SURFACE TRANSPORTATION BOARD

DECISION

STB Docket No. 42087

GROOME & ASSOCIATES, INC. AND LEE K. GROOME
v.
GREENVILLE COUNTY ECONOMIC DEVELOPMENT CORPORATION

Decided: July 27, 2005

In a pleading filed on August 23, 2004 (August 2004 complaint), and supplemented on September 27, 2004, Groome & Associates (G&A) and its principal, Lee K. Groome (Mr. Groome) (jointly, Complainants) asked the Board to institute a complaint proceeding. Complainants also asked the Board to waive the filing fee normally required in connection with formal complaints. The fee waiver request was granted on October 12, 2004.

The August 2004 complaint concerns a damaged rail line extending from MP 0.0 at Greenville to MP 11.8 at Travelers Rest, SC (the line), which the Greenville County Economic Development Corporation (GCEDC) took over in June 1999. The August 2004 complaint asserts that GCEDC violated its common carrier obligation by failing to provide service upon reasonable request over the line. By decision served on October 12, 2004, as modified by decision served on February 10, 2005, a procedural schedule was established in this proceeding. In accordance with that schedule, opening evidence was filed on December 22, 2004, reply evidence was filed on January 24, 2005, and rebuttal evidence was filed on February 22, 2005.

We find that, although GCEDC did not violate its common carrier obligation by failing to make repairs and provide service as soon as it took over the line, after a reasonable period it was required either to put the line back into service or to take steps to obtain abandonment or discontinuance authority. Therefore, GCEDC is liable for damages, but only for the 2-year period preceding the filing of the complaint, in view of the statute of limitations.

BACKGROUND

In 1992, Complainants purchased a building in Greenville, SC, and received rail service on the line, which was operated at that time by the Greenville & Northern Railway Company (G&N), a wholly owned subsidiary of Pinsly Railroad Company (Pinsly). G&N interchanged traffic in Greenville with CSX Transportation, Inc. (CSXT), and Norfolk Southern Railway Company (NS). These railroads served the paper mills that supplied G&A with large multi-thousand pound rolls of bleached sulphate paper coated on one or both sides. According to a traffic history report by Pinsly, G&A received 276 cars in 1994, 247 cars in 1995, and 249 cars in 1996. After receiving the rolls of paper at its facility, G&A would convert or slit the rolls into various sizes for use as wrapping or printing paper by food and pharmaceutical companies. By 1997, Complainants' paper production had expanded to include some specialty items and niche markets, with 125 or more accounts. During this time the physical plant was expanded.

On May 1, 1997, the Board authorized the acquisition of the line by South Carolina Central Railroad Inc. (SCCR).[1] On December 4, 1997 – 7 months after it bought the line – SCCR placed an embargo on the entire line, citing damage to two bridges. An embargo is a temporary stoppage of service that railroads may lawfully impose when physical conditions on the line preclude it from being operated safely. Additionally, on December 12, 1997, SCCR initiated a proceeding by which it obtained Board authority to abandon the southernmost 2-mile portion of the line.[2] What this meant was that SCCR was temporarily excused, by virtue of its embargo, from serving any shippers on the line, and that it was permanently excused, by virtue of the abandonment authority, from serving the southernmost section of the line.

Complainants learned of SCCR's embargo on or about December 10, 1997. Although SCCR was abandoning the southern portion, the remainder of the line, if it were put back into operation, could be used to provide service to G&A and certain other shippers. SCCR sought to impose surcharges on its traffic to help fund the needed repairs, but the shippers, including Complainants, would only agree to pay the surcharges on the condition – which SCCR was apparently unwilling to agree to given the future prospects for the line – that SCCR would make a commitment to continue to operate for 3 years. SCCR and the shippers thus did not reach a resolution on the issue of surcharges.

Apparently concluding that it would not be able to recover the funds it would need to spend to bring the line back into service, SCCR did not attempt to institute repairs. Instead, it opted to conclude its affairs by continuing to serve previously billed traffic for approximately 2 months over the damaged bridges by placing "idler" cars between each loaded car to minimize weight on the bridges. According to SCCR, this process was time consuming and costly. Because there was no prospect of successfully continuing that type of service on a long-term basis, on or about October 8, 1998, SCCR announced its intent to abandon the remainder of the

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[1] See South Carolina Central Railroad Inc., Carolina Piedmont Division – Acquisition Exemption – Greenville & Northern Railway, STB Finance Docket No. 33391 (STB served May 1, 1997).

[2] South Carolina Central Railroad Company, Inc. d/b/a Carolina Piedmont Division – Abandonment Exemption – Greenville County, SC, STB Docket No. AB-312 (Sub-No. 2X) (STB served Apr. 1, 1998).

line, between milepost 2.1 in Greenville and milepost 11.8 in Travelers Rest, which had not previously been approved for abandonment.

By letters dated January 29, 1999, RailTex, SCCR's parent, informed the Chairman of the Greenville County Council (Chairman) and the shippers on the line of its desire to sell all of SCCR's assets on the line for $750,000. The letter to the Chairman indicated that the purchaser would have to assume all rail common carrier shipping obligations, along with approximately $300,000 of expenditures for repair to the bridges. According to Complainants, between January and May of 1999, the shippers' representatives met with SCCR representatives to discuss the shippers' interest in acquiring the line. The shippers also made their interest in the line known to individuals on the Greenville County Council (County Council). Apparently, however, the shippers were not willing to pay the $750,000 asking price; rather, they were of the view that, if they waited until the abandonment process was initiated, they might be able to obtain the line for less under the offer of financial assistance (OFA) procedures that are engaged when a railroad seeks to abandon a line. Complaint V.S. Mathena para. 8.

Rail corridors, once lost, are difficult to replace. Because it did not want to lose this rail corridor, and because nobody else had responded favorably to SCCR's sale offer, the County Council negotiated with SCCR to buy the entire line. The purchase included the main part of the line between mileposts 2.1 and 11.8, the southernmost part of the line that had been approved for abandonment but had not yet been disposed of, and a nearby 3.29-mile piece of track that was not used by G&A. The total purchase price was $1.3 million. The County Council created GCEDC to acquire and own the lines, and GCEDC obtained authority from the Board to acquire all of the lines, with SCCR retaining an easement to operate over the 3.29-mile segment only.[3]

At the time GCEDC purchased it, the line that served G&A was in a state of disrepair, and only two potential shippers remained on the line; indeed, as of the purchase date – with the exception of the minimal (and unsatisfactory) close-out operations using the idler cars – the line had not been operated by the prior owner for 18 months. GCEDC states that it therefore continued the embargo that the prior owner had imposed, although it did not undertake the necessary procedures to formalize the embargo with the Association of American Railroads (AAR).

GCEDC looked for an operator for the line. Apparently, however, any potential operators demanded that GCEDC first fund the costs of repairing the track and bridges. In a letter dated August 9, 2000, GCEDC received written advice from The Great Walton Railroad

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[3] See Greenville County Economic Development Corporation – Acquisition Exemption – South Carolina Central Railroad Company, Inc. Carolina Piedmont Division, STB Finance Docket No. 33752 (STB served June 3, 1999) (Greenville Acquisition Exemption).

Company, Inc. (GWR), stating that restoring the line to service based on Federal Railroad Administration (FRA) Class 1 safety standards[4] would require bridge repairs of $199,982.60, and track repairs costing approximately $1.3 million. GCEDC attempted to secure funding from the County Council and, beginning in June 2000, sought other potential funding sources, including, according to GCEDC, potential shippers on the line. During this period Mr. Groome and GCEDC were in contact and at times were working together to try to find a rail operator. Indeed, the record indicates that the parties in this proceeding had been in contact with one another regarding the line as far back as 1997. Also during this time, Mr. Groome told members of GCEDC as well as members of the County Council that G&A wanted the line repaired so that it could have rail service resumed.

On April 17, 2001, Complainants filed suit in state court seeking damages that they alleged were caused by GCEDC's unlawful failure to provide service. Shortly thereafter, on May 23, 2001, Complainants sent to the Board a document alleging that GCEDC had violated its common carrier obligation (May 2001 submission). The May 2001 submission was not accepted as a formal complaint because the Board did not receive a filing fee or a fee waiver request with regard to the matter. Rather, in letters dated June 1, 2001, and July 31, 2001, the Board informed Complainants and their local counsel that the Board could not process the submission without receipt of the filing fee required under 49 CFR 1002.2. Although they did choose to move forward with their state court case, Complainants did not at that time pursue the matter further at the Board.

In February 2003, almost 2 years after Complainant had instituted proceedings in the state court, Mr. Groome complained informally to the Board's Office of Compliance and Enforcement (OCE) about his company's lack of rail service. In an OCE letter dated February 28, 2003, and received on March 10, 2003, GCEDC was informed that, as a common carrier, it was obligated either to provide service to Complainants or to seek authority for discontinuance or abandonment.

GCEDC then took steps, at least initially, to obtain regulatory authority to be relieved of its common carrier obligation. On June 30, 2003, it filed a notice of exemption invoking the Board's summary procedures for discontinuing service over a line. Complainants, however, filed a letter challenging GCEDC's use of those procedures.

In a decision served on January 29, 2004, the Board dismissed GCEDC's notice of exemption, finding that the use of the expedited procedures for discontinuance authority was

[4] FRA's track safety standards limit track speeds depending on the quality of the line. A line designated by the track owner as "excepted track" (which is how the line was classified at that time) is of lower quality than a line designated as FRA Class 1 and it is subject to additional operating restrictions even though operations over both Class 1 trackage and "excepted" trackage are limited to 10 miles per hour.

inappropriate because the matter was too controversial, and that GCEDC would have to proceed by filing a petition for an individual exemption (under 49 U.S.C. 10502) or a full application (under 49 U.S.C. 10903). GCEDC did not take any further steps to be relieved of its common carrier obligation until June 24, 2005, when it filed a petition for exemption for permission to end that common carrier obligation.

G&A stopped operating its paper business on July 31, 2003, claiming a negative net worth of $388,157. About a year later, on June 24, 2004, the Greenville County Court of Common Pleas denied Complainants' request for damages.[5] The court found that GCEDC's failure to serve was excusable because it was the product of a legitimate embargo, and the court found Complainants' claim that the lack of rail service caused G&A to go out of business to be implausible.

Complainants then filed with this agency the August 2004 complaint that is the subject of this decision. In the complaint, Complainants assert that GCEDC violated its common carrier obligation by: (1) failing to provide service after acquiring the line on June 4, 1999; (2) failing to properly embargo the line or seek abandonment; and (3) failing to make repairs to the bridges in a timely fashion that would permit resumption of rail service. Complainants ask us to find that GCEDC is liable for damages from June 4, 1999, to the present. Additionally, Complainants assert that GCEDC should be required to pay Complainants' attorney fees, and to give the line to Complainants.

PRELIMINARY MATTERS

On March 4, 2005, GCEDC filed what it described as a "clarification of the record" addressing potential sources of funding, and on March 14, 2005, Complainants filed a reply to the clarification. On March 29, 2005, GCEDC filed a supporting affidavit of Christy A. Hall, P.E., of the South Carolina Department of Transportation (SCDOT). On March 31, 2005, Complainants filed a verified statement in support of their reply to the clarification. These filings concern whether certain funds were available to GCEDC, but were not used, to make the necessary repairs. We will accept all of these filings into the record.

DISCUSSION AND CONCLUSIONS

Cases involving the extent to which a party has an obligation to provide rail service and whether it has met that obligation can be difficult because often the required factual determinations are inherently subjective. See, e.g., GS Roofing Products Co. v. STB, 143 F.3d 387 (8th Cir. 1998) (GS Roofing); Decatur County Commissioners, et al. v. The Central Railroad

[5] Groome & Associates, Inc., and Lee Groome v. Greenville County Economic Development Corporation, C.A. 2001-CP-23-2351. The court's written decision was formally issued on September 17, 2004.

Company of Indiana, STB Finance Docket No. 33386, slip op. at 6 (STB served Sept. 29, 2000) (Decatur), aff'd, Decatur County Commissioners v. STB, 308 F.3d 710 (7th Cir. 2002) (Decatur v. STB). This proceeding is more difficult than most. Usually, a carrier and a shipper have an established relationship, and an event occurs that causes the carrier to stop providing service, often pursuant to an embargo, in a manner that the shipper deems unjustified. The Board reviews whether the carrier was justified in stopping service, and whether, and when, it should have taken steps to reinstitute service.

Here, the line at issue was out of service long before the County Council bought it, and the prior owner, SCRR, was prepared to abandon it because SCCR did not believe there was sufficient traffic to justify fixing it. Apparently the County Council bought the line, along with the nearby 3.29-mile line that is not at issue here, largely in order to keep the rail corridor intact. Thus, the parties involved in this case, and their expectations, may be different from what we typically see in cases of this sort. But, notwithstanding what may have been the motivations or expectations of the parties, we must resolve this matter in accord with the law. While the County Council's objective in buying the line is understandable, as we discuss below, a common carrier obligation attaches when someone acquires an active, unabandoned rail line, such as this line. And while Mr. Groome may have been more comfortable advancing his claims first in state court rather than before the Board,[6] as discussed in a companion decision issued today in Greenville County Economic Development Corporation – Petition for Declaratory Order, STB Finance Docket No. 34487 (STB served July 27, 2005), state courts lack jurisdiction to award damages resulting from a claim that a railroad has violated the common carrier obligation. And the federal statute that we administer contains a statute of limitations that limits relief when complaints are not timely filed.

A. Motion to Dismiss. The Board may dismiss a complaint that does not state reasonable grounds for investigation and action. 49 U.S.C. 11701(b). Here, GCEDC asserts that, as a matter of law, the Board should dismiss the complaint because it was filed beyond the statute of limitations period prescribed in 49 U.S.C. 11705(c), and because it involves a commodity exempt from regulation. Complainants responded to the motion to dismiss in their opening evidence. As discussed below, we do not find that the complaint is defective as a matter of law and will therefore deny GCEDC's motion to dismiss.

Commodity Exemption. Under 49 U.S.C. 10502, the Board may exempt rail transportation of a particular commodity from most Board regulation. Relying on the testimony of its expert witness, GCEDC maintains that the bills of lading produced by Complainants in

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[6] That decision follows clear precedent of the United States Court of Appeals for the First Circuit in Pejepscot Industrial Park v. Maine Central Railroad, 215 F.3d 195, 204-05 (1st Cir. 2000). The First Circuit found that, although the Interstate Commerce Act did not intend to oust concurrent federal district court jurisdiction over common carrier obligation claims, Congress did intend to preempt state law and remedies.

discovery showed that the inbound products received by G&A and the outbound products shipped by G&A were paper and scrap paper, many forms of which have been exempted from Board regulation under 49 CFR 1039.11(a). The bills of lading provided, however, did not include the five-digit Standard Transportation Commodity Code (STCC) applicable to the materials, and GCEDC's expert was apparently unable to locate any other documents explicitly naming the actual commodities at issue. Therefore, GCEDC's expert was unable to determine with certainty the actual products involved; instead, his assessment that they were exempt was based on his experience and his review of whatever relevant documents he could locate. See GCEDC Reply V.S. Stewart at 10.

Complainants admit that their manufacturing processes resulted in the production of scrap paper, but they assert that the complaint does not involve scrap paper shipped by rail. Rather, they maintain that the complaint involves only inbound shipments of printing paper, coated or uncoated (STCC 26213) and wrapping paper, wrappers or coarse paper (STCC 26214), none of which are covered by the exemption under 49 CFR 1039.11(a).

Based on the record before us and Mr. Groome's knowledge of his product, we are not persuaded by GCEDC's assertion that exempt commodities are involved here. Therefore, we will not dismiss the complaint on that ground.

Statute of Limitations. A rail carrier is liable for damages sustained by a person as a result of "an act or omission in violation of" the Interstate Commerce Act. 49 U.S.C. 11704(b), (c). A party may file a complaint with the Board under section 11701(b) to enforce such liability against the carrier, but under the provisions of 49 U.S.C. 11705(c), a complaint to recover damages must be filed within 2 years after the claim "accrues." A party therefore may not recover damages resulting from claims that accrued more than 2 years before the complaint was filed. Thus, the threshold question in this case is whether (or to what extent) the request for damages here is time-barred because it was filed more than 2 years after the claim(s) accrued.

Most statutes of limitations are triggered by some sort of action by one party to a case. The Interstate Commerce Act generally defines "accrual" of a cause of action as the result of an affirmative act: "delivery or tender of delivery by the rail carrier." 49 U.S.C. 11705(g). That statutory definition makes it relatively easy in many rail cases to determine when a complaint is timely and when it is not. In a rail rate case, for example, if a carrier makes repeated shipments to a customer, each shipment effectively constitutes a new cause of action, even though the conduct – charging the challenged rate – is the same each time the carrier makes a delivery. Thus, to determine timeliness for statute of limitations purposes, in such cases the Board simply counts back 2 years from the date of the complaint to set a cutoff point for relief; and if a shipper files a complaint about a particular rate level charged over a period of time, it generally may recover only as to shipments that moved within 2 years of the filing of the complaint. See Aluminum Co. of America v. United States, 867 F.2d 1448, 1452 (D.C. Cir. 1989).

The statute of limitations issue here is not so simple, however, because the complaint is not based on anything that GCEDC affirmatively did, but rather is based on an omission that allegedly violated the statute, i.e., GCEDC's failure to repair the line and obtain an operator to provide rail service. Thus, the parties' filings have focused on factors other than delivery or tender of delivery to determine when the cause of action accrued and the extent to which the complaint is timely. GCEDC argues that the claim accrued when G&A stopped receiving service from GCEDC's predecessor on February 8, 1998. Because the August 2004 complaint was filed more than 2 years after G&A stopped receiving service, GCEDC maintains that the complaint is entirely time-barred by the 2-year statute of limitations. Complainants, for their part, assert that the earliest a claim could have accrued against GCEDC was when GCEDC purchased the line on June 14, 1999. Complainants further maintain that the Board should treat the May 2001 submission date as the date of its formal complaint, and they argue that, because the statute of limitations could not begin to run until GCEDC acquired the line in June 1999, the May 2001 submission was timely filed.

We do not completely agree with either party as to the appropriate resolution of the statute of limitations issue. Both parties seem to treat the cause of action here as a single event that accrued at one time and one time only. Yet, the complaint is based on the failure to provide service, which is conduct that continued from the first time Complainant demanded service from GCEDC until G&A closed down its paper business. Thus, just as a railroad's continuing shipments under a challenged rate can effectively constitute a new cause of action for purposes of the statute of limitations, here every day that GCEDC did not provide the service Complainants sought was, in essence, a new "act or omission" that can serve as the basis for a new cause of action. Accordingly, the request to dismiss the complaint in its entirety must be denied.

That does not mean, however, that damages are available for GCEDC's conduct during the entire period. Rather, as noted, a party typically may only recover damages for violations that occurred less than 2 years before it filed its complaint. See Atchison, Topeka & Santa Fe R. Co. v. ICC, 851 F.2d 1432 (D.C. Cir. 1988) (Atchison). Thus, only if we were to view the May 2001 submission as establishing the filing date for purposes of the statute of limitations would G&A be eligible for damages from the time when GCEDC first purchased the line in June 1999. If we conclude that the August 2004 complaint is the governing submission, then any relief Complainants could receive would be limited to the period from August 2002 forward.

We find that the complaint was not filed until August 2004. We recognize that Mr. Groome attempted to engage the Board's processes in May 2001. But his filing at that time was rejected because, among other reasons, it did not meet the filing fee requirements of 49 CFR 1002.2, despite the fact that the Board had informed Mr. Groome and his counsel of those requirements. Under 49 CFR 1002.2(b), "any filing that is not accompanied by the appropriate filing fee … or a request for waiver of the fee is deficient." Therefore, the May 2001 submission (which GCEDC states was never properly served on it, as required by 49 CFR 1111.3) was never accepted and docketed. The May 2001 submission became a part of the record only when it was submitted as part of the August 2004 complaint.

Although Complainants have not requested this sort of relief, in appropriate circumstances – such as when a complainant was unable to learn of its cause of action in a timely way – it might be possible to excuse the delay in filing a complaint on the basis of "equitable tolling," see Atchison, 851 F.2d at 1436; Bangor & A. R. Co. v. ICC, 574 F.2d 1096, 1115 (1st Cir. 1978). Here, however, Complainants were well aware that they had a Federal cause of action; indeed, they filed papers (albeit unperfected ones) in May 2001 seeking relief from the Board. Moreover, in response to the Complainants' request for advice as to how to proceed "in order to comply with your procedures . . . to protect our petition," the former STB Chairman, in a letter dated June 1, 2001, informed them that they must comply with the filing fee and various other requirements in order to proceed before the Board, but that, as an alternative, they could instead proceed before a Federal district court, which would have concurrent jurisdiction. The letter further alerted Complainants that their claims would be governed by a 2-year statute of limitations, and that their rights were at risk if they pursued their proceeding before a state court, because the state court "likely lacks jurisdiction over this federal claim." Complainants nevertheless chose to proceed before the state court.

In light of this history, Complainants' failure to file in a timely manner cannot be excused based on unfamiliarity with the STB's processes. Even if that could be an appropriate basis for equitable tolling, it would not apply here. In this case, Mr. Groome and his attorney were separately informed in writing, in June and July 2001, that the May 2001 submission could not be processed as a complaint without a filing fee. Rather than resubmit the May 2001 submission with a filing fee or a waiver request, Complainants waited until August 2004, to return to the Board with a request for fee waiver.

Complainants argue that their failure to file a complaint should be excused because GCEDC was not prejudiced by it. See their rebuttal statement at 7-8 and n.12 ("Given the fact that Groome mistakenly pursued relief in state court, GCEDC was not lulled into a false sense of security. Instead, it was at all time[s] alerted to Groome's claims and evidence."). But as Mr. Groome was informed in June 2001, the state court's jurisdiction to award relief was dubious. Had Complainants filed a proper complaint with the Board, GCEDC might have acted differently, and, in any event, a Board decision on a 2001 complaint would have issued much earlier, permitting GCEDC to mitigate its damages for the future.

Finally, we reject GCEDC's argument that we should deem the filing of the complaint perfected only after the fee waiver request was granted in October 2004. Complainants started the process when they made their August 2004 filing accompanied by the fee waiver request, and we will not penalize them because we did not rule on the waiver request immediately. Accordingly, we find that the complaint was filed on August 24, 2004, and that based on the statute of limitations, we can only look back 2 years prior to that date – i.e., to August 24, 2002 – should we find damages appropriate.

The Merits. We may award damages here only if we find that GCEDC violated its common carrier obligation to serve Complainants. GCEDC argues that it is not and never was a rail common carrier for purposes of 49 U.S.C. 11101, because it never proposed to operate the line and never held itself out as providing common carrier service for compensation over the line, nor was it authorized to do so. GCEDC states that its exemption petition only sought authority to acquire the line, and that it expressly indicated in the exemption petition that it would procure an operator that would apply for its own operating authority. Indeed, GCEDC points out that its Rail Corridor Preservation Policy specifically prevents it from becoming "active in the operation of the railroad itself."[7] Under these circumstances, GCEDC suggests, the common carrier obligation remained with the seller, SCCR, until a new operator obtained operating authority over the line.

We understand that GCEDC did not intend to become an active participant in the railroad industry. But the line, when GCEDC acquired it, was an active line of railroad. The portion of the line used by G&A was not subject to a pending abandonment proceeding or to a petition to discontinue operations. By acquiring full ownership of an active rail line, GCEDC assumed a common carrier obligation. Even though it did not intend to operate the line itself, it assumed responsibility for contracting with, and ensuring continued service by, a rail operator. See City of Austin, TX – Acquisition – Southern Pacific Transportation Company, Docket No. 30861(A) (ICC served Nov. 4, 1986). Thus, whether GCEDC meant to hold itself out as a common carrier is not dispositive.

Nor does this case fall into the "State of Maine" line of cases governed by Maine, DOT – Acq. Exemption – ME Central R. Co., 8 I.C.C.2d 835 (1991), which hold that a state or local government entity does not itself become a common carrier when the selling railroad, by virtue of the sales agreement, specifically retains the common carrier obligation and the means to carry it out. Here, SCCR may have retained some authority to operate over the 3.29-mile line segment that is not at issue here. See Greenville Acquisition Exemption. But as to the segment between Greenville and Travelers Rest, there is no basis for a finding that SCCR retained the common carrier obligation after the line was transferred to GCEDC with our approval. To the contrary, RailTex's letter notifying the Chairman of the County Council that the line was for sale expressly stated that the service obligations for the line would convey to the purchaser. Accordingly, we find that GCEDC acquired a common carrier obligation to provide service over the line.

Under the common carrier obligation set forth in 49 U.S.C. 11101(a), transportation must be provided "upon reasonable request." In various cases, the Board has required that a shipper must specifically request transportation of a particular type and quantity of goods between

[7] That policy is reproduced in the Groome Opening Statement, Exhibit M.

specific points – which Complainants did not do here – to trigger the common carrier obligation.[8] Those cases, however, involved established railroads that had mechanisms for receiving requests for service. This line, by contrast, was bought by an entity that had no intention of actually operating the railroad itself, even if the line had been repaired. Because there was no operator available to provide service, it would be pointless for us to hold here that G&A should have made a formal request to GCEDC specifying those sorts of details.

Of course, a shipper may not "lie low" when a rail line is damaged and out-of-service and then, much later, file a complaint seeking damages for failure to serve. Here the shippers brought their need for rail service to the attention of the County Council prior to GCEDC's formation and purchase of the line. Mr. Groome informed various members of GCEDC and the County Council that G&A desired the reinstitution of rail service to its facility, and during 2000 and part of 2001, Mr. Groome worked with GCEDC to find an operator for the line so that G&A could receive rail service. Under the circumstances, the record provides sufficient evidence to show that Complainants made a reasonable request for service, thus triggering GCEDC's common carrier obligation.

Liability under the common carrier obligation may be temporarily suspended if the carrier has in place a lawful embargo. Here, the parties dispute whether the embargo that GCEDC claims it imposed could protect GCEDC from liability, given that GCEDC did not follow AAR's procedures for establishing embargoes. In our view, however, whether the embargo was perfected or not under AAR rules should not be controlling here. Even where the proper embargo procedures are followed, a carrier may be found to be in violation of the common carrier obligation if the embargo is premised on damage that can be readily and inexpensively fixed, or if the embargo remains in effect too long. See, e.g., GS Roofing. Indeed, an embargo that extends beyond a reasonable time can be construed as an unlawful abandonment; that is why we require that, at some point, if a carrier is not going to fix a line over which service is requested, it must take steps to obtain abandonment or discontinuance authority. See Bar Ale, Inc. v. California Northern Railroad Co. and Southern Pacific Transportation Company, STB Finance Docket No. 32821, slip op. at 6-7 (STB served July 20, 2001) (Bar Ale); see also Decatur. Thus, even though GCEDC may not have issued an AAR-compliant embargo, we will review all of the evidence submitted to determine whether GCEDC acted reasonably under the circumstances.

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[8] See, e.g., CSX Transportation, Inc. – Abandonment Exemption – In Summit County, OH, STB Docket No. 55 (Sub-No. 31X) (STB served May 12, 2004).

Complainants cite various pre-1980 precedents[9] that suggest that GCEDC is subject to a standard approaching strict liability for failing to provide service. In the Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1895 (1980), however, Congress directed that railroads be treated more like ordinary businesses than like public utilities. Thus, under more recent cases, the Board has conducted a fact-specific balancing test to determine whether the actions of the carrier were reasonable, and the Board has found that if the actions were not unreasonable, the carrier was not liable for damages even though it failed to provide requested service. See, e.g., Bar Ale at 6-7.

In considering whether a failure to serve is reasonable, as well as how long the failure to serve may reasonably continue, the Board balances the following factors: the cost of repairs necessary to restore service, the amount of traffic on the line, the carrier's intent, the length of the service cessation, and the financial condition of the carrier. See Decatur v. STB, 308 F.3d at 715; Bar Ale at 6-7. We do not apply these factors in a formulaic way. Rather, our objective is to determine whether the carrier's actions, including its failure to serve, are reasonable under the circumstances. Id.

Here, our fact-specific inquiry begins with the reasonableness of GCEDC's initial determination not to provide service over the line, and the inquiry revolves mainly around whether the line was operable or could readily have been made operable. Before GCEDC purchased the line, it was made aware that the line needed repairs and that SCCR had embargoed the line because of safety concerns with the two bridges. Complainants dispute that the bridges were unsafe, and they point to the fact that SCCR continued to serve G&A's facility for a time after the embargo. But SCCR's operations using idler cars along with revenue cars were undertaken only to conclude its affairs by delivering traffic that was already scheduled to move. The operations were time-consuming and costly, and SCCR determined that, ultimately, it would abandon the line rather than repair it. The fact that SCCR conducted the close-out operations using empty cars to minimize the impact on the damaged structures does not demonstrate that the line was safe for normal operations. Indeed, at the time GCEDC purchased the line, no carrier had conducted normal operations over it for 18 months because the line needed substantial bridge and track repair. It is well established that a carrier must decide in the first instance whether an unsafe condition exists that prevents it temporarily from providing service, and we typically defer to the operating carrier's opinion on this sort of matter. See Bolen–Brunson–Bell Lumber Company, Inc. v. CSX Transportation, Inc., STB Docket No. 34236 (STB served May 15, 2003). In this case, even though GCEDC never operated the line itself, its conclusion when the line was acquired that the line was not safe to operate was eminently reasonable.

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[9] E.g., Ethan Allen, Inc. v. Maine Central R. Co., 431 F. Supp. 740, 742-42 (D. Vt. 1977) ("the quasi-public nature of railroads entails a higher degree of responsibility than is required of most private corporations").

Often, as here, the more difficult inquiry is not about whether conditions warranted a stoppage of service, but rather how quickly the stoppage of service should have been addressed. This inquiry focuses on how difficult it would be to make the line operable, i.e., the cost of repairs in relation to both the amount of traffic generated by a potential shipper and the financial condition of the carrier. If repairs can be made inexpensively, quickly, and within the carrier's means, then the carrier's failure to provide service for a long period may constitute a violation of the common carrier obligation. See GS Roofing. If, by contrast, repairs will be expensive and potential traffic over the line is light, then a lengthier embargo may not be unlawful. See Decatur v. STB.

Here, the parties have presented very different pictures of how much it would have cost to repair the line, which, when it was transferred to GCEDC, was operated as FRA excepted track. While there are shortcomings with both sides' evidence – GCEDC's presentation calculated the cost to repair the entire line to FRA Class 1 safety standards, even though the line was previously operated as FRA excepted track, and Complainants' evidence on bridge costs was based on an estimate made by Complainants' expert with little supporting documentation – we have enough information to decide this case.

Both parties agree that the line at the time it was acquired did need some rehabilitation, and while we cannot put a precise price tag on it, it would clearly have been substantial. The record shows that the previous owner of the line, SCCR, estimated that it would cost approximately $300,000 to address the problems with the bridges, and GWR, the company that GCEDC contacted in 2000, estimated that bridge repairs would cost about $200,000. After GWR made its estimate to GCEDC, GWR's president, Benny Ray Anderson, testified on behalf of Complainants that GCEDC could have limited its costs by repairing only the bridge used to serve G&A, which Mr. Anderson says probably would have cost less than $77,000. (At other points in their pleadings Complainants use a $70,000 figure to describe the cost to repair the bridge serving G&A's facility.) But even if that estimate is accurate, SCCR, when it put the line on the market, knew that additional work needed to be done on the track as well. Mr. Anderson's firm, in the earlier estimate to GCEDC, concluded that the track work would have cost $1.3 million to meet FRA Class 1 standards.

Complainants argue that the track repair did not need to meet Class 1 standards, that it would have been less expensive had the repairs been done immediately, and that in any event the only portion of the track that would need to be repaired now would be the 2.5-mile portion serving G&A. But repairing the line only to G&A's facility would continue to deny service to the other remaining shipper. And even accepting Complainants' $77,000 bridge repair figure, and a track repair figure of less than the $1.3 million estimated by Complainant's witness Anderson (taking into account the shorter distance to G&A's facility and returning the track to FRA-excepted track standards), the cost to put this line back into service would likely run well into six figures. This, of course, is much higher than the cost to repair the line at issue in GS Roofing, a case on which Complainants rely.

Another important consideration is the level of traffic on the line. A carrier will more likely be found liable for failing to provide service over a heavily used line that can be repaired inexpensively and quickly than for failing to provide service over a lightly used line needing extensive repairs. In this case, 1996 is the last full year for which we have traffic data. (Those data were provided by the carrier who owned the line prior to the owner from whom GCEDC purchased it.) In 1996, G&N carried 1066 cars, a substantial decrease from the 1642 carloads in 1994 and the 1497 carloads in 1995. Of that 1996 traffic, 249 carloads were for Complainants. However, the largest historical customer on the line moved its main facility in 1996, and six of the eight historical users of the line were gone by the time GCEDC acquired the line in 1999. Complainants have provided letters from certain former shippers indicating some possible interest in rail service, but it would appear that traffic over the entire line, had the line been repaired in 1999 or 2000, would not have been much more than the traffic that G&A would have tendered. That level of traffic is quite low in relation to the cost to repair the entire line. And even if we were to weigh the 250 cars that G&A might have shipped against the cost to repair only the portion of the line needed to serve G&A, the level of traffic would have been insufficient to require an immediate investment of the funds needed for those repairs. Indeed, SCCR's determination to abandon the line rather than repair it in light of the likely level of traffic, cost of repairs, and potential revenues to be expected indicates that at least one railroad thought that making the investment necessary to bring the line back would have been imprudent.

In any event, GCEDC has demonstrated that it did not have sufficient funds available to it to put the line back into service quickly. Complainants disagree that GCEDC was financially strapped, asserting that the County Council was paid $150,000 by SCDOT and that that money should have gone to GCEDC. However, GCEDC points out that these funds were used for the purchase of the line by County Council. Complainants also assert that there was a $1.324 million trust, provided by Greenville-Regional Area Transportation Study (GRATS), available to GCEDC for repairs to the line. But SCDOT states that the disposition of that money is not yet final, and that even when the final terms are agreed upon, SCDOT will require that the money only be used to rebuild the rail trestle over a widened Woodruff Road, which is located on the other line – the 3.29-mile line – that GCEDC acquired as part of the same transaction by which it acquired the line at issue. Complainants argue that the terms requiring that the money only be used for the Woodruff Road project were added at the request of GCEDC, but SCDOT states that it agreed to them because it did not want the money used for purposes other than replacement of the trestle and because SCDOT wanted to comply with the GRATS intent in providing the funding.[10] Complainants assert that GCEDC has found enough money to rebuild 2000 feet of track on the line. GCEDC, however, points out that that track work (which is not complete) was performed by SCDOT in connection with a road project; it states that it expended no funds for this project and had no say on how the money related to it was spent. GCEDC does acknowledge that, over the course of 3 years, its income including grants has totaled about $75,000, but it points out that these grants have gone to pay legal and consulting fees in relation

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[10] See GCEDC Clarification of the Record, Affidavit, Christy A. Hall, P.E., para. 9.

to litigation over the line brought by Complainants. Thus, GCEDC could not have used this money to help pay for the repair work.

Finally, Complainants maintain that GCEDC's intent with regard to the line was simply to preserve the rail right-of-way, and that it never intended to provide rail service. It should be noted that GCEDC was created by the County Council, and the County Council's desire to preserve the rail right-of-way would not be surprising. But in fact, GCEDC actively sought an operator, and it also actively sought funding from a variety of sources in addition to the County Council. The fact that the County Council did not write GCEDC a blank check does not, as Complainants suggest, amount to a deliberate refusal by GCEDC to restore service. The County Council has many activities that need funding, and Complainants have not shown that we should second-guess its allocations of its resources in light of the circumstances surrounding the line that we have already discussed.

For all of these reasons, we find that GCEDC did not violate the law by failing to repair the line immediately and put it back into service. The prior owner had not provided regular service for 18 months before GCEDC bought the line, and the prior owner ultimately decided to take steps to abandon the line in light of the line's poor prospects. Had the prior owner pursued abandonment, it would likely have been granted; indeed, it appears that Complainants would not have opposed abandonment, as they apparently were waiting for SCCR to file for abandonment so that they could see how little it might cost them to acquire the property themselves through the OFA process. That GCEDC could not find an operator to repair the line and provide service is not surprising.

Nevertheless, even in such circumstances, a party with an obligation to provide service may not refuse to do so indefinitely in the face of a reasonable request for service. Rather, a railroad must, within a reasonable time, either provide service or take steps to be relieved of the common carrier obligation. Here, given all of the circumstances we have described, we find that GCEDC made reasonable efforts to obtain funding and to find an operator for the first 2 years after it bought the line. During that time, while there were some disagreements, all of the parties seemed to be working toward the same goal, and indeed, Mr. Groome and GCEDC seemed to be cooperating in their efforts at times. But by June 2001, it was, or should have been, apparent to GCEDC that plans for funding and operating the line would not succeed. Moreover, by that time, Mr. Groome had already initiated state court proceedings (although he apparently did not serve his court papers on GCEDC), and it should have become apparent to GCEDC that any remaining shippers were frustrated that GCEDC was not likely going to be able to put the line back into service. At that point, even in the unusual circumstances of this case, GCEDC should have known that it was time to seek to end its obligation to provide service, and it was unreasonable for it not to begin the abandonment or discontinuance process. GCEDC's failure to get the situation resolved constituted a violation of the common carrier obligation.

<u>Damages</u>. The only remaining question is the amount of damages. Under the Interstate Commerce Act, the Board has authority to award damages sustained by a party as a result of a

statutory violation, but it may award damages only where a party shows it is clearly entitled to them. See Pennsylvania R.R. v. International Coal Co., 230 U.S. 184, 204 (1913) ("Both the fact and the amount of damage must be proved"). Here, although some of the damages that Complainants allege are the result of GCEDC's conduct are recoverable, most have not been proven. And even as to the types of damages that we find are available, Complainants may recover only for the 2-year period preceding the complaint, given the applicable statute of limitations.

Complainants seek damages from June 4, 1999, to the present. In their rebuttal statement, they assert that they are entitled to: (1) $285,243 for increased storage, handling and shipping costs resulting from lack of rail service; (2) $506,651.74 of additional mitigation expenses, i.e., funds obtained from refinancing the physical plant and used by the business during the time there was no rail service; (3) $781,301 for funds used to continue running the business that were prematurely withdrawn by Mr. Groome from his profit sharing plan, along with penalties that were paid for early withdrawal and sums borrowed against a whole life policy; and (4) $494,099 of lost profits.[11] Additionally, Complainants assert that GCEDC should be required to pay Complainants' attorney fees, and to give the line to Complainants.

The agency has historically awarded as damages costs directly attributable to the violation at issue. Here, the parties do not contest the finding made by the state court that the increased storage, handling, and shipping costs resulting from the lack of rail service from January 1999 to June 2003 totaled $285,243, or approximately $71,300 per year. We have found that GCEDC should have repaired the line or initiated abandonment/discontinuance proceedings by June 2001, but we have also found that Complainants' filing only permits recovery from August 2002. Therefore, calculating those costs from August 2002 until G&A went out of business (i.e., 5/12 of the year 2002 cost and all of the 2003 cost), we find that Complainants can recover damages in the amount of $37,517.76. See the information presented in Complainants' schedule of financial information (Complaint V.S. Mr. Groome, Exhibit 25) under "warehousing and cross docking costs" and described as "Additional Freight Charges."

Complainants' remaining claims for damages are too remote and speculative in nature to be granted. Essentially, Complainants seek to recover lost profits and all costs associated with running the business (i.e., the funds obtained from the refinancing and the personal funds that Mr. Groome says he took from other accounts and put into the business), on the ground that the lack of rail service was the proximate cause of their financial collapse. Assuming, without deciding, that the costs of running a business can be recoverable as damages, GCEDC presents a compelling argument that, while the lack of rail service was an inconvenience to G&A, Complainants did not prove their case.

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[11] In their opening statement, Complainants had alleged damages of more than $3 million.

The record shows that G&A operated as a second or third-tier niche player in the paper business, which was a very volatile and competitive business environment. This meant that much of G&A's supplies came from materials that the larger companies could not use. The greater the number of larger paper companies, the more likely they would have excess supplies that they would want to release at a reduced cost to anyone that would take them. However, according to GCEDC, because G&A's business depended largely on overproduction by larger paper mills, which provided an inexpensive source of raw materials for G&A, its ability to make a profit was substantially affected by the consolidation and vertical integration in the paper industry that took place beginning in the late 1990s. In short, with fewer, more integrated and better managed companies, there began to be fewer sources of materials for G&A, and bargains were harder to find.

The paper business, particularly for a smaller player such as G&A, experienced substantial ups and downs. A large, well capitalized corporation could weather these fluctuations, but for a smaller business with a thin margin for error, adverse business conditions could prove fatal, particularly if they were experienced in combination with individual business setbacks. Here, the paper industry as a whole underwent a downturn during the period in question. As Complainants' bank stated in a November 2002 memorandum, "The paperboard business has been in a slump for 3 years. Groome states that this slump was initiated by gross over-production by the paper companies which drove down prices and margins and has been extended by the general downturn in the economy . . . ." This memorandum is consistent with the findings of the state court, issued after a 3-day bench trial, that Mr. Groome's sales had already entered a downward trend even before rail service ceased in February 1998. Moreover, G&A suffered other business reversals, including the purchase of an unusually large inventory at inflated prices that could not be recovered in the market, the inability to recover substantial accounts receivable from a large customer that had gone bankrupt, and the loss of favorable sales terms from one of its suppliers.

Complainants concede that all of these events happened, but they downplay some and say that none would have been insurmountable if only they had had rail service. For example, they argue that the bad debt of G&A's large customer that went bankrupt represented less than 5% of G&A's total sales during the fiscal year (an amount that, to us, hardly seems insubstantial); that the supplier that altered G&A's credit arrangements did so not because of anything G&A did, but because of its own liquidity problems; that their inventory purchase decisions were based not on bad timing but rather on the need to compensate for the absence of rail service; and that the fluctuations in the paper business did not have a substantial effect on G&A's business. Thus, their bottom line is that, whatever else happened in their industry or their own experience, the thing that caused their demise was the lack of rail service.

We agree that Complainants' business environment would have been more hospitable if they had had rail service. But Complainants must show that the absence of rail service, and not these other circumstances, is what caused their demise. Complainants have not shown that the various non-rail-related adversities that befell them, along with their thin capitalization that made it difficult for them to weather this combination of events, were not the proximate cause of their business failure. Indeed, as GCEDC points out, Mr. Groome did not even mention the lack of rail service to his bankers until October 2002, long after he alleges he was damaged by it. In short, the absence of rail service may have made business more difficult for G&A, but the record does not support the conclusion that it caused G&A to go out of business.

Complainants say that they were misled by GCEDC into thinking that prompt restoration of service was likely, and that had GCEDC told them that it was not putting the line back into service quickly, they would not have refinanced their building to obtain extra cash, nor would Mr. Groome have obtained additional personal funds. However, the line had been out of service for 16 months before GCEDC even acquired it, and the shipper group, of which Complainants were a part, had been using alternative transportation for a substantial period of time. Moreover the argument that Complainants believed that service would be promptly restored is implausable given the fact that Complainants filed a lawsuit in 2001 – before they had refinanced their building, and before Mr. Groome had obtained his additional personal funds – alleging improper withholding of rail service. Given the course of the dealings of the parties, we do not believe that GCEDC's failure to put the line back into service immediately upon acquiring it was a surprise to Complainants.

Complainants alternatively argue that, had GCEDC sought abandonment sooner, or had it not bought the line in the first place, they would have bought the line through the OFA process, which they say would have saved their business. We seriously doubt that they could have done any better than GCEDC did at finding a feasible and economical way to make the necessary repairs and operate the line. In any event, if they really wanted to own the line, they had self-help available to them. As a complement to the OFA procedures that Complainants say they would have used if the line had been put up for abandonment, the Interstate Commerce Act, at 49 U.S.C. 10907, provides "feeder line" procedures under which a person can take over a line from an existing owner when the Board finds it is in the public interest. Given GCEDC's inability to get the line back into service, if Complainants really wanted to obtain the property, as they say they did, they could have sought to purchase the line using the feeder line provisions.

Complainants also ask that we require GCEDC to give Complainants the line. Based on our governing statute, however, Complainants can only recover for actual loss caused by GCEDC. Therefore, there is no basis for us to direct that the line be given to Complainants.

Finally, Complainants ask the Board to award them attorney fees. There is, however, no statutory authority suggesting that we have the power to award legal fees, and thus we have not done so in the past. See CF Industries Inc. v. Koch Pipeline Co., STB Docket No. 41685 (STB served May 9, 2000). Although we sympathize with Mr. Groome's financial circumstances, we see no basis on which we could order the County to pay his legal expenses.

This decision does not relieve GCEDC of its common carrier obligation and GCEDC must obtain prior Board approval if it wishes to dispose of the line through either a petition for an individual exemption under 49 U.S.C. 10502 or a full application under 49 U.S.C. 10903. As noted previously, GCEDC has begun this process by filing on June 24, 2005, a petition for abandonment exemption authorization in Greenville County Economic Development Corporation–Abandonment and Discontinuance Exemption–in Greenville County, SC, STB Docket No. AB-490 (Sub-No. 1X).

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

It is ordered:

1. Complainant is awarded damages from GCEDC in the amount of $37,517.76.

2. This proceeding is dismissed.

3. This decision is effective August 26, 2005.

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

Vernon A. Williams
Secretary