

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 34608¹

OHIO VALLEY RAILROAD COMPANY – PETITION TO RESTORE SWITCH
CONNECTION AND OTHER RELIEF

Decided: February 23, 2005

By petition filed on October 22, 2004, Ohio Valley Railroad Company (OVR) and Mid-America Locomotive & Car Repair, Inc. (Mid-America) (collectively, petitioners) ask that two switches connecting OVR's lines with those of Indiana Southwestern Railway Co. (ISW) be restored. Petitioners also seek relief under 49 CFR 1146 and 1147. Finally, petitioners ask us to confirm that OVR possesses a contractual right to engage in direct interchange with CSX Transportation, Inc. (CSXT) over ISW's track. We will order ISW to immediately restore one of the removed switches and report to us that it has done so. Because OVR has failed to meet the standards applicable to part 1146 and part 1147, we will not grant relief under those provisions. Nor will we rule on the issue of OVR's asserted right to a direct interchange with CSXT.

PRELIMINARY MATTERS

On November 10, 2004, ISW filed a motion for a 20-day extension of time to respond to petitioners' request for expedited relief.² ISW argues that an extension is warranted, in light of its efforts to assess OVR's complaint and ascertain whether the issue could be resolved informally. ISW

¹ This matter was originally filed under STB Finance Docket No. 34486, Ohio Valley Railroad Company – Acquisition and Operation Exemption – Harwood Properties, Inc. Although this proceeding is related in some respects to STB Finance Docket No. 34486, the facts presented by petitioners and the relief they seek here constitute a separate cause of action. Consequently, this proceeding is now docketed and captioned as shown above.

² Pursuant to 49 CFR 1146.1(b)(2), a reply to OVR's request for emergency relief under part 1146 was due on October 28, 2004 (5 days after the filing of the petition). A reply to OVR's petition for relief pursuant to part 1147 was due on November 22, 2004, consistent with 49 CFR 1147.1(b)(2).

maintains that, because no service emergency actually exists, an extension of time would not harm any of the interested parties. In their reply opposing the extension request, petitioners state that ISW never contacted them to obtain their approval of, or their nonopposition to, the extension request as is customary in such cases. Petitioners argue that ISW's extension request was filed several days after the date by which ISW should have filed its reply.

On November 18, 2004, petitioners filed a motion to strike as untimely ISW's reply to the petition for expedited relief, which ISW filed on November 16, 2004.³ Noting that replies to requests for emergency relief under section 1146 must be filed within 5 business days of the petition for emergency relief (49 CFR 1146.1(b)(2)), petitioners state that, to be timely, ISW's reply should have been filed no later than October 29, 2004. Because petitioners also invoked part 1147 in support of their request for relief, we must consider the timing of ISW's reply in the context of the procedures set forth in that provision as well as part 1146. Under part 1147, ISW's reply needed to be filed no later than November 22, 2004. Because ISW's reply was filed before that date, it is timely and will be accepted. Therefore, we see no need to act upon ISW's extension request and will deny petitioners' motion to strike ISW's reply.

BACKGROUND

On March 23, 2004, OVR, a noncarrier, invoked our class exemption procedures at 49 CFR part 1150 subpart D to acquire by lease and to operate approximately 2.8 miles of track in Evansville, IN. Notice of the proposed transaction was served and published in the Federal Register at 69 FR 21899 on April 22, 2004.⁴ Thereafter, ISW, a Class III carrier and OVR's sole connection to the interstate rail network, filed a petition to reject the notice or to revoke OVR's exemption. We denied the petition.⁵

In anticipation of commencing common carrier operations, OVR has secured reporting marks from the Association of American Railroads (AAR). These marks are necessary to effect the

³ Alternatively, petitioners submitted a rebuttal to ISW's reply.

⁴ Ohio Valley Railroad Company – Acquisition and Operation Exemption – Harwood Properties, Inc., STB Finance Docket No. 34486 (STB served Apr. 22, 2004).

⁵ Ohio Valley Railroad Company – Acquisition and Operation Exemption – Harwood Properties, Inc., STB Finance Docket No. 34486 (STB served Sept. 28, 2004). On October 22, 2004, ISW filed what it styled a “motion for reconsideration” of its petition to reject the notice or to revoke the exemption in STB Finance Docket No. 34486. That motion is addressed in a separate Board decision issued today.

interchange of traffic with other railroads. OVR advised AAR that it intended to begin common carrier service on or before January 1, 2005.

On or about October 16, 2004, ISW removed two switch connections with OVR. OVR states that these switches were its only connections to ISW and therefore its only connections to the interstate rail network. On October 20, 2004, in response to the switch removal, OVR contacted ISW by letter. In that letter, OVR demanded that ISW reinstall the switches, stating that ISW had not informed OVR of any operational, safety, or other issues that might warrant their removal.⁶

ISW responded to the letter the same day, stating that it removed the switch connections because of alleged OVR misrepresentations made to AAR concerning OVR's ability to interchange with CSXT. ISW also said that the removal would "prevent unauthorized entry on [ISW]'s tracks by [OVR]."⁷ ISW asserted that it has no obligation to maintain the switches in question in the absence of an interchange agreement between the parties. ISW indicated, however, that it was willing to discuss the terms for interchange at such time as OVR possessed both valid AAR reporting marks and an ability to interchange traffic with ISW.⁸

Two days later, OVR and Mid-America filed this petition. Petitioners seek authority to reinstall, at ISW's sole cost and expense, the connecting switches that ISW has removed. Petitioners argue that ISW is obligated under 49 U.S.C. 10742 to provide reasonable, proper and equal facilities for the interchange of traffic with OVR, and that ISW is barred by 49 U.S.C. 10744 from engaging in a combination or arrangement that would prevent the continuous movement of freight in interstate commerce. Petitioners also seek to effect a direct interchange between OVR and CSXT by using certain ISW-owned trackage, until OVR can negotiate and enter into an appropriate interchange agreement with ISW.

On October 29, 2004, CSXT filed a response to the petition. Citing a lack of capacity on its main line to handle any direct interchange there between OVR and itself, and noting that CSXT and OVR do not connect directly, CSXT asks the Board summarily to reject petitioners' request for interim interchange relief. Further, asserting that there are many contractual and logistical issues that must be resolved between connecting carriers, CSXT argues that OVR should be required to certify in its notice of exemption that it has entered into agreements with its connecting railroads.

⁶ See Petition for Expedited Relief, Exhibit C (October 20, 2004 Letter of Richard R. Wilson to Daniel A. LaKemper).

⁷ Id. at Exhibit D (October 20, 2004 Letter of Daniel A. LaKemper to Richard R. Wilson).

⁸ Id.

On November 1, 2004, OVR advised the Board by letter that ISW has proposed to reinstall one of the connecting switches to permit the movement of a single passenger car from the facilities of Mid-America,⁹ a car and locomotive repair business that connects with, and would be served from, OVR's lines. While acknowledging the concession, OVR argues that ISW's gesture falls short of a complete restoration of the status quo ante, in which two switch connections existed. OVR asserts that the restoration of both switches is important for the efficient handling of rail traffic between OVR and ISW. In addition, OVR is concerned that, once ISW receives the passenger car, it might remove the restored switch, once again isolating OVR. OVR advises that Mid-America is negotiating for new business that could result in traffic moving over OVR's lines. OVR stresses that it needs interchange and switching agreements with ISW to facilitate the movement of future traffic, and expresses concern over whether ISW would negotiate those agreements in good faith.

In a rebuttal to CSXT's reply, filed November 10, 2004,¹⁰ petitioners advise that ISW has not yet reinstalled either of the switch connections. OVR and Mid-America allege that ISW has failed to provide a date certain by which either connection might be restored. Petitioners request that the Board "order the immediate reinstallation of both switch connections."¹¹ Petitioners respond to CSXT's concerns about interchange by stating that OVR is prepared to exchange traffic with CSXT within OVR's facilities at Harwood Yard under terms outlined in CSXT's reply. In addition, petitioners request that we confirm OVR's legal right to a direct interchange with CSXT,¹² and that we issue an order directing such interchange to occur.

On November 16, 2004, ISW filed its reply. ISW argues that OVR is not providing service at this time, and that no service emergency therefore exists. ISW states that there is no pressing need for the railroad passenger car that is currently on OVR's tracks to be moved from Harwood Yard. ISW also argues that OVR does not need two switches for the purposes of interchange with ISW, and that the switch that ISW would restore would be adequate for such purposes.

⁹ According to petitioners, this car, destined to a Mid-America customer, is trapped on OVR tracks in Harwood Yard as a result of ISW's actions. Petition at 1.

¹⁰ Petitioners' rebuttal appears to have been inadvertently filed under STB Finance Docket No. 34599, Mid-America Locomotive and Car Repair, Inc. – Petition for Declaratory Order. The substance of the filing, however, clearly pertains to matters in this proceeding.

¹¹ Rebuttal at 2.

¹² This request is renewed in a letter filed by petitioners on December 20, 2004.

In justifying the removal of the two connecting switches, ISW asserts that it acted out of concern that OVR would illegally enter onto its property, thereby creating a dangerous situation. ISW maintains that petitioners' request for an interim interchange between OVR and CSXT is unwarranted and would seriously interfere with ISW's ability to provide service to its customers. Finally, ISW disputes OVR's claim to possess a contractual right to effect direct interchange with CSXT via ISW's trackage.

In a rebuttal to the ISW reply, petitioners argue that ISW has not supplied any satisfactory justification for its removal of the connecting switches. OVR and Mid-America repeat their assertion that, by removing the switches, ISW has violated its statutory obligations. Petitioners repeat their concern that the removal of the switches precludes the movement of the stranded railroad car, and reiterate that Mid-America may soon obtain new business that would result in a need for the restoration of the connecting switches. A reference to this potential new business is also contained in a letter filed by petitioners on November 15, 2004. Petitioners there also express concern as to whether Mid-America will be able to secure this new business if, in the absence of the connecting switches between OVR and ISW, it cannot obtain rail service directly to its facility.

Recent correspondence between the parties and with the Board indicates that, while neither connecting switch has yet been restored, OVR and ISW have begun negotiating the terms of an interchange agreement. In connection with these negotiations, OVR has stated that its concerns would be alleviated if ISW would reinstall the south end switch connection, and that, if this is done, OVR would dispense with its request that both switches be reinstalled. OVR, however, continues to voice concerns about ISW's desire to negotiate in good faith.

DISCUSSION AND CONCLUSIONS

Part 1146 of the Board's regulations (49 CFR 1146) provides for the expeditious prescription of alternative rail service in a service emergency. Part 1147 of those regulations, on the other hand, provides for the relief of service inadequacies through the imposition of terminal access or reciprocal switching under 49 U.S.C. 11102(a) and (c), respectively, or through the prescription of an alternative through route under 49 U.S.C. 10705(a). Neither statutory provision affords relief that comports with the remedy that petitioners seek here. Accordingly, we will deny OVR's request for emergency relief under parts 1146 and 1147.

Petitioners assert that, by removing the switches, ISW has shirked its responsibility under 49 U.S.C. 10742 to provide reasonable facilities for interchange between the carriers. ISW has not removed the switch connections with OVR due to safety or cost considerations, and it has acted unilaterally, even though it was aware that its actions would affect OVR. ISW claims that it acted to prevent OVR from trespassing on its lines. We find in the record no credible threat of trespass, or

evidence of actual trespass, by OVR. Under the circumstances, ISW's removal of the switch connections upon learning of OVR's intent to initiate common carrier service is unjustified. ISW does not dispute petitioners' assertions that they are trying to develop new business – Mid-America for its car repair business, and OVR to serve that facility. Petitioners' concern that their isolation from the national rail system arising out of ISW's removal of the switch connections will detract from their attempts to develop their businesses appears to be well-founded. Removing a switch which constitutes the only connection between a common carrier and the rest of the national rail system violates the duty to interchange under 49 U.S.C. 10742 under the circumstances present here. Because ISW has breached its duty under section 10742, it must immediately restore the south end switch that OVR has indicated is needed for interchange purposes, and report to us that it has done so.

Petitioners have also requested that we confirm OVR's contractual right to a direct interchange with CSXT. We usually defer to the courts in matters of contract interpretation. The Township of Woodbridge, NJ, et al. v. Consolidated Rail Corporation, Inc., STB Docket No. 42053, slip op. at 5 (STB served Dec. 1, 2000); Kansas City Terminal Railway Company and the Atchison, Topeka and Santa Fe Railway Company – Contract to Operate Exemption – In Kansas City, MO, STB Finance Docket No. 32896, slip op. at 3-4 (STB served Nov. 20, 1996). Therefore, we decline OVR's request to confirm its disputed contractual right to interchange directly with CSXT.

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

It is ordered:

1. ISW's motion for an extension of time to file its reply to petitioners' request for relief is deemed moot by its filing within the deadlines prescribed at 49 CFR 1147.1(b)(2).
2. Petitioners' motion to strike ISW's reply is denied.
3. The petition by OVR and Mid-America for temporary emergency and alternative service relief under 49 CFR 1146 and 1147 is denied.
4. ISW must immediately restore the south end switch connection with OVR, and report to us that it has done so.
5. Petitioner's request that we confirm OVR's contractual right to a direct interchange with CSXT is denied.

6. This decision is effective 30 days after its date of service.

By the Board, Chairman Nober, Vice Chairman Buttrey, and Commissioner Mulvey.

Vernon A. Williams
Secretary