

SERVICE DATE - JANUARY 9, 1997

SURFACE TRANSPORTATION BOARD¹

DECISION

Docket No. AB-446 (Sub-No. 2)²

DENVER TERMINAL RAILROAD COMPANY--
ADVERSE DISCONTINUANCE--IN DENVER, CO

Decided: January 2, 1997

By applications filed August 29, 1995, the Western Stock Show Association (WSSA or petitioner) asked the Interstate Commerce Commission (ICC) to find that the public convenience and necessity require or permit the discontinuance of service by the Burlington Northern Railroad Company (BN), the Union Pacific Railroad Company (UP), and the Denver Terminal Railroad Company (DTRC) (the latter doing business as Denver Rock Island Railroad), over two lines of railroad adjacent to WSSA's facilities in the Denver Stockyards, in Denver, CO.³ WSSA also requested, in the event its application for adverse discontinuance of DTRC's trackage rights was not granted, that certain terms and conditions for the rail carrier's continued operation be prescribed. WSSA concurrently filed a petition for an exemption from the requirements of 49 U.S.C. 10903-04 to permit it to abandon the lines.

In a decision served July 3, 1996, in Western Stock Show Assn.--Aban. Exemption--In Denver, CO, 1 S.T.B. 113, we: (1) granted the adverse discontinuance applications to the extent that they were unopposed, and otherwise denied them; (2) denied the request that we set terms and conditions to govern DTRC's continued operations; and (3) denied the abandonment exemption petition.

On August 16, 1996, WSSA filed a petition to reopen the DTRC

¹ The ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (the ICCTA), which was enacted on December 29, 1995, and took effect on January 1, 1996, abolished the Interstate Commerce Commission (ICC) and transferred certain functions and proceedings to the Surface Transportation Board (Board). Section 204(b)(1) of the ICCTA provides, in general, that proceedings pending before the ICC on the effective date of that legislation shall be decided under the law in effect prior to January 1, 1996, insofar as they involve functions retained by the ICCTA. This decision relates to a proceeding that was pending with the ICC prior to January 1, 1996, and to functions that are subject to Board jurisdiction pursuant to 49 U.S.C. 10903. Therefore, this decision applies the law in effect prior to the ICCTA, and citations are to the former sections of the statute, unless otherwise indicated.

² This proceeding formerly was consolidated with three related proceedings under lead Docket No. AB-452 (Sub-No. 1X). No appeals were filed in the related proceedings.

³ A discontinuance of a railroad's service sought by a party other than the railroad is called an "adverse" discontinuance.

proceeding, directed solely at our refusal to set terms and conditions relating to insurance and property rental for DTRC's continued operations. On October 7, 1996, DTRC replied to the petition.

BACKGROUND

The background of this proceeding is detailed in our prior decision. We will repeat background information here only as necessary for clarity of discussion.

A December 10, 1993 agreement between WSSA and DTRC gave the carrier the right to operate over the subject lines until October 31, 1994. The agreement expired without the parties reaching a renewal agreement. WSSA then sought adverse discontinuance of DTRC's trackage rights and service or, in the alternative, the prescription of certain terms and conditions for DTRC's continued operations. WSSA requested that DTRC be required to: (1) pay the property taxes on the property over which it operates; (2) carry railroad comprehensive liability insurance with a policy limit of at least \$10 million; (3) establish an escrow account adequate to purchase 7-years "tail insurance" coverage⁴ in the same amount; (4) pay annual rent of \$36,100; and (5) post an irrevocable letter of credit with WSSA to secure the prescribed financial obligations. The primary dispute between the parties centered on the level of liability insurance DTRC should be required to carry and the amount of rent it should be required to pay for the use of the lines. Under the expired agreement, WSSA had accepted \$2 million in insurance coverage and had charged nominal rent.

In our decision, we found that the record did not establish that continued operations by DTRC would impose a burden on the carrier, on the community, or on interstate commerce. We concluded that, to the contrary, the record established that discontinuance would be detrimental to the carrier and the public and, thus, to interstate commerce. We therefore denied the sought adverse discontinuance. Our findings in this regard are amply supported by the record and have not been challenged in an appeal or in the petition to reopen. We also concluded that the record did not provide good cause for us to fix terms and conditions of continued operations, and we declined to do so. As noted, it is that action that is the subject of WSSA's petition.

In our decision, we also cited Arkansas & Missouri R. Co. v. Missouri Pacific R. Co., 6 I.C.C.2d 619 (1990) (A&M), in which the ICC had noted its jurisdiction to fix the terms and conditions of trackage rights agreements. WSSA, referring to A&M, requested that we fix the terms of compensation in light of the methodology used in that case. We noted, however, that, in A&M, the parties had agreed to submit their trackage rights dispute to the agency for resolution following unsuccessful negotiations. We found that, in this proceeding, there appeared to be little to suggest that the parties had attempted to negotiate a new trackage rights agreement. 1 S.T.B 113, at 136.

⁴ Because DTRC's insurance policy covers only losses from claims made when the policy is in effect, WSSA asks that DTRC carry "tail insurance," which covers losses that arise during the term of the policy for which claims are filed after the policy expires.

We said that, in any event, the record before us was not sufficiently complete for us to set terms and conditions had we wanted to do so. Id. We then discussed the issues raised and offered comments and guidance intended to assist in negotiations. We advised the parties that, should negotiations not prove fruitful, they could bring the matter before us again by means of a petition under 49 U.S.C. 11327.⁵

POSITIONS OF THE PARTIES

In its petition to reopen, WSSA argues that the Board erred in concluding that WSSA had not attempted to negotiate with DTRC before filing its application and request. In support of its argument, petitioner submits a summary of negotiations it conducted with DTRC between October and December 1994.⁶ WSSA further indicates that negotiations did not stop after it filed its application; it summarizes the negotiations the parties conducted between January and June 1996. Petitioner contends that such evidence of extensive, unsuccessful negotiations constitutes new evidence that the parties cannot agree and that the matter is ripe for Board resolution.

Petitioner contends also that the Board erred in finding that there was insufficient evidence to enable us to determine the required insurance coverage limits. Petitioner avers that its insurance broker witness expressly took into account most of the factors that we suggested as relevant. WSSA argues further that we have sufficient evidence to prescribe the terms of compensation DTRC must pay for use of the property under the formula used in A&M. WSSA calculates the rental to be \$37,845 a year based on values we found reasonable for the real property and track involved, adjusted by WSSA to account for acreage DTRC shares with BN.

Petitioner requests that, on reopening, we order DTRC to take six specific actions. WSSA would have us order DTRC to: (1) take out liability insurance coverage meeting the requirements detailed in a two-page letter written by WSSA's counsel on December 1, 1994; (2) acquire 5-year tail insurance meeting the same requirements; (3) pay a monthly rental of \$3,154; (4) pay WSSA the same monthly rental retroactive to November 1994; (5) comply with paragraphs 8, 9, and 10 of the parties' expired agreement, including provisions regarding the preservation and maintenance of crossings; and (6) pay interest on all amounts due and unpaid.

In reply, DTRC argues that there was no material error in the Board's decision, and that WSSA has not shown new evidence or substantially changed circumstances warranting reopening. The railroad avers that the matter submitted by WSSA shows attempts by it to coerce DTRC into acceptance of new trackage rights terms, not good faith efforts to resolve issues. DTRC asserts that it needs to, and is prepared to, negotiate with WSSA in good faith, and believes that our decision provides a helpful framework for doing so.

⁵ Under the provisions of that section, when cause exists, we may make appropriate orders supplemental to an order made in a proceeding approving a trackage rights or lease agreement.

⁶ In support, petitioner offers a verified statement from Peter J. Crouse, who acted for it in those negotiations.

DISCUSSION AND CONCLUSIONS

A petition to reopen must be supported by a showing of material error, new evidence, or substantially changed circumstances. 49 CFR 1152.25(e)(6). (See also former 49 U.S.C. 10327 and section 722(c) of the ICCTA.) Petitioner has not made the required showing. Indeed, its appeal bolsters our prior conclusion that negotiations following our decision are warranted.

WSSA's recounting of the negotiations that occurred between October and December 1994 does not serve to demonstrate error in our comments noting the absence of serious, good faith negotiations. The detailing of various contacts, inquiries, and demands does not reveal significant actual negotiations between WSSA and DTRC. Evidence of negotiations that occurred between January and June 1996, between the time the record closed and our decision was issued, is not new evidence that can enable us properly to set terms and conditions. Rather, it suggests that we were correct in concluding that more negotiations were and are warranted. Indeed, WSSA's exhibits (letters between the parties' representatives) show discussions of matters not previously brought to our attention.⁷ The exhibits also reveal that issues of property rights, discussed in our prior decision, continue to play a role in negotiations.

Disputing our findings regarding the sufficiency of the evidence vis-a-vis the required level of insurance coverage, petitioner cites the statements of its witness who testified regarding insurance matters. Petitioner ignores the fact, however, that a witness for DTRC also testified regarding insurance matters. As noted in our prior decision, the testimony of the two insurance witnesses conflicts. We suggested in our decision (1 S.T.B. at 138) that, in future negotiations, the parties might want to consider the points raised by DTRC's insurance agent witness. We reiterate that suggestion here.

Moreover, contending that we have sufficient evidence to prescribe the terms of compensation, and that we erred in finding otherwise, petitioner has calculated a rental based on values we found reasonable for the real property and track involved. As we had suggested that the parties might do, WSSA has adjusted the values to account for acreage DTRC shares with BN. However, WSSA has used a figure--600 feet--that we had used only for illustrative purposes. It has ignored our statements that the parties "may want to determine the precise distance of River Corridor track BN needs to serve [shipper] Pepcol. It is not clear on the record why more than 600 feet is needed." 1 S.T.B., at 137.

WSSA has the right to seek prescription of the terms and conditions of the trackage rights agreement between itself and DTRC. But this agency has the discretion to manage its docket, as long as, in so doing, we do not unreasonably burden or prejudice any party. We did not attempt to prescribe terms on the basis of the record before us in our prior decision, a record that chiefly supported an abandonment case rather than a petition

⁷ In particular, the parties discuss the matter of removing certain track in one corridor, re-laying that track in another corridor, and allocating the estimated \$300,000 cost of doing so.

to set compensation. Rather, we provided guidance to both parties on our views on a number of compensation issues and asked the parties, with the benefit of that guidance, to undertake negotiations to attempt to set the compensation by agreement.

Instead of doing so, WSSA has put forward its own computation of terms and has asked us to approve it. WSSA has not asserted that it has undertaken any negotiations with DTRC following our decision. Indeed, it appears that WSSA has filed this petition in lieu of negotiating with DTRC. We addressed a number of the compensation issues in that decision specifically to facilitate negotiations between the parties. We expect the parties to negotiate in good faith. We will set the terms if the parties can show that they tried and failed to set the terms themselves.

We again encourage the parties seriously to negotiate the issues that concern them using the parameters we have set for guidance.

If the parties come before us again with a request to set terms and conditions, they should show that they have conscientiously engaged in serious negotiations. Each matter that the parties would have us resolve should be clearly and concisely listed. Each position must be supported by reliable, probative, and substantial evidence. Finally, each party should be aware that, in any future proceeding, it runs the risk of an adverse decision respecting any issue on which it has not negotiated in good faith or on which it advances an unsupported position.

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

It is ordered:

1. The petition to reopen is denied.
2. This decision is effective on its service date.

By the Board, Chairman Morgan, Vice Chairman Owen, and Commissioner Simmons. Commissioner Simmons did not participate.

Vernon A. Williams
Secretary