STB EX PARTE NO. 564

SERVICE OBLIGATIONS OVER EXCEPTED TRACK

Decided October 8, 1997

The Board issues a policy statement declaring that it will continue the current practice of evaluating railroad service issues on a case-by-case basis, and that, when safety issues are involved, it will continue to seek advise from the Federal Railroad Administration.

BY THE BOARD:

In a notice of proposed rulemaking published at 62 Fed. Reg. 24,896 (1997), the Board sought comments on the circumstances under which it should require a railroad to operate over excepted track that does not meet Federal Railroad Administration (FRA) Class 1 track safety standards,[1] and that the operating railroad deems to be unsafe. After reviewing the comments, the Board has decided not to issue rules, but instead, to issue this policy statement declaring that the Board will continue the current practice of evaluating railroad service issues on a case-by-case basis.

BACKGROUND

In a decision in *GS Roofing Products Company, Inc., Beazer West, Inc., D/B/A Gifford Hill & Company, Bean Lumber Company and Curt Bean Lumber Company v. Arkansas Midland Railroad and Pinsly Railroad Company, Inc.*,

[1] The FRA has established a hierarchy under which track meeting different criteria can accommodate different traffic and/or operating speeds. *See*, 49 CFR part 213. Class 6 track meets the most exacting standards, and permits the highest speeds. Class 1 track meets the FRA's lowest standards, and permits speeds of only 10 miles per hour for freight. Another category of track that track owners may designate -- "excepted" track -- does not meet class 1 standards. Nevertheless, railroads may provide service over excepted track, under specified conditions designed to ensure safety. *See*, 49 CFR 213.4.

Docket No. 41230 (STB served March 11, 1997) (*GS Roofing*),[2] we reviewed a fact-specific complaint concerning a railroad's embargo.[3] Specifically, we considered whether that embargo -- which was imposed as a result of washouts following a period of heavy rains -- of certain excepted track that had been operated at less than FRA Class 1 operating standards while a determination was made whether to repair, abandon, or sell all or part of the line was unlawful so as to support a request for damages for failure to provide service during the period of the embargo. We found that the embargo was not unlawful.

In our *GS Roofing* decision, we addressed, in general terms, the relationship between the common carrier obligation and a railroad's determination to impose an embargo. We pointed out (at 2 n.5) that a carrier's common carrier obligation is not extinguished by its imposition of an embargo. We also noted (at 8) that, "under its common carrier obligation, a railroad's primary responsibility is to restore safe and adequate service within a reasonable period of time BY THE BOARD:[4] * * *." Nevertheless, in the *GS Roofing* case, we concluded that the carrier's initial determination to embargo the track was reasonable, as the track had been damaged by flooding and the carrier thus had reasonably concluded that the track was unsafe. We also found that the carrier's continuation of the embargo for a short time, while it determined whether to repair the track or instead to seek to abandon or sell it, was not unreasonable.

Although our *GS Roofing* decision was fact-specific, and was not intended to address broadly the circumstances under which a railroad's refusal to provide service over excepted track would be deemed to be unreasonable, some of the parties to that proceeding characterized the decision as having held that railroads can, as a matter of course, avoid their common carrier obligation simply by declaring their track to be excepted track. As a result, we initiated this proceeding to address the circumstances under which we should require a

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[2] Petition for review pending, *GS Roofing Products Company, Inc., et al. v. Surface Transportation Board*, No. 97-107 (8th Cir.).

[3] An embargo is a temporary cessation of service by a railroad that is temporarily unable to provide service.

[4] The *ICC Termination Act of 1995*, Pub. L. No. 104-88, 109 Stat. 803 (1995) (*ICCTA*) abolished the Interstate Commerce Commission (ICC) and transferred certain functions to the Surface Transportation Board (Board), effective January 1, 1996. 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 new 49 U.S.C. 10707.

railroad to provide service to shippers over track that does not meet FRA Class 1 track safety standards, and that the carrier has concluded is not safe.

THE COMMENTS

Comments were submitted by railroad representatives,[5] government entities (Federal[6] and state[7]), shipper interests,[8] rail labor parties,[9] and a group representing property owners.[10] The comments, for the most part, reflected a broad consensus on several points. Most significantly, all of the participants appear to concur that the common carrier obligation, 49 U.S.C. 11101(a), which requires railroads to provide service on reasonable request, applies to both excepted track and track in Class 1-6 status. Thus, the participants are in general agreement that a railroad's obligation to restore service on inoperable track applies equally to excepted track and other track. The participants also were nearly unanimous in recommending that we not seek to adopt rules in this matter.[11]

DISCUSSION AND CONCLUSIONS

In our *GS Roofing* decision, we followed the case-by-case approach to assessing the reasonableness of an embargo that had historically been followed by our predecessor, the Interstate Commerce Commission (ICC). We used the balancing test that the ICC had applied in *Louisiana Railcar, Inc. v. Missouri*

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[5] Opening comments were filed by the Association of American Railroads (AAR), the American Short Line Railroad Association (ASLRA), and Wisconsin Central Ltd. (Wisconsin Central). AAR and ASLRA also filed reply comments.

[6] The United States Department of Transportation (DOT).

[7] The State of New York (New York) and the State of Vermont.

[8] National Grain and Feed Association (NFGA), and GS Roofing Products Company, Inc. (GS Roofing) (opening and reply comments).

[9] United Transportation Union (UTU) and Joseph C. Szabo.

[10] The National Association of Reversionary Property Owners.

[11] UTU suggests that we might issue regulations protecting employee wages in the event that a carrier were to engage in a lengthy and unwarranted embargo, but we do not intend to permit lengthy and improper embargoes. New York suggests a time limit for embargoes, with extensions available if necessary.

Pacific R.R., 5 I.C.C.2d 542, 546 (1989), and in other cases.[12] We see no reason to depart from that approach.

As the participants recognize, insofar as the common carrier obligation is concerned, excepted track is no different from other track. A railroad must provide service over it upon reasonable request. A railroad may embargo excepted track (like other track) when, in its opinion, a disability or interruption exists that temporarily prevents the carrier from providing service. However, as with other track, a carrier's principal obligation is to restore safe and adequate service, within a reasonable time, regardless of the class of the track involved.

Because a railroad's common carrier obligation is the same for excepted track as for other track, it would be inappropriate to adopt special rules for excepted track; indeed, as NGFA and Wisconsin Central note, such rules might undermine service to small communities by discouraging carriers from operating branch lines. Although complaints alleging improper embargoes are rare, we will continue to take them seriously, as we have in the past. And when safety is placed in issue in assessing the reasonableness of an embargo, we will continue to be guided by advice from the FRA.[13] We conclude that the issuance of rules would be inappropriate. We will continue to address issues such as these on a case-by-case basis.

It is ordered:

1. This proceeding is dismissed.
2. This decision is effective on October 22, 1997.

By the Board, Chairman Morgan and Vice Chairman Owen.

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[12] Under the balancing test, the Board considers factors such as the length of the service cessation, the intent of the railroad, the cost of repairs, the amount of traffic on the line, and the financial condition of the carrier.

[13] We agree with DOT's suggestion in its comments that we secure an appropriate inspection by an FRA-certified inspector before directing restoration of service over a line embargoed for safety reasons. Indeed, in light of DOT's primary jurisdiction to determine whether particular rail lines are unsafe, we intend to continue the practice that we followed in *GS Roofing*, and are pursuing informally in a more recent embargo situation, of seeking advice from the FRA whenever the parties raise safety issues. Thus, upon the filing of a complaint addressed to an embargo, we will request from the FRA an opinion as to whether and under what conditions the line can be safely operated.