers, notifying them of its willingness to make a capital contribution of \$200,000 if the Shippers agreed to pay a \$10 surcharge per car and assure the shipment of a certain number of cars.²⁹ According to Pinsly, the Shippers refused to contribute, through higher rates or traffic commitments, to the improvement of the track that served their respective facilities.³⁰ Moreover, the Shippers reportedly advised AMR that any rate discussions would have to be with UP, not with AMR, even though AMR was the serving carrier.

On February 18, 1994, AMR filed a system diagram map (SDM) with the ICC, on which it designated the entire Norman Branch as being a candidate for abandonment. Thereafter, AMR amended its SDM to modify the designation by removing the southernmost 3-mile portion of the line on which IP is located. That portion of the line was changed from a category 1 status, which designates a line as being a potential candidate for abandonment, to a category 5 status, meaning that the carrier had no plans to abandon that portion of the line. See 49 CFR 1152.10(b)(1) and (5).

The Shippers and certain carrier entities with which they were affiliated then filed three different actions at the ICC. First, the Caddo, Antoine, Little Missouri Railroad Company (CALM), a noncarrier subsidiary of the Dardanelle and Russellville Railroad Company (DRRC), filed a feeder line application under 49 U.S.C. 10910 (now 49 U.S.C. 10907) to

²⁸ Relying on 45 U.S.C. 41 (which has been recodified as 49 U.S.C. 20903), the Shippers assert that the FRA Report is not properly part of the record in this case. We disagree. Section 41 applies in civil actions for damages in cases in which the FRA has investigated collisions, derailments, or other accidents resulting in serious injury to a person or to the property of a railroad. See former 45 U.S.C. 40. The FRA Report involved here, which is not being used in a civil action for damages, and which did not involve an accident resulting in serious injury, was prepared at the request of the ICC in response to complaints by the Shippers that AMR should not have embargoed the line. The condition of the track--a matter as to which FRA has considerable expertise and primary responsibility--was directly relevant to the question of the reasonableness of the embargo. Moreover, inasmuch as directed service under 49 U.S.C. 11125 was being sought, the ICC was statutorily obligated to consider the FRA Report and its evaluation of the line's condition.

²⁹ V.S. Levine at 6-7; AMR's Statement of Facts and Argument at 12 & Attachments 11a-c.

³⁰ The Shippers claim that they did agree to pay a surcharge.

acquire the entire Norman Branch.³¹ Second, on March 18, 1994, as supplemented on March 22, 1994, DRRC and CALM requested that the ICC issue a directed service order pursuant to 49 U.S.C. 11125³² directing DRRC/CALM to begin immediate operations over the entire Norman Branch. Finally, the Shippers filed this damage action against AMR and Pinsky.

Service Order No. 1516. In Service Order No. 1516, the ICC, by decision served March 28, 1994, denied the request for a directed service order under 49 U.S.C. 11125 because the prerequisites of that statutory provision had not been met.³³ Pursuant to 49 U.S.C. 11123, however, the ICC authorized DRRC/CALM, based on its willingness to do so and AMR's willingness to permit it to do so, to provide voluntary interim service over the northern portion of the Norman Branch, including the portion affected by the embargo.³⁴ The ICC also authorized DRRC/CALM to enter into an agreement with AMR for trackage rights over the southern segment of the line on which AMR continued to serve IP, so that DRRC/CALM could interchange directly with UP.

In authorizing the service, the ICC noted (Service Order No. 1516, at 3-4) that AMR consented to the service order requested by DRRC/CALM and the Shippers, and that, before operations could commence, DRRC/CALM was required to certify to the ICC that it had made repairs to the damaged portions of the line and that, in its opinion, the line was safe to operate. Also, once operations began, DRRC/CALM's agreement with AMR required it to provide limited rehabilitation of the line. In addition, the ICC stated that, according to the terms of 49 U.S.C. 11123, DRRC/CALM would have to compensate AMR for the use of the line, including trackage rights over the approximately 3-mile southernmost portion of the line that AMR continued to operate.³⁵ As noted,

³¹ Caddo Antoine and Little Missouri Railroad Company -- Feeder Line Acquisition -- Arkansas Midland Railroad Company Line Between Gurdon and Birds Mill, AR, ICC Finance Docket No. 32479.

³² Pursuant to 49 U.S.C. 11125, the ICC could direct service when a carrier lacked the funds to operate; a court had ordered the cessation of operations; or the railroad had unlawfully discontinued operations. Under 49 U.S.C. 11125(b)(2), the ICC was expressly prohibited from directing service that would violate the Federal Railroad Safety Act of 1976.

³³ See id., and the decision served June 6, 1994, extending the service order, slip op. at 3. As particularly relevant here, the ICC found that there had not been an unlawful discontinuance of service.

³⁴ Section 11123 authorized the ICC to issue a 30-day service order (which could be extended) to remedy a transportation emergency resulting from a shortage of equipment, congestion of traffic, or other failure in traffic movement.

³⁵ The compensation for the use of the embargoed portion of the line was limited to maintenance expenses and indemnification of AMR from liability. We initially established the monetary compensation to be paid by DRRC/CALM for the trackage rights in
(continued...)

the ICC did not order directed service because it concluded that AMR's discontinuance of service had not been shown to be unlawful. See Service Order No. 1516 at 3.

DRRC/CALM began operations in April 1994, pursuant to the ICC service order.³⁶ DRRC/CALM's service continued until August 30, 1996, when it ceased operations. At the request of the Shippers, and with the consent of all parties, including AMR, we then amended Service Order No. 1516 and substituted the East Texas Central Railroad Company as the authorized operator.³⁷

The Feeder Line Proceeding.³⁸ As noted, CALM sought, through the feeder line provisions of the statute, to acquire the entire Norman Branch. The ICC, however, by decision served April 18, 1995, granted the feeder line application only as to the approximately 49-mile portion of the Norman Branch that AMR had sought to abandon. CALM declined to acquire that portion on the ground that those operations would not be profitable, and filed a petition for review of the ICC's decision in the United States Court of Appeals for the Eighth Circuit. On judicial review, the court set aside the ICC's decision permitting CALM to purchase only the northern portion under the feeder line provisions. The court remanded the feeder line proceeding for the Board to

³⁵(...continued)

Dardanelle & Russellville Railroad Company -- Trackage Rights Compensation -- Arkansas Midland Railroad Company, Finance Docket No. 32625 (STB served June 3, 1996 and Sept. 5, 1996). DRRC/CALM filed a petition for review of those compensation decisions in the United States Court of Appeals for the Eighth Circuit. Caddo Antoine and Little Missouri Railroad Company Et Al. v. STB Et Al. No. 96-3352 (filed September 9, 1996). The court granted our motion to hold the case in abeyance pending our consideration of DRRC/CALM's supplement to its administrative appeal, which had not been considered in our September 5, 1996 decision denying rehearing. By decision served December 23, 1996, in Finance Docket No. 32625, we reopened the compensation proceeding to stay the effect of our June 3, 1996, and September 5, 1996 decisions until the feeder line proceeding (which, as discussed below, has also been reopened) is resolved. The parties then stipulated that the petition for review filed in No. 96-3352 should be dismissed. The court granted the stipulation and dismissed that court case by order served January 22, 1997.

³⁶ AMR also continued to explore possible solutions to provide service on the line. See AMR's Statement of Facts and Argument at 15-19.

³⁷ East Texas Central Railroad Company -- Authorized to Operate -- Lines of Arkansas Midland Railroad Company, Supplemental Order No. 7 to Service Order No. 1516 (STB served September 24, 1996).

³⁸ Caddo Antoine and Little Missouri Railroad Company-- Feeder Line Acquisition--Arkansas Midland Railroad Company Line Between Gurdon and Birds Mill, AR, Finance Docket No. 32479.

consider the entire Norman Branch as a single line.³⁷ By decision served November 15, 1996, we reopened the feeder line proceeding and provided an opportunity for all interested parties to present their views on how the Board should proceed on remand when, as directed by the court, we treat the Norman Branch as a single line. That proceeding, which has no bearing on the reasonableness of the embargo--the question at issue here--is still pending.

DISCUSSION AND CONCLUSIONS

An embargo issued by a carrier justifies a cessation or limitation of service as a temporary measure when the carrier is of the view that it is unable to serve specific shipper locations and thus unable to perform its duty as a common carrier. Embargoes, which may be of varying duration, are quite common in the railroad industry, and, typically, they do not result in government intervention at all. They can be challenged, however, and in the rare case in which they are used improperly--for example, if they are used as a permanent measure to route or control traffic--a rail carrier may be liable for damages and/or an injunction. In addition, under its common carrier obligation, a railroad's primary responsibility is to restore safe and adequate service within a reasonable period of time over any line as to which it has not applied for abandonment authority. The curtailment of service beyond a reasonable time unaccompanied by an application to abandon can be construed to be an illegal abandonment.

The reasonableness of an embargo is determined by a balancing test. Overbrook Farmers Union - Petition for Declar. Order, 5 I.C.C.2d 316, 322 (1989) (Overbrook). Even a conclusion that the carrier's own negligence was the partial cause of the embargo does not require a finding that it is unlawful. General Foods Corp. v. Baker, 451 F. Supp. 873 (D. Md. 1978) (General Foods). Rather, reasonableness is determined by considering such factors as the length of the service cessation, the intent of the railroad, the cost of repairs, the amount of traffic on the line, and the financial condition of the carrier. ICC v. Baltimore and Annapolis Railroad Company, 398 F. Supp. 454 (D. Md. 1975), aff'd, 537 F.2d 77 (4th Cir.), cert. denied, 429 U.S. 859 (1976); Louisiana Railcar, Inc. v. Missouri Pacific R. Co., 5 I.C.C.2d 542, 545 (1989) (Louisiana Railcar). Often, the cost of repairs, compared both to the amount of traffic on the line and the financial condition of the carrier, has been critical to the conclusion. Overbrook, 5 I.C.C.2d at 323. Typically, an embargo is found to be invalid, or to constitute an unlawful abandonment, where the embargo is a long one, and the cost of repairs is not substantial. Id.

The embargo in this case was not extraordinary, and was of the type that would not ordinarily have come to our attention. Given the obvious animosity between AMR and the Shippers, however, virtually every difference of opinion seems to produce litigation, and, as a result, we have been asked to rule on this

³⁷ Caddo Antoine and Little Missouri R. Co. v. United States, 95 F.3d 740 (8th Cir. 1996).

matter. In applying the balancing historically used to determine reasonableness, we will look at two questions: (1) whether AMR's initial determination to impose an embargo was reasonable under the circumstances; and (2) whether AMR made all efforts that it reasonably could be expected to make to facilitate the reinstatement of service. We believe that the answer to both of these questions is yes, and hence that AMR should not be found to be liable for damages for the brief period during which no rail service was available.

A. The Imposition of the Embargo. At the outset, we find that AMR acted reasonably in imposing the embargo in the first place. As we have noted, under well established railroad procedures, the carrier decides in the first instance whether an unsafe condition exists that prevents it temporarily from providing service. Where, as here, we are called upon to review such a determination, we must defer to a carrier's opinion, so long as it is reasonable, as to whether a line is safe to operate at a given point in time. The evidence presented by both the Shippers and AMR shows that storm damage did occur; that it was substantial; that it aggravated the existing problems caused by the poor overall condition of the track; that adequate repairs would have been expensive; that AMR could not afford to make them; that the prospects for improved traffic or revenues over the line were dim; and thus that there was a reasonable basis for AMR's initial decision not to repair the line immediately, at least until it had an opportunity to determine whether to seek authority to abandon it or to make some other disposition of the property.

1. The Condition of the Track and the Cost of Repairs. The poor condition of the line at the time AMR bought it is confirmed by the Arkansas State Highway and Transportation Department's submission to the FRA in December 1992. The Shippers really do not contest AMR's assertion that the line was in bad shape when AMR bought it, and that it continued to deteriorate notwithstanding AMR's substantial investments shortly after buying it.³⁸ It is clear to us that, after the flooding, the already marginal track was not safe to operate.

Indeed, the FRA Report and the ICC Invest. Rept., both of which were based on site visits by impartial inspectors, identified track defects on the line that raised serious safety concerns. The ICC Invest. Rept. notes (at 9-11) that AMR needed about 28,000 ties for rehabilitation, as well as extensive repairs to bridges. FRA's report sets out over 85 instances of non-compliance with minimum FRA track safety regulations and concludes that extensive rehabilitation would be necessary even

³⁸ The Shippers do not challenge the fact that there were 17 derailments during an 11-month period in 1992. Moreover, they do not challenge the substantial expenditures undertaken by AMR during 1992 and 1993, but instead contend that the expenditures were for derailment repairs instead of maintenance or rehabilitation. Regardless of the Shippers' semantical arguments, the record supports AMR's contentions regarding the poor condition of the line and the carrier's willingness to attempt to address it.

to bring the line up to its class 1 (10 m.p.h.) standards. Some of the problems specifically noted in the FRA Report (at 3, 5) include bridge problems ("perform repair work of utmost importance on three bridges"); deteriorating rails ("the 75-pound rail . . . is deteriorating and developing internal defects leading to failure, sometimes under trains. It will not carry the 100-ton cars of rock and gravel without constant potential for failure and derailment"); and flood damage ("the current washouts resulted from an unusually high flood").

The Shippers argue that the FRA Report is entitled to little weight because it was keyed to FRA class 1 standards, while the Shippers sought only a restoration of the existing "excepted" service. But, as noted, class 1 standards are the FRA's minimum standards; they are the lowest standards to which the ICC and now the Board have looked in assessing rehabilitation costs in abandonment cases; and, notwithstanding the fact that a carrier may, in unusual circumstances, seek (at its own election) to operate under excepted standards, class 1 standards represent the minimum level of safety compliance at which a carrier can be required to operate. They are therefore the appropriate level to be used in the typical embargo proceeding.³⁹ Moreover, the statements in the FRA Report that "the line was in poor condition" and that "operations over the line in its current condition would likely result in derailments" refer to excepted track. The fact that numerous derailments occurred on the line both before and during DRRC/CALM's common carrier operations under Service Order 1516,⁴⁰ and that the \$200,000 Federal assistance offer was contingent on an upgrading of a substantial portion of the line to class 2 standards, supports AMR's contention that the restoration of excepted service on this line would have been inadequate, at least in the long run, with a substantial risk of derailment and a loss of operating efficiencies.

We also find that AMR acted reasonably in not repairing the line immediately, in light of the substantial rehabilitation costs necessary for safe and economical operations. At the time of the embargo, AMR's personnel estimated that rehabilitation of the 49-mile portion of the line on which the Shippers are located would cost \$1.6 million, while a private contractor estimated

³⁹ We recognize that, in Louisiana Railcar, 5 I.C.C.2d at 546, the ICC found that the carrier could have returned the line to service by rehabilitating it to FRA excepted track standards. In contrast to this case, however, that line "was satisfactorily operated at excepted levels prior to the embargo." Id. Here, of course, the operations--which involved very heavy shipments moving over very dangerous track--were marginal before the embargo, as reflected by the numerous derailments that occurred (and have continued to occur). Moreover, we note that, in Louisiana Railcar, the ICC found that the \$18,000 cost of restoration was "an amount that [the railroad], a large Class I carrier, could afford." Id. Here, as discussed below, the cost of rehabilitation is significantly higher, and AMR is a small short line railroad with few of the resources available to a Class I carrier.

⁴⁰ V.S. Levine at 7.

that repair or replacement of the most seriously deteriorated bridge components would cost between \$100,000 and \$120,000.⁴¹ The ICC Invest. Rept. also identified significant rehabilitation costs (\$500,000 to put the line back into service and as much as \$3 million to bring the track to FRA class 2 standards), and \$125,000 to correct the drainage problems along the line from Pike Junction, AR to Birds Mill. The FRA Report does not estimate the cost of the repairs it suggests, but it is quite apparent that the cost will be substantial. Finally, we cannot ignore AMR's concern about the fact that, unless the line were repaired to a level that would permit speeds sufficient to accommodate a single crew, substantially higher rates would be needed to make continued operations economically feasible.

The Shippers argue that the embargo was "contrived," because the flood damage to the line was not severe, and AMR's descriptions of the bridge and track deterioration were overstated. To support this contention, DRRC/CALM's president, William K. Robbins, Jr., stated that two small washouts on the line required "less than four hours" to repair; that DRRC/CALM's total repair time was 3 weeks; and that its total repair cost was less than \$10,000.⁴² In Mr. Robbins' opinion, the storm damage could have been repaired before the first embargo was imposed.⁴³ The Shippers also maintain that, in fact, the track conditions were better on the northern segment of the line that was initially embargoed than on the remainder of the Norman Branch.⁴⁴ They also allege that AMR removed numerous cars that had previously been delivered to the Shippers from the line in mid-December.⁴⁵ Thus, they conclude that, despite the storm damage,

⁴¹ V.S. Levine at 5; November 24, 1993 Preliminary Inspection Report prepared by Osmose. Although they characterize the Osmose report differently, the Shippers do not dispute the fact that substantial rehabilitation expenses will be required for necessary bridge repairs. See V.S. Ron Finkbeiner at 3 (Complainants' Opening Statement, Vol. II, Attachment D).

⁴² See V.S. William K. Robbins at 6 (Complainants' Opening Statement, Vol. II, Attachment F).

⁴³ Id.

⁴⁴ V.S. Finkbeiner at 3.

⁴⁵ Specifically, GS Roofing states that, on the very day that it was advised of the embargo, and advised that service north of milepost 477 would be halted, AMR moved locomotives over the line to remove approximately 25 or 30 cars from GS Roofing's facility. See V.S. John W. Smith at 6 (Complainants' Opening Statement, Vol. II, Attachment A). Not noted, however, was that the cars removed from the line were empty cars, not loaded cars. See ICC Invest. Rept. Obviously, empty cars can be transported over questionable track more easily than cars loaded with the extremely heavy commodities such as those shipped by the Shippers. The fact that AMR removed its empty cars is of no relevance to whether continued operations of heavily loaded cars were feasible.

transportation was possible over the washed-out segments of the line.⁴⁶

The Shippers have not made their case. The argument that \$10,000 and 3 weeks of work is all that was required here is refuted by the fact that DRRC/CALM itself had proposed to spend \$1.15 million in its first year of operation and \$800,000 in its second year under its plan submitted in the feeder line application proceeding.⁴⁷ Moreover, the derailments that AMR experienced and that DRRC/CALM continued to experience during its operation of the line support AMR's argument that the cost of properly rehabilitating the line has been vastly understated by the Shippers. AMR did not act unreasonably in eschewing the temporary fixes that DRRC/CALM applied to address the washouts, and the continual subsequent problems on the line. Particularly given the initiative assigned to the operating railroad in determining whether or not to embargo a line, the fact that the Shipper-owned DRRC/CALM elected to perform only minimal work before it began operating, to address derailments as they occurred (all too frequently), and to apply "band-aids" as it went along is not determinative of the reasonableness of AMR's conclusion that more would be needed--even in the short run--by a going concern such as AMR.⁴⁸

2. AMR's Intent. The Shippers contend that the real reason that AMR imposed the embargo was unilaterally to terminate service on the unprofitable portion of the Norman Branch, while retaining the profitable southernmost portion of the line to serve IP.⁴⁹ But that argument is belied by credible evidence, which we have already chronicled in considerable detail, that AMR tried to resolve the problems on the entire line, both in terms of its revenue needs and maintenance, and to provide reliable and safe transportation over it.⁵⁰ As the record shows, AMR made

⁴⁶ See V.S. Bradley Batson at 2 (Complainants' Opening Statement, Vol II, Attachment H).

⁴⁷ See Shippers Comments in the feeder line proceeding, Vol. IA, V.S. William K. Robbins (June 13, 1994).

⁴⁸ The fact that the ICC authorized DRRC/CALM to operate over the line in Service Order No. 1516 does not discredit the evidence showing that the overall condition of the line was poor and that significant rehabilitation was required. In issuing the voluntary service order, the ICC noted that, before operations could begin, DRRC/CALM was required to notify the ICC that it had made repairs to the damaged portions of the line and to certify that the line was, in its opinion, safe to operate. DRRC/CALM's determination to make only minimal repairs does not indicate that the line is in fact safe or that AMR should have made or supported the types of repairs apparently made by DRRC/CALM.

⁴⁹ See V.S. Roy Martin at 5-6 (Complainants' Opening Statement, Vol. II, Attachment I).

⁵⁰ Thus, the cases suggesting that a carrier can be held liable even in the case of an act of God where the carrier has been negligent or directly responsible for track conditions are
(continued...)

numerous efforts to secure adequate funding, and revenue and volume commitments from the Shippers, so that it could upgrade the line to what AMR believed would be a reasonably serviceable level. AMR, however, was unable to obtain enough assistance from outside sources, or assurances from shippers of increased revenues and traffic volume needed to make the operations compensatory. AMR eventually concluded that there was little chance of operating the embargoed portion of the line successfully, and hence little basis for expending the substantial sums necessary to repair it properly. Its determination, which was consistent with the determination that any prudent business would have made, not to commit substantial funds without first exploring other options, including abandonment, was reasonable.

The Shippers, on the other hand, suggest a contrived embargo designed to force an abandonment. But in our view, this case is substantially similar to many other cases in which a carrier first (lawfully) embargoes a line, and then (lawfully) obtains authority to abandon it.⁵¹ It is well settled that a carrier cannot legitimately be required to expend money to rehabilitate a line where it will lose money on the operation. Purcell v.

⁵⁰(...continued)

inapposite here. E.g., Johnson v. Chicago, Milwaukee, St. Paul & Pacific R. Co., 400 F.2d 968, 972 (9th Cir. 1968); ICC v. St. Johnsbury & Lamoille County Railroad, 403 F. Supp. 903 (D. Vt. 1973). See also Overbrook, 5 I.C.C.2d at 322, citing General Foods (conclusion that carrier negligence was the partial cause of the embargo does not require a finding that the embargo is unlawful).

⁵¹ See, e.g., Consolidated Rail Corporation -- Abandonment Exemption -- In Northampton County, PA, STB Docket No. AB-167 (Sub-No. 1163X) (STB served Dec. 20, 1996) (granting petition for abandonment exemption where railroad estimated it would cost approximately \$498,930 to restore the line to service); Dakota, Minnesota & Eastern Railroad Corporation -- Abandonment Exemption -- In Wabasha and Olmsted Counties, MN, STB Docket No. AB-337 (Sub-No. 5X) (STB served Dec. 16, 1996) (authorizing abandonment of line embargoed since 1995 where railroad estimated rehabilitation costs of \$1,038,347 to restore the line to service); Wheeling & Lake Erie Railway Company -- Abandonment Exemption -- In Huron County, OH, STB Docket No. AB-227 (Sub-No. 8X) (STB served Dec. 5, 1996) (same result in case where railroad estimated it would cost approximately \$400,000 to repair flood damage and bring the line to FRA class 1 standards); Indiana Hi-Rail Corporation -- Abandonment Exemption -- Between Newton and Browns IL, STB Docket No. AB-336 (Sub-No. 4X) (STB served May 3, 1996) (continued operation of line not justified where line had been embargoed for more than a year and bankrupt carrier lacked resources to make needed repairs estimated to cost \$500,000 - \$1.5 million); Consolidated Rail Corporation -- Abandonment Exemption -- In Bergen and Passaic Counties, NJ, ICC Docket No. AB-167 (Sub-No. 1151X) (STB served May 23, 1996) (authorizing abandonment of line embargoed since March 1995 due to unsafe track conditions where railroad indicated it would cost \$180,948 to rehabilitate a portion of the track and that the pre-embargo level of traffic did not justify rehabilitation expense).

United States, 315 U.S. 381, 385 (1942) ("When materials and labor are devoted to the [re]building of a line in an amount that cannot be justified in terms of the reasonably predictable revenues, there is ample ground to support a conclusion that the expenditures are wasteful whoever foots the bill."). Cf. Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co., 450 U.S. 311, 325 (1981) (carrier authorized to abandon a line damaged by mud slides rather than repair it; duty to serve is not absolute, but rather, the law exacts only what is reasonable of the railroad under the existing circumstances). It has long been recognized that this view has a Constitutional dimension. See Brooks-Scanlon Co. v. R.R. Commission of Louisiana, 251 U.S. 396, 397-99 (1921) (to compel a carrier "to carry . . . at a loss" could "deprive [it] of its property without due process"); accord, Bullock v. R.R. Commission of Florida, 254 U.S. 513 (1921); R.R. Commission of Texas v. Eastern Texas R.R., 264 U.S. 79 (1924).

We would not presume to prejudge the result of any abandonment application that may someday be filed as to all or part of this line. Insofar as the reasonableness of AMR's actions are concerned, however, it is clear that rehabilitation costs would have been substantial, and that the Shippers were unwilling or unable to provide enough support to make AMR's operations worthwhile. Thus, viewed through AMR's eyes, it was perfectly rational not to sink any new money into the operation before reviewing the situation and the options available. The fact that, shortly after imposing the embargo, the carrier indicated its intent to abandon all or part of the line supports the reasonableness of its decision not to rehabilitate it immediately.

3. The Shippers and the Amount of Traffic on the Line. Another of the criteria to be considered in assessing the reasonableness of the embargo is the amount and type of traffic on the line. The traffic over the embargoed portion of the line is minimal, and certainly inadequate to warrant substantial repairs without a thorough review of the options available. Only five shippers are located on the 49-mile northern portion of the approximately 52-mile line, the largest of which is at the far end of the line. The rail traffic of those shippers has declined significantly since AMR acquired the line, and in fact, only one of the Shippers is totally dependent on rail service for as much as 75% of its shipments.⁵² Indeed, the record shows that certain Shippers (including G.S. Roofing, the largest affected shipper) used truck transportation as a matter of course during the period of the embargo, because it was their normal slow period, not because rail transportation was unavailable.⁵³ Given the Shippers' apparent inability to make adequate traffic commitments, AMR reasonably decided not to repair the line before exploring its options, inasmuch as the prospect of increased

⁵² For example, only 20% of Barksdale Lumber's total volume (70 carloads during 1993) was shipped by rail. See ICC Invest. Rept. at 16.

⁵³ Specifically, G.S. Roofing stated that the months from December to February are slow and that it can get by with loading trucks for those months. It does not need rail service until March, when its business increases. See Invest. Rept. at 14.

traffic levels that would justify substantial rehabilitation expenditures was dim.

4. AMR's Financial Condition. Another of the criteria to be considered is the financial condition of the carrier imposing the embargo. AMR is a struggling Class III carrier with limited financial resources.⁵⁴ It sought increased rates and traffic commitments from the Shippers, but they were unable or unwilling to provide enough assistance.⁵⁵ Without substantial additional revenues, it would have been impossible for the carrier to have supported the cost of the necessary repairs, which would have been significant even assuming arguendo that the line could have been safely operated if something less than a rehabilitation to FRA's class 1 or 2 standards had been achieved.

B. The Length of the Embargo. Having concluded that the embargo was not unlawful when it was first imposed, we must now consider whether the embargo was in place for too long, and whether the carrier did too little to try to resolve the situation. Here, the embargo was initiated in mid-December; an intent to abandon was announced by mid-February; and a new operator was announced by the end of March. That means that the embargo was in place for only 2 months before the carrier publicly announced its intentions to no longer provide service itself,⁵⁶ and for only slightly more than 3 months before a new operator had been found. The ICC Invest. Rept. noted that AMR would need about 60-90 days to put the line back into service. Thus, even if work had begun right away, the length of the embargo would not likely have been substantially shorter than the embargo that the Shippers now claim was unreasonable.

⁵⁴ AMR states that it suffered a 25% decline in revenues during its first 2 years of operation; the loss in 1993 amounted to \$464,000 based on revenues of just over \$3 million.

⁵⁵ The Shippers criticize AMR's efforts to secure their assistance through rate and traffic commitments as an alternative to a sale of the embargoed segment to a qualified purchaser for NLV or a request to the ICC for authority to abandon that portion of the line. It is well settled, however, that a surcharge (or request that a shipper guarantee a certain level of traffic) is not per se unlawful, even if its effect will be to eliminate the movement of traffic from the line. City of Cherokee v. ICC, 671 F.2d 1080, 1084 (8th Cir. 1982); Mississippi Public Service Commission v. ICC, 662 F.2d 314, 317 (5th Cir. 1981).

⁵⁶ The Shippers are correct that AMR could have indicated an intention to seek abandonment authority earlier. But that does not mean that the embargo became unlawful because the railroad decided to wait until February 1994 to list the embargoed portion of the line as a candidate for abandonment on its SDM. As AMR states, it properly used the time between the December 3rd flooding and February 1994 to assess the damage to the line, determine what it would take to rehabilitate the line so as to not compromise safety, and explore other options, including a sale of the embargoed portion to one of the Shippers for NLV.

Moreover, beginning in January 1994, just about a month after the embargo began, there were substantive discussions between AMR, DRRC/CALM, and affected shippers aimed at reaching an agreement that would allow DRRC/CALM to substitute for AMR as the operator over the embargoed portion. The presumption of these discussions was that there would not be a violation of section 11101, but instead the establishment of an agreement by which DRRC/CALM would succeed AMR. As noted, Service Order No. 1516 accomplished that substitution of operations, conditioned upon DRRC/CALM's representation to the ICC that the line had been made, in its opinion, safe to operate.

Thus, all of the circumstances demonstrate that AMR's intent here plainly was not to leave the line in an embargoed status indefinitely. As noted, the record shows that AMR sought a lessee/purchaser to continue rail service on the embargoed line. Furthermore, AMR was open to arrangements with DRRC/CALM to operate under Service Order No. 1516, which took effect on March 29, 1994, approximately 3 months after the initial embargo and only 11 days after DRRC/CALM and the Shippers had requested ICC authority to restore service over the line.⁵⁷ Accordingly, the service interruption lasted only one month with respect to Gifford-Hill and approximately 3 months for the other Shippers. Typically, embargoes that have been found to be unlawful have been in force much longer.⁵⁸

SUMMARY

In sum, consistent with decisions such as Overbrook and Louisiana Railcar, we have balanced the length of the out-of-service period, the apparent intent of the railroad, the cost of required repairs, the amount of traffic and the Shippers' needs, and the financial ability of the carrier to make repairs in determining whether the embargo and its continuation were justified. The balancing test as applied to the circumstances of this case persuades us that here, the cessation of service was warranted initially and at no point became unreasonable. Accordingly, we find no violation of section 11101(a) in this case, and hence no basis for damages.⁵⁹

⁵⁷ AMR also agreed to subsequent extensions of the service order and to the substitution of another carrier after DRRC/CALM ceased its operations.

⁵⁸ Compare Ethan Allen, Inc. v. Maine Cent. R. Co., 431 F. Supp. 740, (D. Vt. 1977) (railroad liable for damages in case where a line was embargoed, several months elapsed before repairs were begun or the embargo was lifted, and the ICC commenced a civil action seeking to enjoin the railroad from an alleged illegal abandonment); Overbrook (embargo unlawful where embargo continued for almost 3 years, despite the shipper's protestations and offers of financial assistance); Louisiana Railcar (violation of section 11101 based on unlawful embargo lasting 19 months).

⁵⁹ We thus do not need to calculate an appropriate level of damages. We note that the damages requested by the Shippers--including attorneys fees, lost profits, and the cost of constructing a transloading facility--appear excessive in light
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This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. The complaint and the request for damages are denied.
2. This proceeding is discontinued.
3. This decision is effective on the date of service.

By the Board, Chairman Morgan and Vice Chairman Owen.

Vernon A. Williams
Secretary

⁵⁹(...continued)
of the Shippers' regular use of alternative transportation as a matter of course.