

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 34479

ARKANSAS MIDLAND RAILROAD COMPANY, INC.–ALTERNATIVE RAIL SERVICE–  
LINE OF DELTA SOUTHERN RAILROAD, INC.

Decided: March 11, 2004

On February 20, 2004, Arkansas Midland Railroad Company (AKMD or petitioner) filed a petition pursuant 49 U.S.C. 11123 and 49 CFR part 1146,<sup>1</sup> seeking an emergency service order for it to provide interim rail service for an initial period of 30 days and a total period of not more than 270 days on a Union Pacific Railroad Company (UP)-owned line from milepost 422.32 in Dermott, AR, to milepost 461.74 at Warren, AR, a distance of about 39.42 miles (the Warren Line or Line). AKMD states that the petition has the support and endorsement of UP, the Potlatch Corporation (Potlatch), Fulghum Fibres Company (Fulghum), and the Warren & Saline River Railroad Company (WSR). The line is currently leased to Delta Southern Railroad, Inc. (Delta), and Delta currently has the exclusive right to operate the Line under a 20-year lease with UP dated September 21, 1997. The petition will be granted unless, by March 18, 2004, Delta certifies to the Board and all parties and shippers that it has taken all steps necessary and is fully serving all customers on the Line.

BACKGROUND

The Delta Southern Railroad Company (Old Delta) leased the Warren Line from UP in 1997. Delta Southern Railroad Company – Lease and Operation Exemption – Delta Southern Railroad – Union Pacific Railroad Company, STB Finance Docket No. 33451 (STB served Sept. 23, 1997). Delta acquired assets of Old Delta in 1999. Delta Southern Railroad, Inc. – Acquisition and Operation Exemption – Delta Southern Railroad Company, STB Finance Docket No. 33802 (STB served Oct. 20, 1999). The Warren Line generates about 6,000 carloads of traffic per year, the great majority (5,500 carloads) coming from Potlatch (outbound lumber and woodchips) and Fulghum (outbound woodchips). Fulghum is served directly by Delta. Potlatch is served by WSR, a wholly owned switching carrier subsidiary of Potlatch that exchanges railcars with Delta at Warren. There are two other active shippers at Warren and two active (as well as two currently inactive) shippers at Monticello, AR.

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<sup>1</sup> These rules were adopted in Expedited Relief for Service Inadequacies, 3 S.T.B. 968 (1998) (Service Inadequacies).

## ARGUMENTS OF PARTIES

AKMD petition. According to petitioner, Delta “has functionally ceased operations on the Warren Line, and no shipper on the line has received rail service for at least two weeks.” Petition at 1. Delta originally provided service on the Line 5 days a week, but in 1999 reduced the frequency of service to shippers to 3 days a week. AKMD asserts that the “level of rail service . . . has deteriorated steadily in recent months, and particularly since December [Delta] operations on the Warren Line no longer appear to be sustainable.” Petition at 4. According to AKMD, service to shippers has been disrupted on numerous occasions due to a series of derailments, and Delta has failed to make adequate repairs on the Line to prevent further derailments. Petitioner states that a train derailed on January 12, 2004, and Delta did not resume operations until January 16. Delta lost its insurance on January 20, 2004, and again suspended operations. After receiving partial replacement insurance, Delta resumed operations on January 22, but derailed another 3 cars on that day and for most of the next week failed to spot empty cars for loading. AKMD asserts that Delta has been unable to obtain insurance for lading, rolling stock damage, or liability,<sup>2</sup> and will likely be unable to do so. On January 28, Delta overturned another 2 cars and again suspended operations. Petitioner claims that Delta provided rail service to Potlatch for just 8 days in January. Petitioner states that, because of Delta’s lack of insurance, substandard maintenance, and failure to provide service, UP has given notice to Delta that its lease will be terminated in 30 days if Delta is unable to cure the deficiencies.

Petitioner states that Potlatch has had no rail service since February 2, 2004, and Delta has apparently provided no service on the Warren Line since February 6, 2004, when Delta issued an embargo with “track conditions” as the cause. Delta cancelled the embargo on the same day but failed to resume rail service on the Line. Because of the lack of service on the Warren Line, Fulghum and Potlatch have diverted all of their traffic to trucks, with a resulting increase of more than 90 trucks a day on local roads.

In a pleading filed on February 24, 2004, AKMD indicated that the Federal Railroad Administration (FRA) had recently inspected the Line and determined that it did not meet FRA Class 1 track maintenance standards. The inspection involved the eastern 20 miles of the 39-mile Warren Line and found 80 track defects. AKMD asserts that 20 of the defects continued for “an extended period of time” and formal violations and civil penalties against Delta were recommended by the FRA inspectors. AKMD also submits that the last operable Delta locomotive on the Line was taken out of service at the direction of FRA inspectors.

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<sup>2</sup> Petitioner also refers to the missing insurance as equipment and cargo insurance. Delta refers to the insurance as derailment and bill of lading insurance and Foreign Rolling Stock Cover. All of these terms will be used.

Delta reply. In its reply, Delta calls the petition “unwarranted and premature” and asks the Board to deny AKMD’s request as contrary to the regulations and an intrusion on Delta’s leasehold rights. Delta asserts that, when it assumed operations in 1997, track conditions were poor, with 70% of the Line below Class 1 condition, and that the Line is difficult to maintain because of the spongy nature of the soil and the relatively high water table. Consequently, Delta states that to keep the track in satisfactory condition, it must continually add rock to the roadbed and resurface the track, and that the Line is susceptible to flooding and flood-related damage. Moreover, Delta asserts that most of the track has noncontrol cooled jointed rail, which makes it more liable to rail breakage, and it cannot handle freight cars that weigh more than 263,000 pounds.

Delta claims that it has not ceased operations. It maintains that UP directed it to suspend operations until it acquires derailment and bill of lading insurance. Delta states that it “is in the process of repairing defective track and obtaining derailment and bill of lading insurance. It has locomotives and personnel in place and is ready to resume service as soon as customers are ready to return to using rail.” Affidavit of Delta President William P. Wainright at 2.

Delta asserts that it is a profitable company and its loss of derailment and bill of lading insurance was due to what it admits was an excessive number of derailments (9 between March 2, 2003, and January 28, 2004, caused by the 286,000-pound freight cars and overloaded woodchip cars)<sup>3</sup> and not by financial problems. Delta claims that it has not lost all insurance coverage<sup>4</sup> but rather only derailment and bill of lading insurance as of January 20, 2004. It states that it is working diligently to acquire this insurance, which it hopes will be in place within several days. In the interim, it is self-insuring with a \$220,000 line of credit.

Delta states that operations were temporarily suspended as of February 9, 2004. It “has undertaken a major track program costing about \$90,000 to restore the Line to FRA [Class 1] condition.” Wainright affidavit at 3. Delta states that the project is about two-thirds complete and will be finished before the middle of March 2004. Then, Delta asserts that it “should be able to provide reliable service provided that customers do not order 286,000 pound freight cars or overload lighter cars.” Id. (citations omitted).

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<sup>3</sup> Delta asserts that, after each derailment, the line was never out of service for more than 2 days.

<sup>4</sup> Delta states that it “continues to carry the normal general liability and other forms of coverage short line railroads normally have . . . . The only portion of the ‘normal’ liability coverages deleted . . . are Bill of Lading and Foreign Rolling Stock Cover.” Affidavit of Louis M. Schillinger at 2.

UP has advised Delta that it considered Delta in default of its lease. Under the lease, Delta has 30 days, until March 18, 2004, to cure. According to Delta, the reasons for the default are failure to maintain the premises and failure to acquire the required insurance. Delta asserts that it is working diligently to restore the Line and acquire insurance.

Delta asserts that, under the Board's regulations at 49 CFR 1146, a petition must show a substantial measurable service deterioration or other demonstrated service inadequacy by the incumbent carrier, and provide a summary of discussions by petitioner with the incumbent carrier concerning service problems and the reasons why the incumbent carrier is unlikely to restore adequate rail service consistent with current transportation needs within a reasonable period of time. Delta argues that the petition fails these two tests. First, concerning issue of service deterioration or inadequacy, Delta acknowledges that it has had service problems since about December 2003 and it had some isolated problems before that. Delta, however, states that it "has spent the past several weeks restoring its railroad to a [Class 1] track standard and working to locate derailment and bill of lading insurance. . . . [Delta] has engines and personnel ready to resume service when its two principal customers are ready to shift back to rail service." Reply at 8-9 (citation omitted).

Second, concerning the summary of discussions with the incumbent carrier, Delta asserts that "[p]etitioner AKMD has not made any attempt to meet with [Delta] to discuss service." Reply at 9. Delta also asserts that the first time that Potlatch voiced significant concerns about Delta's quality of service was in a conference call around February 11 or 12. Delta also contends that UP did not express its concerns about service quality until a few weeks before giving default notice.

Delta argues that the petition is premature because, under the lease, Delta has a right to cure until March 18. By that time Delta believes that it will be in full compliance with the lease terms. It asks the Board to deny AKMD's petition at this time and to encourage UP, Potlatch, and Fulghum to meet with Delta to work with it cooperatively on a longer term basis.

Rebuttal. AKMD and UP filed rebuttal evidence. AKMD submits that Delta does not strongly deny that there has been a "substantial, measurable deterioration or other demonstrated inadequacy" in its rail service on the Line in recent months. The Line, according to petitioner, has been effectively shut down since early February. AKMD also claims that Delta is unlikely to restore adequate rail service.

Petitioner asserts that Delta has been without equipment and cargo insurance for over 6 weeks. AKMD argues that Delta is unlikely to get the necessary insurance, and an uninsurable carrier should not be declared the best the shippers on the Line can expect.

AKMD disputes Delta's assertion about the progress of its rehabilitation. UP completed an all-day physical inspection of the entire Line on February 26, 2004. UP "reports that no on-

going track maintenance or repair work was occurring on the [L]ine at the time and that no substantial repairs were in evidence. The track does not comply with FRA Class 1 track standards in several broad categories at many locations.” Rebuttal at 4. AKMD argues that, whatever Delta may be doing on the Line, it is inadequate to permit the resumption of any safe and meaningful rail service on the Line.

AKMD states that the February 12, 2004 FRA track inspection report found 20 safety violations on half the Line for “rail joints that have no bolt holes drilled into one rail end.” The FRA report stated that 20 “violations are recommended with civil penalties.” These violations, argues AKMD, were not caused by overloaded or misloaded cars, but by Delta’s inadequate track maintenance standards and procedures.

AKMD also disputes Delta’s assertion that derailments and poor track conditions are caused by overloaded cars. Potlatch presented evidence of actual weights of woodchip cars, showing that only an occasional car exceeds 263,000 pounds. UP submits that, while some rail cars have the capacity of 286,000 pounds (lading plus tare), their loads never reach this maximum because the lumber hauled cannot take full advantage of the weight carrying capability of the car. UP presented evidence of 188 weighed cars; none were at 286,000 pounds, only 4 were above 268,000 pounds, and the vast majority of cars were under 263,000 pounds.

AKMD disputes Delta’s claim to be ready to resume service. Petitioner submits that Potlatch has 9 loaded cars that were tendered to Delta on January 29, 2004, and that remain sitting on Delta track. Two other loaded rail cars shipped by Potlatch 3 and 4 months ago allegedly remain in sidings along the Delta. AKMD states that Delta has embargoed another of its Arkansas lines, and it questions how Delta can deal effectively with two service crises at the same time.

#### DISCUSSION AND CONCLUSION

The Board is prepared to grant the relief sought by AKMD for 30 days under 49 U.S.C. 11123 and 49 CFR 1146,<sup>5</sup> unless, by March 18, 2004, Delta has certified to the Board and to the all parties and shippers that it has taken all steps necessary and is fully serving all customers on the Line. The Board will issue an order immediately thereafter, indicating either that Delta is in compliance with the requirements of this decision or that AKMD may begin operations on the Line. This decision is being issued in response to the demonstrated service deterioration and inadequacy on the Line on the one hand, and in light of the March 18, 2004 cure date, to provide

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<sup>5</sup> This relief is subject to both a reappraisal requirement after the initial 30-day period and a maximum 270-day time limit. 49 U.S.C. 11123(c)(1).

Delta the opportunity to meet its assertions that it is working diligently to restore service and acquire insurance and will soon be able to provide service to shippers.

Here, petitioner has shown that alternative service relief is justified. Section 1146 is intended to “handl[e] requests for localized immediate service relief,” Service Inadequacies, 3 S.T.B. at 972, n.11, and AKMD has shown “a substantial, measurable deterioration or other demonstrated inadequacy in rail service provided by the incumbent carrier.” 49 CFR 1146.1(a). Delta’s operations have deteriorated since December. Derailments have resulted in repeated interruptions of service, although overloaded cars do not appear to be a major problem on the Line. Delta has lost insurance and has not obtained coverage that would meet its obligations to compensate shippers for lading lost and connecting freight carriers for freight car damage. Delta has suspended its operation of the Line. The two identified shippers on the Line generate a significant amount of traffic – about 6,000 cars of rail traffic per year – which has been diverted to motor carriers (about 90 trucks a day) to the detriment of the shippers and the surrounding communities. Potlatch and Fulghum, which together account for about 95% of the traffic on the Line and the UP, the lessor, strongly support alternative rail service from AKMD.

The record indicates that the February conference call was not the first time Potlatch consulted with Delta but that Potlatch, Fulghum, UP and Delta met formally in September 2003 to discuss Delta’s service problems. Potlatch also had various e-mail communications with Delta concerning rail service on the Line. The proponents of alternative service do not believe that Delta is likely to restore adequate rail service, given Delta’s failure for the past two months to make necessary repairs or maintain the Line sufficiently to prevent further derailments or allow for sustained rail operations and Delta’s inability for the last month to obtain insurance for loss of lading or to protect its interline freight connections.

AKMD states that it gives the Board its commitment to provide service on the Warren Line to meet the needs of Fulghum, Potlatch, and other shippers during the period of alternative service. AKMD is a Class III rail carrier conducting operations on 3 separate rail lines in Arkansas, each of which connects with UP. Petitioner acts as a “handling” carrier for UP – it “does not appear in the route, and traffic to and from the branch moves in single-line UP routings with pricing and other terms determined by UP and the shipper.” Petition at 10. AKMD states that this is the same arrangement Delta has with UP on the Warren Line, and AKMD is familiar with the rail service requirements to be provided on the Line, and is completing arrangements with UP for interim operations. AKMD indicates that, because Delta has stopped operations on the Warren Line, no coordination of operations would be necessary, but even if Delta were able to resume operations, AKMD would coordinate operations so that the two carriers would never be operating on the Line during the same period. AKMD also submits that its operations would have no effect on either its or Delta’s other lines because none are contiguous with the Warren Line (although one Delta line connects to the Warren Line via trackage rights).

Petitioner states that, once it is authorized to provide alternative service, it intends quickly to make necessary spot track repairs and then begin operations. AKMD asserts that there is no reason why problem areas on the Line “cannot be made roadworthy if repairs are conducted in a thorough, diligent, and timely manner.” Petition at 11.

Under 49 CFR 1146.1(c), there is a rebuttable presumption that alternative service will need to continue for 30 days, but that can be rebutted by the incumbent carrier. While a further Board order is needed at the end of the 30-day period, the presumption “is designed to simplify and expedite the 30-day reexamination by avoiding a rehashing of the original inquiry into whether relief is appropriate and limiting the evidentiary presentations and our analysis to the issue of whether the emergency is over so that the relief is no longer needed.” Service Inadequacies, 3 S.T.B. at 982.

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

It is ordered:

1. By March 18, 2004, Delta must certify to the Board and to all shippers and parties that it has taken all steps necessary and is fully serving all customers on the Line.

2. In the event Delta does not comply with the certification requirement, AKMD’s petition will be granted.

3. The Board will promptly issue a decision, stating either that Delta is in compliance with the requirements of this decision or that AKMD may commence operations on the Line under the emergency service provisions in 49 CFR 1146.

4. This decision is effective on its date of service.

By the Board, Chairman Nober.

Vernon A. Williams  
Secretary