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SERVICE DATE – DECEMBER 23, 2014

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 31250 (Sub-No. 1)

NEW ENGLAND CENTRAL RAILROAD, INC.—TRACKAGE RIGHTS TERMS AND
CONDITIONS—PAN AM SOUTHERN LLC

Docket No. FD 35842¹

NEW ENGLAND CENTRAL RAILROAD, INC.—TRACKAGE RIGHTS ORDER—PAN AM
SOUTHERN LLC

Digest:² The Board finds that conditions a railroad has placed on a second railroad's use of its line violate the terms for such use established by the Interstate Commerce Commission, the Board's predecessor, and directs the parties to propose a procedural schedule to establish new terms and conditions.

Decided: December 22, 2014

New England Central Railroad, Inc. (NECR), has requested in Docket No. FD 35842 that the Board set new terms and conditions for the trackage rights of Pan Am Southern LLC (PAS) over a NECR-owned railroad line in Vermont, New Hampshire, and Massachusetts. PAS, in turn, alleges that NECR is violating the trackage rights terms and conditions originally set in Docket No. FD 31250 by the Interstate Commerce Commission (ICC) in 1990 by imposing improper conditions on PAS's operations that negatively impact the ability of PAS to serve its customers. In Docket No. FD 31250 (Sub-No. 1), we find that the conditions imposed by NECR on PAS's use of the line violate the 1990 terms and conditions. We are also instituting a proceeding in Docket No. FD 35842 to establish new terms and conditions for PAS trackage rights, and direct the parties to confer and propose a procedural schedule.

¹ These proceedings are not consolidated. A single decision is being issued for administrative convenience.

² The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. Policy Statement on Plain Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

BACKGROUND

The subject rail line extends approximately 72.8 miles, from White River Junction, Vt., to East Northfield, Mass. In National Railroad Passenger Corp.—Conveyance of Boston & Maine Corp. Interests in Connecticut River Line in Vermont & New Hampshire (Amtrak I), 4 I.C.C. 2d 761 (1988),³ the ICC required Boston and Maine Corporation (B&M) to sell to Central Vermont Railway, Inc. (CV), a 48.8-mile portion of the subject line from Windsor, Vt., to Brattleboro, Vt., and CV to grant to B&M trackage rights over that portion of the line. In National Railroad Passenger Corp.—Conveyance of Boston & Maine Corp. Interests in Connecticut River Line in Vermont & New Hampshire (Amtrak II), 6 I.C.C. 2d 539 (1990), the ICC imposed terms and conditions (the TO) for the trackage rights for the 48.8-mile portion at issue in Amtrak I, as well as two adjoining CV-owned segments over which B&M previously had trackage rights (collectively, the subject line).⁴ The rights associated with Amtrak I and Amtrak II have subsequently been acquired by other railroads; NECR has acquired CV's ownership rights, and PAS now holds the trackage rights originally assigned to B&M.⁵

On June 17, 2014, NECR filed a request to set new terms and conditions for the trackage rights over the subject line in Docket No. FD 35842. NECR notes that, under Amtrak II, either party may request that the Board modify the terms and conditions 20 years after the original conveyance and that this time has passed.⁶ PAS states that it would participate in the merits of that proceeding.⁷

On June 27, 2014, PAS filed a motion to show cause, alleging that NECR has imposed unilateral operating restrictions in violation of the TO. Specifically, PAS claims that NECR has placed speed restrictions on PAS trains and required production of waybill information for all cars moving over the line. PAS further requests that the Board hold NECR's request to set new terms and conditions in abeyance until the Board resolves the issues raised in PAS's motion to show cause.⁸

NECR argues in its reply that PAS's motion to show cause should be dismissed because (1) the Board's regulations do not provide for such a procedure; and (2) the matters raised by PAS are not germane to NECR's request for new terms and conditions.⁹

³ Aff'd, Nat'l R.R. Passenger Corp. v. Boston & Maine Corp., 503 U.S. 407 (1992).

⁴ B&M and CV agreed that the final trackage rights agreement should govern the entire subject line. Amtrak II, 6 I.C.C. 2d at 542.

⁵ NECR Request to Set Trackage Rights Terms & Conditions (FD 35842) 4.

⁶ Id. at 4-6.

⁷ PAS July 23, 2014 Letter.

⁸ PAS Motion to Show Cause 6.

⁹ Because we are addressing in this decision the serious issues raised by PAS in its motion to show cause, we will deny NECR's request to dismiss that motion.

In a decision served in Docket No. FD 31250 (Sub-No. 1) on October 2, 2014, the Board directed NECR to respond to PAS's claims that the actions NECR has taken are unreasonable practices and violate the TO. On October 9, 2014, NECR filed a reply to PAS's claims, arguing that the waybill requirement and the speed restriction do not violate the TO, and PAS filed its Board-authorized reply to NECR's reply on October 16, 2014.

NECR argues that its waybill requirement is a reasonable way to enforce its rights under the TO, namely to determine whether PAS is handling haulage traffic over the line, which NECR argues is prohibited under the TO.¹⁰ NECR points to several sections of the TO as support for its interpretation that PAS may not provide haulage service to other carriers.¹¹ NECR states that it became aware that PAS was considering entering into arrangements to perform haulage for another carrier (Vermont Rail Systems), and as a result, asked for the production of waybills prior to traffic moving over a specific portion of the line.¹² NECR states that this is a reasonable method to monitor compliance with the terms of the TO, that it is willing to allow PAS to redact confidential information from the waybill, that waybill production is not a burden, and that the requirement is not intended to delay the movements of PAS trains.¹³

In reply, PAS argues that the plain language of the TO allows it to use its trackage rights over the line to provide haulage to other carriers.¹⁴ PAS further argues that NECR's waybill requirement is in fact burdensome, as waybill information typically accompanies a car as it moves between carriers and so it is difficult to provide a waybill in advance of a shipment. Moreover, because NECR is not a carrier on the movements in question, PAS argues it is not entitled to that information.¹⁵ PAS claims that, in fact, the waybill requirement may violate disclosure restrictions in 49 U.S.C. § 11904,¹⁶ and that, even if redactions of certain information made it possible to overcome such a violation, the associated process would be inefficient and would unnecessarily burden PAS and its shippers.¹⁷ Finally, PAS alleges that the waybill production requirement delays its trains and therefore violates Section 5.1 of the TO, which requires that trains must be "operated without prejudice or partiality" to either party "and in such

¹⁰ NECR October 9, 2014 Reply 4-8.

¹¹ Id. at 5.

¹² Id. at 6.

¹³ Id. at 6-7.

¹⁴ PAS October 16, 2014 Reply 2.

¹⁵ Id. at 2-3.

¹⁶ Section 11904 makes it unlawful for a rail carrier to knowingly disclose to anyone other than a shipper or consignee, without the shipper's or consignee's consent, any information regarding the nature, destination, consignee or routing of property tendered to the carrier for rail transportation.

¹⁷ Id. at 3-4.

a manner as will result in the most economical and efficient manner of movement of all traffic.”¹⁸

With regard to the speed restriction, NECR acknowledges that it issued a bulletin on May 21, 2014, limiting the operating speeds of foreign freight carriers to 25 miles per hour, but argues that the speed limit aligns with the requirements of the TO.¹⁹ Specifically, NECR argues that Section 3.2 of the TO requires NECR to maintain the line to Federal Railroad Administration (FRA) Class 2 conditions, and therefore that type of track is the basis for the compensation that PAS provides NECR for use of the line. Because the speed limit on such track is 25 miles per hour, NECR asserts that its speed restriction is consistent with the compensation levels set by the TO.²⁰ NECR also argues that Section 5.1 of the TO only requires that the scheduling of trains be performed without prejudice or partiality, and that lowering the speed limit does not violate that section. NECR also argues that the speed restriction is justifiable because of safety concerns.²¹ NECR states that PAS is not disclosing the commodities hauled under the TO, so in a conservative approach to safety, NECR has made the assumption that PAS trains may be handling highly flammable or other hazardous materials that should be moved at a maximum speed of 25 miles per hour.²² Finally, NECR further notes that the bulletin applies to all foreign carriers, not only PAS.²³

In response, PAS maintains that the minimum requirement of FRA Class 2 condition for the line does not correlate to the trackage rights fee.²⁴ PAS states that compensation for its use of the line is set by Section 3.3 of the TO, and that section does not require the fee to be adjusted based on the condition of the line.²⁵ PAS further argues that NECR’s speed restrictions on other carriers are immaterial to whether the restriction on PAS violates the TO.²⁶ PAS reiterates that Section 5.1 of the TO requires that trains of PAS and NECR be operated without prejudice or partiality and maintains that the speed restriction violates those terms.²⁷ Regarding NECR’s safety concerns that PAS may be moving flammable or hazardous materials, PAS argues that Section 5.3 of the TO requires PAS to follow NECR’s operating rules on the line, including rules

¹⁸ Id. at 4-5.

¹⁹ NECR October 9, 2014 Reply 8.

²⁰ Id.

²¹ Id. at 8-9.

²² Id.

²³ Id.

²⁴ PAS October 16, 2014 Reply 6.

²⁵ Id.

²⁶ Id.

²⁷ Id.

dealing with the movement of such materials, and NECR's unilateral speed restriction is therefore unnecessary.²⁸

DISCUSSION AND CONCLUSIONS

We find that NECR is violating the TO established in Amtrak II by imposing improper conditions on PAS's operations that negatively impact the ability of PAS to serve its customers. Section 5.1 of the TO requires that PAS and NECR trains must be "operated without prejudice or partiality" to either party, in a way that "will result in the most economical and efficient manner of movement of all traffic." Both of the conditions at issue violate this provision of the TO.

Waybill Production Requirement

NECR claims that its requirement for PAS to provide waybills prior to the movement of cars is an acceptable way to enforce its claim that the TO does not grant PAS general haulage rights on the line, and that any associated burden is minimal. But requiring waybill production to a carrier that is not part of a movement is not part of the normal course of business. The burden of producing this material before trains are moved can delay PAS's service to shippers and slow its operations. Furthermore, PAS's concern that the dissemination of waybill material could potentially violate 49 U.S.C. § 11904 is well founded, and the necessary redaction of confidential material in the waybill before it is produced to NECR makes this requirement even more burdensome. Moreover, the TO does not authorize NECR's imposition of a waybill production requirement. Because production of this information before traffic movement can delay and burden PAS's operations, the requirement violates Section 5.1 of the TO.

NECR argues that haulage is prohibited under the TO, citing multiple sections of that document. Outside of a generic statement that it does not agree with NECR's reading of the TO on haulage, PAS does not rebut NECR's argument. The parties are encouraged to confer and attempt to resolve privately issues surrounding the TO, such as this haulage issue and acceptable methods for monitoring compliance with the TO. However, absent private resolution of such matters, either party may file a formal Board action requesting enforcement of the TO, as PAS did in this case, and seek to obtain discovery of necessary documents to make its case.²⁹ Here, if NECR seeks a ruling from the Board with respect to haulage issues under the TO—for example, whether haulage is allowed under the TO, whether PAS conducted haulage, and what remedies might follow a violation—it may file a request in Docket No. FD 31250 (Sub-No. 1) for such a ruling. But NECR may not attempt to enforce its interpretation of the TO through unilateral self-help that goes beyond the terms of the TO, such as its waybill production requirement.

²⁸ Id. at 6-7.

²⁹ We note that the Board's involvement in enforcement of the TO, which the ICC imposed, differs from the Board's approach to private contracts. As a general matter, the Board leaves enforcement of private contracts to the courts. See, e.g., Sierra R.R. v. Sacramento Valley R.R., NOR 42133, slip op. at 4 & n.12 (STB served Nov. 28, 2012).

Speed Restriction

NECR's speed restriction also violates the TO. NECR first tries to justify its speed restriction by arguing that it is only required to maintain the track to a FRA Class 2 standard, under which traffic can only move at 25 miles per hour. NECR's argument is that the compensation levels in the TO correspond to this track standard and that PAS has no rights to the benefits associated with a better-maintained line. Nothing in the TO, however, states or implies such a limitation. Indeed, NECR's argument directly conflicts with the plain language in Section 5.1 of the TO: NECR's allowing its own traffic to move faster than PAS's violates the "without prejudice or partiality" requirement, and restricting the speed of PAS's trains below what is otherwise in accordance with legal standards and operating procedures is not "the most economical and efficient manner of movement of all traffic." NECR's claim that Section 5.1 pertains only to the scheduling of trains and not their operation is without merit. The title of Section 5 refers to both "Scheduling of Trains" and "Operating Rules," and specifically states that "trains, locomotives, cars and equipment . . . shall be operated without prejudice or partiality to any party" (emphasis added).

NECR's safety justification is also precluded by the TO. NECR states that, because it does not know what type of traffic PAS is moving, it needs to restrict all traffic to the speed requirements for highly flammable or other hazardous materials in the name of safety. Section 5.3 of the TO, however, already requires PAS to move traffic according to NECR's operating rules, which address the movement of these materials. Indeed, because Section 5.3 of the TO and NECR's operating rules already address the movement of trains carrying hazardous materials, it appears that the only trains affected by the speed restriction may be foreign trains that are not carrying hazardous materials. Further, PAS is subject to federal rules and regulations that govern the movement of hazardous materials. NECR's speed restriction is therefore unwarranted.

NECR also attempts to justify its speed restriction by stating that it limits the speed of other foreign carriers as well. But the status of carriers not party to the TO has no bearing on the dispute here.

NECR's actions run counter to the specific provisions of the TO. We find that the production of waybill data before traffic can be moved and the speed restriction on foreign trains introduce "prejudice or partiality" and obstruct "the most economical and efficient manner of movement of all traffic."

ORDER INSTITUTING PROCEEDING AND PROCEDURAL
SCHEDULE FOR SETTING NEW TERMS AND CONDITIONS

NECR invokes the provision of Amtrak II that allows either party to request that the Board modify the TO 20 years after the original conveyance, and asks that the Board begin a proceeding to set new terms and conditions.³⁰ PAS agrees to participate in that proceeding.³¹

³⁰ NECR Request to Set Trackage Rights Terms & Conditions (FD 35842).

We will institute a proceeding in Docket No. FD 35842 to establish new terms and conditions for PAS's trackage rights on the Subject Line and direct the parties to confer and submit to the Board a proposed procedural schedule for the setting of new terms and conditions in Docket No. FD 35842 by January 22, 2015.

The parties should, if possible, reach agreement regarding what line or lines any new terms and conditions would cover (*i.e.*, whether the terms and conditions should encompass the entire line covered under Amtrak II, or if there should be separate terms and conditions for the 48.8-mile portion of the line at issue in Amtrak I and the remaining portions of the subject line); rules governing disclosures and discovery; the procedural schedule; the types of pleadings and evidence to be submitted on the record; and any other matters to which the parties can agree. The parties shall submit one joint filing outlining the outcome of this discussion. Should the parties be unable to reach agreement on any of these matters, the parties may submit individual pleadings explaining the disagreements and supporting their positions.

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

It is ordered:

1. NECR's request to dismiss PAS's motion to show cause is denied.
2. The waybill production requirement and speed restriction imposed by NECR on PAS on the line violate the TO.
3. The Board institutes a proceeding in Docket No. FD 35482 for the purpose of setting terms and conditions governing PAS's trackage rights.
4. The parties shall confer and submit to the Board a pleading addressing the proposed scope and procedural schedule for the new terms and conditions in Docket No. FD 35842 by January 22, 2015.
5. This decision is effective on the date of service.

By the Board, Chairman Elliott, Vice Chairman Miller, and Commissioner Begeman.

(... continued)

³¹ PAS July 23, 2014 Letter.