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SURFACE TRANSPORTATION BOARD

DECISION

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Docket No. NOR 42148

NORTH COAST RAILROAD AUTHORITY AND NORTHWESTERN PACIFIC RAILROAD
COMPANY v. SONOMA-MARIN AREA RAIL TRANSIT DISTRICT

Summary of Telephone Conference Call between the North Coast Railroad Authority (NCRA),
Northwestern Pacific Railroad Company (NWPCo),¹ Sonoma-Marín Area Rail Transit District
(SMART) and Surface Transportation Board (STB) Staff

Held October 6, 2016, 3:00 PM Eastern Time

NCRA Participants: Christopher Neary

NWPCo Participants: Douglas Bosco

SMART Participants: Edward Fishman, Jon Kerruish, Tom Lyons, Justin Marks, Kevin Sheys

STB Participants: Than Bawcombe, Evelyn Kitay, Erik Light, Scott Zimmerman

STB provided an introduction and welcome to the meeting and identified all STB Staff participating on the call. They then clarified that staff on the call are working on the proceeding and would not be recused from further work on the case.

NCRA stated that approximately two weeks ago they learned that SMART was unhappy with LPG tank cars in the Schellville Yard and shut down all freight traffic. On September 22, 2016, they received a letter saying that movement of freight traffic would be determined on a case-by-case basis. One train was held up for 1.5 days. A grain shipment was allowed to proceed on September 24-25. NCRA explained that the parties currently dispute whether LPG tank cars are permitted on the line and in storage. NCRA received 12 LPG tank cars for which SMART continues to deny a track warrant. SMART stated that there have been some changes; the overall dispute is whether dispatch authority gives it the authority to deny access. NCRA asserted that it has had two trains stopped which is why it is now before the Board.

STB Staff inquired whether only grain and hazardous materials (hazmat) trains had been held up, to which the railroads replied that the issue is broader. NCRA stated that it has had random notifications from SMART about other trains, such as lumber and rock, being delayed because SMART disagrees with the railroads' ability to transport petroleum products. The railroads

¹ For ease of reference we will refer to NCRA and NWPCo collectively as the railroads.

arranged truck transportation for grain cars that were held up for four days. NCRA alleges that SMART has asserted total discretion to deny track warrants, regardless of car type.

STB Staff next asked whether there were trains or cars currently not allowed to move. The railroads replied that 12 LPG cars are stranded on their line because SMART will not issue track warrants. However, they acknowledged that they can move grain cars, but point out that SMART's assertion that NWPCo put grain cars together with hazmat cars to cause issues is untrue.

SMART then stated that its view is that the only issue in this case is whether SMART's blocking of LPG cars for storage is subject to the Board's jurisdiction and must cease. SMART alleged that it is only blocking and will only purport to block the movement of loaded LPG tank cars.

STB Staff then asked whether there is a distinction between movement to shippers and movement for the purpose of storage. SMART replied that it would not block loaded LPG cars headed to a shipper on the line and that there were no other cars currently waiting to be moved. SMART reiterated that it believes the storage of loaded tank cars is a contract dispute between the parties and noted that the contract has an arbitration provision. SMART also believes that under the contract the railroads gave up the right to store hazmat on the line, and even if they did have the right to store hazmat, that right would be subject to FRA regulations, which limit storage to private track and include a requirement that SMART approve the storage. SMART stated that its approval has never been sought and that the question of whether it is private track under the contract is subject to arbitration. SMART sees no preemption issues under Township of Woodbridge v. Consolidated Rail Corp., FD 42053 (STB served Dec. 1, 2000).

STB Staff asked where the 12 LPG cars are now, whether they can be moved, and whether they are blocking other operations on the line. NWPCo replied that they are currently on the track close to the interchange point, blocking traffic, and preventing the railroad from interchange with the Northern California Railroad. NWPCo also stated that it cannot move the cars back because it has accepted the cars for shipment; NWPCo is moving the cars to private track at the Schellville Yard, which it asserted it has a right to do. SMART replied that the cars are at interchange between the California Northern Railroad and NWPCo and that SMART believes they should be re-interchanged with that railroad again until this issue is resolved. SMART stated there would be no irreparable harm to the railroads if that is the resolution because they can get money damages.

NCRA stressed that SMART's suggested resolution is exactly what they are concerned about because they believe SMART is using its dispatching function to set up unilateral contract interpretations. It also stated that SMART will prevent NCRA from moving approximately 50 cars of hazmat out of the Schellville Yard.

SMART then stated that there are 80 tank cars stored at the Schellville Yard which were moved there without proper contract rights. It acknowledged that the parties need to determine how to move those 80 cars off the line; SMART stated that it is open to solutions for moving those cars. SMART distinguishes between the 12 cars the railroads are trying to move onto the line and the 80 that are already there.

STB Staff next asked whether there has historically been hazmat traffic on the line or whether it is new. SMART replied that it is its understanding that hazmat is new to the line/railroad. NWPCo stated that the railroad has always moved hazmat, although not in recent history and they have a right to do so pursuant to the parties' operating agreement. The railroads asserted that the question that SMART is raising is whether NWPCo can temporarily store LPG tank cars while waiting for shippers to request them for delivery. NWPCo explained that its position is that SMART's remedy for the current dispute is to shut down the railroad's operations while they arbitrate; the railroad asserted that it should be able to continue current operations during arbitration because they have an absolute right to carry the goods.

NCRA pointed to paragraphs five and six of the Declaration of John H. Williams included in its petition, which states that the railroad experienced a complete shutdown of movement and that six grain cars in addition to the hazmat were denied track warrants. It also pointed to Exhibit D of the petition outlining SMART's inconsistent positions, and asserted that the inconsistencies are not tolerable. NCRA stated that it cannot get into a negotiation over each shipment. SMART asserted that the current dispute is the movement of loaded LPG tank cars.

STB Staff questioned whether the issue with the six grain cars had been resolved, which NCRA confirmed had been resolved. STB Staff next clarified that the issue is the 80 loaded tank cars at Schellville and the 12 that have been denied a track warrant to move to storage at Schellville. NWPCo confirmed that these are the current issues, but it declined to agree that the 80 cars are in "storage." NWPCo stated that the 80 cars are not there indefinitely, and explained that each car has a specific shipper to whom the railroad will deliver the tank cars when winter fuel is needed in California. SMART replied that the description sounds like indefinite storage and, regardless, the issue is a contract issue. The railroads then replied that they are happy to arbitrate this contract issue, but that they are not willing to be shut down pending the conclusion of arbitration. SMART reiterated that it considers this a contract issue that is not for the Board to resolve.

STB Staff then asked whether SMART believes that temporary storage of these rail cars is part of common carriage. SMART stated that the cars are not part of common carriage because they are in storage and not in movement. The railroads disagreed and asserted that SMART's position is contrary to FRA regulations. SMART argued that storage versus transportation is not simply decided on case law because the agreement between the parties must be construed as to what the carrier agreed to. SMART reiterated that it believes Woodbridge controls, and argued that the Board has ruled that a carrier can limit itself. It also stated that the railroad is not in financial trouble and will not fail and that shippers will not be harmed if LPG is not stored here; the potential harm is not enough to overcome any contractual promise. SMART added that FRA rules prohibit this type of storage unless there is a proper lease, and nothing shows that FRA has made that determination here.

The railroads then asserted that the track is industrial track, as defined in the agreement between the parties, and under that agreement, industrial track is under the exclusive control of the railroad, meaning that the railroad does not need SMART's approval. They asserted that there are private track agreements between the parties, which the FRA has examined and approved. The railroads reiterated that they cannot allow cars to be stranded while they go to arbitration and

stated that if they do not move the 12 LPG cars they cannot move any of their traffic. However, SMART asserted the railroads could return the cars or move them off the line. SMART stated that it has a right to stop storage of tank cars until an arbitrator concludes that their position is incorrect.

STB Staff then asked whether SMART is a rail carrier to which SMART replied that it is a residual common carrier. STB Staff then asked the railroads whether they are making a claim that SMART is violating its residual common carrier obligation by not allowing LPG onto the line. The railroads said they are not making such a claim because SMART is a passenger carrier only and cannot carry freight. STB Staff clarified that the common carrier obligation requires the carrier with the residual common carrier obligation to move the freight if the operating common carrier cannot move it. The railroads said that they have the exclusive freight easement and SMART has no ability to provide freight service.

STB Staff then asked the railroads to clarify whether their claim of preemption is that SMART is a state agency and the Board should preempt their actions. The railroad replied in the affirmative and asserted that SMART is claiming preclearance authority.

STB Staff next asked whether there is still an emergency, to which the railroads replied in the affirmative because they still have cars stuck at the interchange and SMART is claiming total authority to control which cars can move. STB Staff asked whether SMART intended to impede the delivery of the 80 cars now at Schellville, to which SMART replied that they would work with the railroads because they want the tank cars off the line. The railroads then asserted that they had to cancel other LPG cars destined for Schellville so the issue is not just the 12 cars, but also the others they cannot send to the yard. SMART then stated that the agreement between the parties gives SMART the express right to approve leases, and if the railroads have leases on “subject segments,” SMART has not reviewed them. However, the railroads disagreed that the track where the 80 cars are located is a “subject segment.” SMART disagreed that these are industrial tracks and stated that this is another contract issue.

STB Staff then asked if there was an agreement the parties could come to while the Board is considering the petition. The parties discussed whether they could move the cars to the California Northern or to Schellville and what the railroad might do with additional shipments until arbitration concludes. SMART asked whether the railroads could move the cars back to the California Northern and the railroads asked why not move them to where the other cars are located. SMART then asked if it were to allow the 12 cars to move to Schellville, would the railroad move the other cars off the line. The railroads could not say whether they would agree to stop inbound loaded LPG tank cars, but noted that they voluntarily agreed to stop a shipment of 30 inbound cars. SMART stated that the only open question is whether no more cars would be moved if they allowed the 12 LPG cars to be moved to Schellville and offered to expedite arbitration. NCRA expressed that even expedited arbitration would take a long time. NCRA stated it could not commit immediately because they would have to do a financial analysis and NWPCo noted that while a contract issue could be resolved in arbitration, it has an absolute right to move the materials in the meantime and is not willing to indefinitely relinquish its rights as a common carrier.

STB Staff next asked for clarification on a few issues, including explaining the layout of the three segments of the line, who owns each, who has operating rights, and what segments are used to reach the 80 cars. NWPCo stated that there are three segments, each with slightly different management. It explained that the Willits Segment is the northernmost segment and not used by anyone; the Healdsburg segment is used by both SMART and the railroad; and the east-west Lombard segment is used by freight and by SMART only for occasional equipment movement. The Healdsburg segment is where commuter activity will occur. All three segments exclude industrial tracks. The 80 cars are stored eight miles from the interchange with the Northern California on the Lombard segment. NWPCo asserted that the LPG tank cars go nowhere close to SMART's operations. STB Staff next asked whether the "industrial track" is excepted track to which NCRA replied in the affirmative regarding the two sidings at Schellville.

SMART added that track is owned by NCRA and SMART for different reasons. It stated that the Lombard segment will be used for training and other activities and possibly for commuter or passenger service in the future. SMART then asserted that the two tracks where storage is occurring have not been designated as industrial track. NWPCo stated that they are clearly excepted track under 49 U.S.C. § 10906. SMART stated that although it may be § 10906 track, under the contract "industrial track" is defined differently and because these sections have not been designated industrial track it is a contract issue. However, the parties agreed that for Board purposes it is considered § 10906 excepted track.

After STB Staff offered mediation, staff opened the conversation to closing thoughts. NCRA stated that it does not want the Board to rule on contract issues, but asserts that the contract is being used to determine what type of cargo is shipped. NCRA noted that on two occasions all track warrants have been denied and argued that the result of these actions implies that SMART believes it can use its dispatching authority to control movements whenever it has a contract issue.

SMART then stated that a lot of what was discussed is not in the record and SMART will not answer everything now, but will focus on the issue on the table. SMART believes the question is whether it can use its dispatching authority to stop the movement of hazmat on to the line for storage on the line.

STB Staff concluded that that is likely the legal issue that the Board will need to address if this moves forward; the law resolving that issue is unclear.