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SERVICE DATE - MARCH 26, 1999

SURFACE TRANSPORTATION BOARD

DECISION

STB Docket No. AB-103 (Sub-No. 14)

THE KANSAS CITY SOUTHERN RAILWAY COMPANY—
ADVERSE DISCONTINUANCE APPLICATION—A LINE OF
ARKANSAS AND MISSOURI RAILROAD COMPANY

Decided: March 23, 1999

On November 30, 1998, Arkansas and Missouri Railroad Company (AMR) filed an application¹ under 49 U.S.C. 10903 requesting that we find that the public convenience and necessity require or permit the discontinuance of trackage rights held by The Kansas City Southern Railway Company (KCS) over an approximately 5.5-mile segment of rail line owned by AMR, extending between milepost 417.0 and milepost 422.5, in Sebastian County, AR, and LeFlore County, OK. Previously, in a decision served November 24, 1998, AMR was granted a waiver of certain regulations and statutory provisions dealing with notice and filing requirements, except to the extent that they apply to bridge or overhead traffic.² Also, in a decision served December 14, 1998, AMR's motion for a protective order to safeguard the confidentiality of certain information, including specified traffic data and information involving contractual terms between the parties, was granted.

Protests to the application were filed by The Port Authority of the City of Fort Smith, AR (the Port),³ the Oklahoma Department of Transportation (ODOT),⁴ Willamette Industries, Inc. (Willamette), Gerber Products Company (Gerber), Riverside Furniture Corporation (Riverside),

¹ Notice of the filing was served and published in the Federal Register on December 18, 1998 (63 FR 70182).

² In an earlier decision addressing the waiver request served November 13, 1998, AMR was directed to provide more information about its future plans involving the overhead service now being provided by KCS and the impact on affected overhead shippers and communities.

³ Included in the protest is a letter from the Arkansas Waterways Commission (AWC) supporting the Port's position.

⁴ Although ODOT's pleading was received 1 day late, on January 15, 1999, ODOT has submitted a letter from Federal Express explaining that the filing was delayed due to inclement weather. Accordingly, ODOT's comments are accepted for good cause shown under 49 CFR 1152.25(d)(5).

Fort Smith Railroad Co. (FSR),⁵ and KCS.⁶ The United Transportation Union seeks imposition of employee protective conditions. AMR filed a reply. For the reasons discussed below, the application will be denied.

BACKGROUND

AMR is a Class III rail carrier operating approximately 139.5 miles of rail line acquired from the former Burlington Northern Railroad Company (BN)⁷ in 1986, between approximately milepost 283.0 at Monett, MO, and milepost 422.5 at South Fort Smith, AR. See Arkansas and Missouri Railroad Company, et al.—Exemption from 49 U.S.C. 10901, 11301, 11322, and 11343, Finance Docket No. 30764 (ICC served July 17, 1986, and Feb. 9, 1987). The acquisition was subject to bridge trackage rights granted to KCS by a predecessor of BN in 1944. These trackage rights, which are the subject of this adverse discontinuance application, connect KCS's branch line from Heavener, OK, to its Fort Smith rail yard. Without the trackage rights, KCS would be unable to reach its Fort Smith rail yard where it interchanges traffic with AMR, FSR, and various motor carriers.⁸

After initially operating under an informal trackage rights agreement, the parties formalized a written agreement (the agreement) on January 23, 1988, that required KCS to pay a per car-mile fee for traffic moving over the line and for AMR to dispatch the line and perform all necessary

⁵ The protests of Gerber, Riverside, and FSR were filed 1 day late. Although AMR objects to acceptance of late-filed pleadings, adequate explanations have been given for the late filings and, accordingly, we will accept them for good cause shown under 49 CFR 1152.25(d)(5). Late-filed comments were also received from Emerson Transload of Fort Smith, AR, and Arkansas State Senator R. Gunner DeLay expressing opposition to the application. However, neither letter contains a certificate of service or indicates that it was served on AMR as required by 49 CFR 1152.25(c)(3). Accordingly, the comments cannot be considered as protests, but they will be included in the correspondence section of the docket.

⁶ KCS's protest incorporates statements in opposition to the application on behalf of O.K. Transportation, Inc. (OK Feed), Boise Cascade Corporation, Mead Containerboard (Mead), Willamette, Gerber, AWC, and Oklahoma State Representative Kenneth Corn.

⁷ Now The Burlington Northern and Santa Fe Railway Company (BNSF).

⁸ There are four categories of traffic moving over the line: (1) traffic originating or terminating on AMR that is interchanged to or from KCS for the long haul move; (2) traffic originating or terminating on KCS and moving over the subject line; (3) traffic served directly by KCS without a prior or subsequent move on any other railroad but is transloaded to or from motor carrier in the KCS yard; and (4) traffic originating or terminating on FSR that is interchanged to or from KCS in the KCS yard for the long haul move. More than 80% of the Fort Smith traffic involves categories 2, 3, and 4.

maintenance. Subsequently, on August 10, 1992, the agreement was amended to make two principal changes: (1) the trackage rights fee was converted into an annual fixed fee, adjustable every three years; and (2) the maintenance obligation was shifted from AMR to KCS.⁹ It is the maintenance obligation that allegedly KCS has breached and which AMR asserts precipitated the filing of this adverse discontinuance application.

ARGUMENTS

Pursuant to section 4.7 of the agreement, AMR may elect to exclude KCS from the use of the joint trackage if KCS fails to cure a default within 30 days after receiving written notice. AMR submits that it wishes to exercise its right under the agreement to bar KCS from the line because KCS allegedly has failed to meet its obligations to maintain the line in accordance with the 1992 amendment; has been unresponsive to AMR's demands that it perform as required by the agreement; has failed to cure its breach within 30 days after notice of the breach by AMR; and has failed to compensate AMR when AMR has undertaken the repairs itself, as provided for in the agreement.¹⁰

In lieu of the overhead service that KCS currently provides via the trackage rights, AMR proposes to provide the service itself by interchanging with KCS in one of two ways: (1) AMR crews can either drive to milepost 422.5 and operate the KCS train over the line using the KCS power that brought the train north;¹¹ or (2) KCS can uncouple its locomotive from the train to enable

⁹ Section 3.3 of the amended agreement specifies that the joint trackage shall be maintained at Federal Railroad Administration (FRA) Class 2 safety standards.

¹⁰ According to AMR's Executive Vice President, Larry Bouchet, he discovered in 1996 that the line was not being maintained at FRA Class 2 safety standards and initiated discussions with the local KCS trainmaster. Mr. Bouchet contends that, over the course of 1997 and the first half of 1998, KCS officials refused to talk to him, failed to attend scheduled meetings, and failed to keep promises to repair the track. During this time, FRA initiated a multi-disciplinary task force safety audit of AMR's entire railroad and, on the basis of inspections conducted between July 14-17, 1997, identified 70 track defects, 20 of them on the 5.5-mile subject line. Pursuant to a Safety Compliance Agreement entered into with FRA, Mr. Bouchet states that AMR made the repairs itself to bring the line back to FRA Class 1 safety standards. It then billed KCS in accordance with section 3.3 of their trackage rights agreement, but KCS assertedly has not paid the invoice. On April 20, 1998, Mr. Bouchet notified KCS in writing that it was not fulfilling its maintenance obligations and that the agreement was in the process of being cancelled if matters were not resolved. Mr. Bouchet reports that, as of November 23, 1998, 8 of the 18 defects identified during a walking tour of the line on October 14, 1998, had not been corrected by KCS.

¹¹ The KCS crew could either deadhead with the AMR crew or cab between milepost 422.5 and the KCS yard; then, after the switch work in Fort Smith is completed, the KCS crew could notify AMR to cab a crew from the AMR yard, located only 3 miles away, to handle the southbound
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AMR to use its own power for the move over the line.¹² AMR contends that service will improve after it resumes maintenance responsibilities and restores the line to FRA Class 2 safety standards because transit time over the 5.5-mile line segment will be reduced from the current 33 minutes to 13 minutes. AMR also argues that its participation in the KCS traffic should not cause shippers to pay materially higher rates because the KCS traffic is price constrained by motor carrier competition.¹³

KCS argues that AMR's interchange options are not viable. According to KCS, changing crews at milepost 422.5 will delay service¹⁴ and increase costs due to the duplication of crew time. In addition, because the KCS crew has to complete the round trip between Heavener and Fort Smith and perform its terminal operations at Fort Smith within 12 hours under Federal hours of service laws, KCS is concerned that the crew could exhaust the 12 on-duty hours before completing its run. If AMR were to use its own power for the move, KCS submits that transit times would increase because each interchange would require a formal inspection of all cars, a process that could take 30 minutes per inspection. There are also the additional costs associated with maintaining duplicate crews and locomotives which would either make KCS non-competitive for the Fort Smith traffic it currently handles, or increase the overall level of rail rates that those shippers must pay. As a result, KCS submits that it probably would be forced to abandon its Fort Smith yard facility.

KCS contends that the addition of AMR into all of its routings into Fort Smith would not be in the public interest because it would reduce the competitive options available to Fort Smith shippers. Moreover, AMR assertedly would have the means to significantly influence the through rate because it would be able to demand a division of that rate. Indeed, KCS submits that if AMR refuses to join in a through rate, KCS would be required to construct a rate for its customers

¹¹(...continued)
train back to milepost 422.5.

¹² AMR states that it is willing to join with KCS in the construction of two sidings, one on each side of the main line at or near milepost 422.5. One track would be used by KCS to set out northbound cars for AMR and the other by AMR to set out southbound cars for KCS. AMR currently owns property extending 50 feet on either side of the centerline at milepost 422.5 that would be suitable for the construction and calculates that each party could construct a 3,500-foot siding at a cost of less than \$200,000.

¹³ The application includes letters of support from the following six local shippers: Stone Container Corporation, Lendel Vines Co., Inc., Fort Smith Waste Paper Company, H. J. Baker & Bro., Incorporated, Norton Alcoa Proppants (Norton), and Love Box Company, Inc. However, Norton withdrew its support for the application in a letter filed December 14, 1998. The remaining shippers contend that there should be no material change in service under the proposed interchange arrangement.

¹⁴ KCS would have to wait for AMR to provide a crew to handle the interchange.

consisting of a combination of the rate to the interchange point, and whatever rate AMR demands for its 5.5-mile haul of the traffic. Because AMR directly competes with KCS for traffic moving between Fort Smith and the service territory north and west of Fort Smith via its interchange with BNSF at Monett, MO, KCS argues that another consequence of the discontinuance is that AMR will have an incentive to establish its division or rate for the KCS Fort Smith traffic at a level which will favor AMR receiving its long haul via Monett.

KCS also contends that its traffic and business data demonstrate that it makes significant use of the line and that its service is of significant importance to its customers in the Fort Smith area.¹⁵ While AMR claims to have shipper support, KCS notes that the support is all from shippers that AMR already serves and will not be effected because their traffic would simply be interchanged at a point 5.5 miles south of Fort Smith instead of at Fort Smith. Moreover, KCS submits that the supporting shippers account for only a small volume of KCS's traffic in contrast to the traffic of OK Feed, Gerber, Mead, and the other shippers who registered strong objections to the application and have a significant interest in KCS's continued operation over the subject line.¹⁶ Indeed, KCS avers that none of its customers have complained about its service or requested that KCS discontinue its overhead trackage rights so that they could receive service from AMR.

Finally, KCS argues that this is a contract dispute that should be settled through the agreement's arbitration provisions.¹⁷ Alternatively, KCS suggests that it is willing to further amend

¹⁵ During 1998, KCS states that it used the trackage rights to provide service to approximately 30 customers located in the Fort Smith area.

¹⁶ The overhead shippers that have filed protests strongly disagree with AMR's argument that there will be no adverse impact on them or surrounding communities because the former KCS bridge traffic will now be handled by AMR. On the contrary, they generally argue that the discontinuance would not only reduce competition but would result in increased transportation costs. These shippers basically echo KCS's arguments that any method of an AMR-KCS interchange will adversely delay transit times, increase costs due to switching inefficiencies, and allow AMR an opportunity to dictate the joint rates assessed. FSR expresses these same sentiments in its protest, arguing that the unnecessary addition of AMR in the routing, which would necessitate two additional interchanges, will cause increased transit times, unnecessary delays, and increased rates to shippers.

¹⁷ Even though KCS argues that this is a contract matter for arbitrators and the courts and not the Board to decide, it nevertheless has responded to AMR's allegations that KCS has failed to maintain the line. For example, based on 11 personal inspections conducted in the past few months, KCS's Division Engineer, Danny H. Cox, avers that the line meets FRA Class 2 safety standards. Mr. Cox also outlines his efforts to make necessary repairs to the line and he contends that not all of the repairs demanded by AMR were KCS's responsibility to correct. Moreover, because AMR consistently remained dissatisfied with the condition of the track and continued to insist that it was

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the agreement to shift the maintenance control back to AMR.

DISCUSSION AND CONCLUSIONS

In adverse discontinuance proceedings, the primary question to be resolved is whether there exists sufficient public interest in operation of the subject line to merit continued oversight by the Board. The statutory standard governing abandonment or discontinuance of operations is whether the present or future public convenience and necessity require or permit the proposed discontinuance. In making the finding, the Board shall consider whether the discontinuance will have a serious, adverse impact on rural and community development. 49 U.S.C. 10903(d)(2). As the moving party, AMR has the burden of proof to establish that the public convenience and necessity permit the proposed discontinuance. The former Interstate Commerce Commission and now the Board have determined that a finding of public convenience and necessity removes our exclusive and plenary jurisdiction as an obstacle to termination of an authorized rail carrier's service over the line, enabling the parties to undertake other legal remedies to effectively remove a carrier from a line. See Modern Handcraft, Inc.—Abandonment, 363 I.C.C. 969 (1981) (Modern Handcraft); Fore River RR. Corp.—Discon. Exempt.—Norfolk County, MA, 8 I.C.C.2d 307 (1992); and Grand Trunk Western Railroad Incorporated—Adverse Discontinuance of Trackage Rights Application—A Line of Norfolk and Western Railway Company in Cincinnati, Hamilton County, OH, STB Docket No. AB-31 (Sub-No. 30) (STB served May 13, 1998). In implementing the statutory standard, we consider the relative burdens that continuation of service on the one hand, and cessation of service on the other, would have on the involved carrier, on the owner-lessor of the line, and on the public. Jacksonville Port Authority—Adverse Discontinuance—In Duval County, FL, STB Docket No. AB-469 (STB served July 17, 1996) (Jacksonville).

AMR cites to the decisions in Jacksonville and in Tacoma Eastern Railway Company—Adverse Discontinuance of Operations Application—A Line of City of Tacoma, in Pierce, Thurston and Lewis Counties, WA, STB Docket No. AB-548 (STB served Oct. 16, 1998), as examples of adverse discontinuance cases that were granted, based on facts that assertedly were quite similar to those in this proceeding. On the contrary, those cases involved situations where discontinuance authority was sought to replace the existing contract operators. Here, although AMR would, in theory, simply replace KCS's service under the trackage rights, the result would be that AMR would be inserted as an interline carrier in the movement of all traffic that KCS currently handles into or out of Fort Smith.

¹⁷(...continued)

not in FRA Class 2 condition, KCS proposed that FRA perform an impartial inspection. Mr. Cox states that on September 23, 1998, he accompanied the FRA inspector on the inspection trip. Although four defects were identified, Mr. Cox notes that they did not affect the FRA Class 2 rating of the track. Indeed, the only defect resulting in a FRA Class 1 designation assertedly relates to a side track not covered by the agreement. Mr. Cox avers that KCS repaired the defects identified in the FRA inspection shortly after the inspection was conducted.

As in the case of an abandonment, the function of our exclusive and plenary jurisdiction over a trackage rights discontinuance is to provide the public with a degree of protection against the unnecessary discontinuance, cessation, interruption, or obstruction of available rail service. Modern Handcraft, 363 I.C.C. at 972. Indeed, AMR was specifically advised that the impact of its proposal on the overhead shippers appeared to be germane to a decision on the merits of the application.¹⁸ Here, the evidence demonstrates that there is substantial overhead traffic moving over the line, and that KCS, FSR, and many of the overhead shippers strenuously object to the discontinuance. The shippers argue that the discontinuance would reduce competition, that transit times and resultant costs would be increased by the interchange, and that AMR would be able to control the rates on all movements. AMR has failed to adequately address these concerns. Instead, it attempts to shift the burden to KCS by arguing that “KCS has not submitted any evidence whatsoever that quantifies the incremental costs of such operational changes or otherwise demonstrates that KCS would incur material harm.”

The evidence of record suggests that overhead shippers could lose routing options and have less efficient, more costly service if KCS is forced to discontinue its trackage rights over the subject line. Moreover, in terms of operational efficiency, AMR has not shown that there are any public benefits associated with its proposal to substitute itself as an interchange carrier in all of KCS’s Fort Smith traffic. In fact, AMR admits that termination of the involved trackage rights will make the handling of KCS’s trains “somewhat less efficient” due to the fact that “all interline service is somewhat less efficient than single-line service.” After considering the arguments and balancing the possible harm to all parties, we conclude that AMR has not presented credible evidence to show that continuation of KCS’s trackage rights is a burden on interstate commerce, and has failed to demonstrate that the requested discontinuance meets the public convenience and necessity test.

Also, it should be noted that AMR has other remedies available. For example, KCS has agreed to terminate the 1992 amendment, renegotiate the agreement, and return control of maintenance back to AMR. Also, the existing agreement contains a provision in section 6 which provides that questions or controversy arising between the parties in connection with the agreement shall be settled by an arbitrator. While not discontinuing KCS’s use of the line, these remedies can address the disputed maintenance problem. We reiterate here, as we have stated in the past, that the Board will not undertake to interpret or enforce operating agreements or contracts. See Tacoma Eastern Railway Company—Adverse Discontinuance of Operations Application—A Line of City of Tacoma, in Pierce, Thurston and Lewis Counties, WA, STB Docket No. AB-548, slip op. at 4 (STB served Mar. 3, 1999).

We find:

1. AMR has failed to establish that the present and future public convenience and necessity require or permit the proposed adverse discontinuance of trackage rights held by KCS.

¹⁸ See supra note 2.

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

It is ordered:

1. The adverse discontinuance of trackage rights application is denied.
2. This decision is effective on April 26, 1999.

By the Board, Chairman Morgan, Vice Chairman Clyburn and Commissioner Burkes.

Vernon A. Williams
Secretary