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SERVICE DATE - DECEMBER 7, 1999

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 33795

AMERICAN PLANT FOOD CORPORATION--ALTERNATIVE RAIL SERVICE--
LINE OF TEXAS NORTHEASTERN RAILROAD

Decided: December 6, 1999

American Plant Food Corporation (APF) has filed a request seeking relief to alleviate an alleged service emergency in Paris, TX. APF requests that we allow the Kiamichi Railroad Company, L.L.C. (Kiamichi),¹ to switch industries on the tracks of the Texas Northeastern Railroad (TNER) in Paris for 30 days.² TNER has filed a response. We will deny APF's request.

BACKGROUND

APF states that its Paris facility, which is served by TNER, receives carloads of fertilizer materials. APF contends that the TNER has not provided adequate rail service. It claims that in the past year, cars consigned to it and placed on the TNER interchange tracks by Kiamichi "were undelivered for days on end" APF also submits that shipments were delayed for several days awaiting pickup by TNER to deliver to the connecting carrier's interchange tracks.

APF claims that there is an emergency situation, because the service problems have lasted for at least 3 months. APF asserts that it has contacted TNER repeatedly about the alleged service problems, but that promises of improved service have been unfulfilled. Consequently, APF argues that it has had to bear the inconvenience and added costs resulting from the alleged service failures, including a \$750 surcharge per car. APF states that it has spoken to representatives of Kiamichi, who have told APF that Kiamichi can provide switching service in the Paris terminal area over TNER's tracks without impairing service on its own lines.

¹ The parties' pleadings in this proceeding refer to "Kiamachi" Railroad Company.

² APF does not cite any statutory or regulatory authority for its requested relief, but we will consider its request under 49 CFR part 1146, which is predicated on 49 U.S.C. 11123. Part 1146 and the regulations at 49 CFR part 1147 were adopted in Expedited Relief for Service Inadequacies, STB Ex Parte No. 628 (STB served Dec. 21, 1998). Under 49 CFR 1146.1(a), the Board can prescribe alternative rail service if we "determine[] that, over an identifiable period of time, there has been a substantial, measurable deterioration or other demonstrated inadequacy in rail service provided by the incumbent carrier."

In reply, TNER claims that APF has failed to show a service emergency, and that, indeed, it has not demonstrated a single service failure. TNER also argues that APF has not attempted to discuss the alleged service concerns with it, and has failed to demonstrate that the sought alternative service would not unreasonably interfere with TNER's ability to provide service. TNER "surmises" that the real motive for APF's request relates not to inadequate service, but to the rates charged by TNER.

APF did not file a rebuttal.

DISCUSSION AND CONCLUSION

We have established procedures under which shippers receiving poor service can obtain relief. Under 49 U.S.C. 11123 and 49 CFR part 1146, a petition seeking such relief must (A) show substantial, measurable service deterioration or service inadequacy; (B) summarize discussions with the incumbent carrier and show why the incumbent is unlikely to restore adequate rail service within a reasonable time period; (C) contain a commitment from an alternative carrier to meet current transportation needs, and a showing that this service can be performed safely without hurting service to existing customers of the alternative carrier and without unreasonably interfering with the incumbent's service; and (D) be served, by hand or overnight delivery, on the incumbent and proposed alternative carriers and the Federal Railroad Administration (FRA). It does not appear that APF has met these requirements.

A. Service Inadequacy. APF has alleged inadequate service, but it has failed to show any service failures at all. TNER states that APF has tendered only 5 carloads to TNER since January 1, 1999 (3 cars on May 12, 1999, and 2 cars on May 14, 1999), none of which has been the subject of any service complaint or inquiry by APF. APF claims that "TNER's serious service failures have persisted for no less than three months' time," but TNER's unrebutted submission indicates that APF has tendered no traffic to TNER during that period.

APF argues that TNER has taken too long to pick up cars from Kiamichi, but TNER states that not a single car bound for APF was interchanged by Kiamichi to TNER in the past year.³ Moreover, TNER submits that, contrary to APF's assertion that its outbound cars sat awaiting TNER pickup, APF tendered no outbound shipments to TNER in the past year.

As noted, APF failed to file a rebuttal even though it is entitled to do so under 49 CFR 1146.1(b)(3). As the record stands, we cannot find that APF has demonstrated that TNER's service has been inadequate or that it has deteriorated.

B. Discussions With the Incumbent. The regulation requiring pre-filing discussions is designed, among other things, to ensure that the shipper and the carrier have done all that they can to

³ TNER asserts that all cars consigned to APF during that time were interchanged by the Union Pacific Railroad Company (UP) to TNER at Denison, TX.

work out their service issues before coming to the Board for relief. APF claims that “[w]e have contacted TNER repeatedly about its flawed service but without success. TNER’s promises of improved service have not been fulfilled. . . .” TNER, however, asserts that neither its General Manager, its Customer Service Representative, its former Marketing Director, nor the Assistant Vice President Operations Support for RailTex, Inc., TNER’s parent, recall being contacted in the past 9 months concerning service complaints. Notwithstanding its general allegation that it has sought to discuss service issues with TNER, the fact that APR has shipped only five carloads in eight months, along with its failure to file a rebuttal after TNER denied that any discussions had taken place, strongly suggests that the discussion requirements of section 1146.1(b)(1)(B) have not been met.

C. Interference With TNER’s Operations. Under section 1146.1(b)(1)(C), a petitioner must show, *inter alia*, that the requested service can be provided safely and without unreasonably interfering with TNER’s operations. APF claims that it has discussed these matters with Kiamichi and has been assured that Kiamichi can provide alternative service “without in any way impairing service on its own lines.” As TNER points out, however, APF has not indicated the nature and extent of the service Kiamichi would provide, or what TNER lines would be used. Thus, we have no way of knowing whether the proposed Kiamichi operations would unreasonably interfere with TNER’s operations on the Denison-to-Paris line.

Summary. APF has asserted that it needs relief. It does not appear, however, that APF has complied with the requirements of section 1146.1(b)(1)(C),⁴ or otherwise shown that TNER ought to be required to allow Kiamichi to operate over its lines.

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

It is ordered:

1. APF’s request for relief is denied.
2. This decision is effective on its date of service.

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

Vernon A. Williams
Secretary

⁴ We also note that, while APF sent by overnight delivery copies of its request to TNER and the FRA, it does not indicate whether a copy was sent to Kiamichi. See 49 CFR 1146.1(b)(1)(D).