

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 35130

CENTRAL OREGON & PACIFIC RAILROAD, INC.—COOS BAY RAIL LINE

Decided: April 10, 2008

This decision directs RailAmerica, Inc. (RailAmerica) and Central Oregon and Pacific Railroad, Inc. (CORP) (sometimes collectively referred to as the railroad), to show cause why the Board should not consider CORP's ongoing failure to provide service on the Coos Bay Line (the Line) in Oregon to be an unlawful abandonment and why CORP should not be required either to promptly repair the tunnels on the Line and resume rail service or to seek abandonment authority.

BACKGROUND

The Line is 120 miles long and runs from Eugene to Coquille, OR. The Line is operated by CORP, a subsidiary of RailAmerica, which was acquired by Fortress Investment Group in February 2007.<sup>1</sup> In late 2006, one of the tunnels on the Line collapsed during repairs. Subsequently, the railroad hired consultants to study all nine of the tunnels on the Line. Following three more tunnel incidents and the release of the consultants' report, the railroad decided to shut down the Line for safety reasons. On November 8, 2007, the Federal Railroad Administration (FRA) issued a report based on its own investigations that concurred with the consultants' assessment of the tunnels at issue.

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<sup>1</sup> CORP obtained authority to acquire and operate the Line by notice of exemption in 1995. Central Oregon & Pacific Railroad, Inc.—Lease, Operation, and Acquisition Exemption—Southern Pacific Transportation Company, Finance Docket No. 32567 (ICC served Jan. 19, 1995). On that same date RailTex, Inc., the noncarrier parent of CORP and the predecessor of RailAmerica, acquired authority to continue in control of CORP upon its becoming a Class III rail carrier. RailTex, Inc.—Continuance in Control Exemption—Central Oregon & Pacific Railroad, Inc., Finance Docket No. 32568 (ICC served Jan. 19, 1995). CORP's exemption authority was partially revoked by decision served February 13, 1996, to allow for the imposition of labor protection. Central Oregon & Pacific Railroad, Inc.—Lease, Operation, and Acquisition Exemption—Southern Pacific Transportation Company, Finance Docket No. 32567 (ICC served Feb. 13, 1996).

On September 21, 2007, the railroad issued an embargo on the Line,<sup>2</sup> citing solely the “[u]nsafe conditions in Tunnels 13, 15, and 18.”<sup>3</sup> In a press release issued by RailAmerica describing the embargo, a representative of CORP is quoted as stating, “The Coos Bay line just doesn’t have enough business on it today to justify us making the repairs.” The press release went on to indicate that the Line could be reopened to support a container terminal at Coos Bay should such a terminal be developed.

Following the embargo, shippers dependent on the Line were immediately impacted. For example, according to press reports, Georgia Pacific’s Coos Bay sawmill laid off 120 workers for over 2 weeks. And, as reported in *The Register-Guard*, five companies that rely on the Line are being required to absorb increased transportation costs ranging from 10 to 15% because they must use trucks rather than the railroad.<sup>4</sup>

In November 2007, the railroad presented a proposal to potentially interested parties for financing repair work on the Line. The railroad projected that it would cost approximately \$2.9 million to repair tunnels 13, 15, and 18 in order to reopen the Line. The railroad, however, apparently contemplated doing other work as well before CORP would again begin service. Thus, the entire proposal contemplated spending over \$23 million “to restore [the] line to status quo,” and included proposed contributions of \$4.66 million apiece from CORP, the State of Oregon, the Port of Coos Bay, shippers on the Line, and the Union Pacific Railroad Company (UP), CORP’s connecting rail carrier.

On December 22, 2007, the railroad placed an advertisement in the Coos Bay World newspaper that stated, “The Coos Bay rail line is closed for now, but we plan to reopen it one day.” In January of this year, the railroad provided a slightly modified version of its original proposal, which again included individual outside contributions of approximately \$4.66 million from each of the proposed contributors. On several occasions, Oregon Governor Ted Kulongoski stated that Oregon would not provide funding until CORP makes a good faith gesture by repairing tunnels 13, 15, and 18 and reinstating service on the Line. In addition, it appears that none of the other prospective contributors have agreed to the proposal. The railroad,

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<sup>2</sup> An embargo is a notification to the railroad industry and affected shippers that, in the carrier’s opinion, a disability exists that temporarily prevents it from providing service. An embargo, which is issued through the Association of American Railroads pursuant to Circular TD-1, does not require prior Board approval. *See, e.g., Bar Ale, Inc. v. California Northern Railroad Co. and Southern Pacific Transportation Company*, STB Finance Docket No. 32821, slip op. at 5 (STB served July 20, 2001) (*Bar Ale*). If justified, the embargo will temporarily relieve the carrier of its common carrier obligation. *Groome & Associates, Inc. and Lee K. Groome v. Greenville County Economic Development Corporation*, STB Docket No. 42087, slip op. at 11 (STB served July 27, 2005) (*Groome*).

<sup>3</sup> The nine tunnels on the Coos Bay Line are numbered consecutively from 13 to 21.

<sup>4</sup> Winston Ross, *Governor Rejects Railroad’s Request*, *The Register-Guard*, Feb. 13, 2008, at B11 (statement of Bob Ragon, Executive Director, Douglas Timber Operators, Eugene, OR).

however, has continued to indicate that it will not repair the three tunnels that precipitated the shutdown until it has secured funding for the additional work that would begin after the tunnels are repaired and the Line is brought back to a serviceable condition.

## DISCUSSION AND CONCLUSIONS

Under 49 U.S.C. 11101(a), rail carriers have an obligation to provide rail service upon reasonable request. That obligation is not absolute, Chicago & North Western Transportation Co. v. Kalo Brick & Tile Co., 450 U.S. 311, 325 (1981), and may be temporarily suspended if the rail carrier is incapable of providing service. Such incapacity may arise from physical conditions affecting safety such as weather and flood damage, tunnel deterioration, or operating restrictions due to congestion. Bar Ale, slip op. at 6.

But a carrier is not given a free pass to choose not to serve just because of circumstances that make it difficult or expensive to provide service. In order for a cessation of service to be lawful, an embargo must be reasonable at the time it is issued, and the carrier's ongoing choice to maintain the embargo must continue to be reasonable as well. Decatur County Commissioners, et al. v. The Central Railroad Company of Indiana, STB Finance Docket No. 33386, slip op. at 19 (STB served Sept. 29, 2000), aff'd sub nom. Decatur County Comm'rs v. STB, 308 F.3d 710 (7th Cir. 2002); GS Roofing Prods. Co. v. STB, 143 F.3d 387, 392 (8th Cir. 1998). An embargo that extends beyond a reasonable time can be construed as an unlawful abandonment. Groome, slip op. at 11. Thus, if a carrier is not going to repair a line over which service is requested within a reasonable time, it must initiate action to obtain abandonment or discontinuance authority. Id.<sup>5</sup>

When determining whether a failure to serve is reasonable, as well as how long the failure to serve may reasonably continue, the Board typically balances the following factors: (1) the cost of repairs necessary to restore service; (2) the amount of traffic on the line; (3) the carrier's intent; (4) the length of the service cessation; and (5) the financial condition of the carrier. Id. at 12. The factors are not applied in a formulaic way. Id. Rather, the objective is to determine whether the carrier's decision to cease service on the line was reasonable considering the circumstances, and whether the carrier's decision to continue failing to serve is reasonable as well. Id.

The information available to the Board at this point, when viewed in light of agency and court precedent, suggests that CORP's embargo of the Line, although it may have been reasonable when imposed, may have gone on for so long that it may have become an unlawful abandonment. The tunnel conditions that precipitated the embargo on September 21, 2007, did

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<sup>5</sup> While a railroad may normally seek to relieve itself of its common carrier obligation by either seeking authority to discontinue service or, alternatively, authority to abandon the line altogether, the existence of substantial rehabilitation costs on the Coos Bay Line raises a question as to whether a petition for discontinuance authority, which typically focuses just on revenues from and the costs of operations, could adequately address the circumstances prevailing on the Line.

not arise from any sudden or unexpected event such as a landslide or other collapse. Rather, it appears that the slow deterioration of the tunnels' support structures—a decay that both RailAmerica and CORP had every opportunity to observe during the several years that they owned and operated the Line—eventually resulted in the condition that was used to justify the embargo. That the condition did not arise from any event that could not have been anticipated (such as a landslide) or any suddenly perceived latent defect is demonstrated not only by the FRA report, but also by the fact that on the same day that the embargo was announced, indeed in the same announcement, the railroad was in a position to state that to repair the tunnels on the Line would cost \$7 million and that the railroad would seek a “public-private partnership” to fund the repairs. In short, the available information suggests that the railroad was not caught off guard by the need to close the tunnels and embargo the Line. And the reference to a “public-private partnership” suggests that the railroad had already determined that it would not undertake to put the Line back in serviceable condition without a significant contribution of public funds.

This inference is supported by what apparently occurred at a meeting that RailAmerica held with representatives of the State of Oregon and the Port of Coos Bay on November 14, 2007. In a 13-page briefing paper distributed shortly thereafter, RailAmerica candidly stated that “The deteriorated physical plant on the Coos Bay Line of the CORP is the result of many years of use and little funding to invest in the line.” In the same briefing paper, RailAmerica stated that the Line “has operated at a significant deficit,” that “traffic is declining,” that the Line “does not justify reinvestment,” and, specifically, that the “Coos Bay line currently operates at an annual deficit of approximately \$1,500,000, making operations and future capital expenditures unsustainable.”

In addition to detailing the Line's economic situation, the briefing paper spelled out at some length the railroad's year-long review of the nine tunnels on the Line, the problems in the tunnels revealed by a series of inspections, and the steps leading up to the issuance of the embargo on September 21, 2007. The briefing paper strongly indicates that the railroad has no intention of investing substantial funds to rehabilitate the Line until substantial financial commitments from several other entities are obtained.<sup>6</sup>

The fact that the railroad wants to use outside funding for the bulk of the work it wants to do is not, in and of itself, a basis for our concern that CORP may be violating its obligations under the statute. Railroads may look for creative ways, including public/private partnerships, to maintain or upgrade their facilities, and the railroad was entitled to wait a reasonable period for a reaction to its funding proposals. In this case, however, it would seem that the railroad has known for some time that a key aspect of its proposals—that the other parties commit to a

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<sup>6</sup> The briefing paper documents \$23 million in capital investment that would be needed to restore the Coos Bay Line to a condition that the railroad deems serviceable in the long term. The briefing paper states that the specific cost to “stabilize tunnels 13, 15 and 18 to reopen the line” would be \$2.9 million. Also included, however, are expenditures for tie replacement, surfacing, tunnel liner repairs, bridge repairs, and tunnel drainage. To fund all of this, RailAmerica proposed that \$4.66 million each be contributed by CORP, the Oregon Department of Transportation, the Port of Coos Bay, the shippers on the Coos Bay Line, and UP.

financial contribution before the railroad repairs the tunnels and lifts the embargo—has not been embraced by the various interests involved.

After hearing the proposal, Governor Ted Kulongoski reacted promptly on January 24, 2008, stating that the railroad should first repair the tunnels, lift the embargo and reopen the Line for rail service. At that point, he stated, the State of Oregon would be willing to work with RailAmerica to solve the long term maintenance and safety problems. The Governor added that the State would need an equity interest in the Line in connection with any state investment. In other words, before the State would commit substantial funds, it wanted a showing of good faith participation by the railroad.

The railroad responded to the Governor on February 4, 2008. In a mirror image of the Governor's reaction, the railroad stated that, before it would repair the tunnels, it needed a "public commitment" from the State for the funds necessary to make the "second phase" of the repairs.

The Governor responded to the railroad's reply on February 12, 2008. In his statement he reiterated exactly what he had said in his previous statement: that the State would make no financial commitment until the railroad repaired the tunnels and resumed service. On February 20, 2008, a group of shippers on the Line endorsed the Governor's position. The shippers added that they believed that repair of the tunnels should begin by April 1, 2008, more than 6 months after the embargo began.

At this point, it would seem that the railroad cannot be in any doubt that the commitment to public and shipper funding, which it has repeatedly said are preconditions to repairing the tunnels, will not be forthcoming until the tunnels are repaired. And it would also seem that the railroad has no intention of fixing the tunnels at its own expense at this time. Indeed, the railroad maintains that the traffic on the Line does not generate enough revenue to meet the costs of providing that service, a condition which, according to the railroad, has existed for years and which is worsening due to declining traffic volume.

The embargo here has been in place for over 6 months, and there are shippers on the Line that are seeking the resumption of service. It may be that CORP's decision to embargo the Line on September 21, 2007, was reasonable. But it does not appear that there is any reason for the railroad to delay either restoring the tunnels and providing service,<sup>7</sup> or, if CORP does not want to serve the Line anymore, to seek relief from the obligation to provide service. Because RailAmerica and CORP have done neither, the Line's current status appears to be that of an unauthorized abandonment.

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<sup>7</sup> RailAmerica, CORP's parent, is a leading short line and regional rail service with 42 railroads operating approximately 7,800 route miles in two countries, and CORP itself has indicated that it is willing to fund at least \$4.66 million toward work on the Line. Therefore, it would appear that the carrier is financially able to supply the \$2.9 million that CORP says is needed to repair the three tunnels and restore service.

Therefore, RailAmerica and CORP will be ordered to show cause by May 12, 2008, why CORP's ongoing failure to provide service on the Line is not unlawful, and why the Board should not require CORP either to repair the tunnels and resume rail service or to seek abandonment authority. RailAmerica and CORP will be required to serve their response on designated entities, which will have an opportunity to respond.

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

It is ordered:

1. RailAmerica and CORP are ordered to show cause by May 12, 2008, why the Board should not consider CORP's ongoing failure to provide service on the Coos Bay Line to be an unlawful abandonment and why CORP should not be required either to repair tunnels 13, 15, and 18 on the Line and resume rail service or to seek abandonment authority.
2. RailAmerica and CORP must serve a copy of their response on the State of Oregon, the Port of Coos Bay, shippers on the Line, and Union Pacific Railroad Company.
3. Entities served with the railroad's response will have 10 days from the filing of the railroad's response with the Board to address that response.
4. This decision is effective on its service date.

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

Anne K. Quinlan  
Acting Secretary