

STB FINANCE DOCKET NO. 34397

KEOKUK JUNCTION RAILWAY COMPANY–ALTERNATIVE RAIL
SERVICE–LINE OF TOLEDO, PEORIA, AND WESTERN RAILWAY
CORPORATION

Decided October 31, 2003

The Board finds that rate disputes cannot justify emergency relief under the alternative rail service provisions of 49 U.S.C. 11123.

BY THE BOARD:

On August 8, 2003, Keokuk Junction Railway Company (KJRY)¹ filed a petition under 49 U.S.C. 11123 and 49 CFR part 1146 for authority to provide alternative rail service on the “La Harpe Line” (or Line), which KJRY describes as a 71.50-mile rail line in the State of Illinois between milepost 194.50 at La Harpe and milepost 118.5 at Hollis.² Specifically, KJRY seeks to provide what it describes as localized immediate service relief for shippers located on a 56-mile portion of the La Harpe Line between La Harpe and Canton, milepost 138.50. Toledo, Peoria, and Western Railway Corporation (TP&W), the owner of the Line, filed a reply on August 15, 2003.³ KJRY’s petition will be denied.

¹ KJRY is a Class III railroad controlled by Pioneer Railcorp, a noncarrier holding company. KJRY operates over a 38-mile line mostly between Keokuk, IA, and La Harpe, IL, and over 27.6 miles of railroad between La Harpe and Fort Madison, IA.

² KJRY refers to a “71.5 mile line” notwithstanding that the distance between the mileposts it has identified, milepost 194.50 and milepost 118.5, appears to be 76 miles. The Board assumes that when KJRY requests alternative service on “the La Harpe Line,” it refers to the line between La Harpe and Hollis. In prior decisions, discussed below, KJRY had described the La Harpe Line as the line extending 71.5 miles between milepost 194.50 at La Harpe and milepost 123, which KJRY originally described as being at Peoria and which it now describes as being at Mapleton, IL. The Board’s decisions in those cases followed KJRY’s description.

³ KJRY filed a rebuttal on August 20, 2003, and on August 25, 2003, TP&W filed a motion to strike part of the rebuttal and in the alternative a reply and request for leave to file a reply. KJRY, on September 11, 2003, filed a reply to the motion to strike, and in the alternative a surrebuttal and a request for leave to file a surrebuttal.

In the motion to strike, TP&W requests that a sentence and verification in KJRY’s rebuttal (intended to show that KJRY had discussed service problems with TP&W, as required under 49 CFR 1146.1(b)(1)(ii)) be stricken because these matters could and should have been in KJRY’s petition as part of its case-in-chief. Because the part 1146 regulations are designed to be an accelerated process, it is important that all available evidence be in the petition for relief. Nevertheless, the evidence TP&W seeks to have stricken actually concerns additional offers by KJRY to purchase the La Harpe Line. In the interest of a more complete record, both TP&W’s request for leave to file a reply to KJRY’s rebuttal and KJRY’s request for leave to file a surrebuttal will be granted.

BACKGROUND

In *SF&L RY.—Acquire & Operate—Toledo, Peoria & Western Ry.*, 6 S.T.B. 408 (2002) (*SF&L Railway*) (clarified January 31, 2003), the Board at KJRY's request revoked the authority for SF&L Railway, Inc. (SF&L), to acquire the operating easement, rail, ties, and certain improvements of the La Harpe Line. On January 21, 2003, while the Board was considering appeals of the *SF&L Railway* decision, KJRY filed a petition for authority to provide alternative rail service on the La Harpe Line. See *Keokuk Junction Railway Company—Alternative Rail Service—Line of SF&L Railway, Inc.*, STB Finance Docket No. 34310 (STB served February 14, 2003) (*KJRY Service—SF&L*). KJRY based the request on its claim that SF&L had embargoed the Line on October 18, 2002, the day after the decision in *SF&L Railway* was served, and that the shippers and the public needed, and supported the resumption of, rail service.

In *KJRY Service—SF&L*, the Board observed that KJRY's alternative rail service petition had been eclipsed by SF&L's reconveyance of the La Harpe Line to TP&W on February 10, 2003. Based on TP&W's assurances that it was "ready, willing, and able to resume operations over the Line" and that there were "plans to restore service to the Line once it is reacquired from SF&L," the Board found it "likely that rail service to the La Harpe Line would be restored speedily." *KJRY Service—SF&L*, slip op. at 2. The Board denied KJRY's petition without prejudice to resubmission if rail service was not restored after the reconveyance. The petition that is the subject of this decision is therefore KJRY's second request for authority to provide alternative service on the La Harpe Line.

Under 49 U.S.C. 11123, the Board may act to protect the public's access to rail transportation.⁴ The Board's implementing regulations at part 1146 deal with "requests for localized immediate service relief." See *Expedited Relief for Service Inadequacies*, 3 S.T.B. 968, 972 n.11 (1998) (*Service Inadequacies*). Under section 1146.1(a), the Board will prescribe emergency alternative rail service relief if it finds "that, over an identified period of time, there has been a substantial, measurable deterioration or other demonstrated inadequacy in rail service provided by the incumbent carrier."⁵ Relief under part 1146 is subject to

⁴ Under 49 U.S.C. 11123(a), the Board may order service relief: [w]hen the Board determines that shortage of equipment, congestion of traffic, unauthorized cessation of operations, or other failure of traffic movement exists which creates an emergency situation of such magnitude as to have substantial adverse effects on shippers, or on rail service in a region of the United States, or that a rail carrier providing transportation subject to the jurisdiction of the Board * * * cannot transport the traffic offered to it in a manner that properly serves the public * * * .

⁵ Under section 1146.1(b)(1), a petition for relief must also: (1) summarize discussions with the incumbent carrier and show why the incumbent is unlikely to restore adequate rail service within a reasonable time period; (2) include a commitment from the alternative carrier to meet current transportation needs, and show 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 (3) be served on the incumbent carrier and the Federal Railroad Administration (FRA).

both a reappraisal requirement after the initial 30-day period and a maximum 270-day time limit. 49 U.S.C. 11123(c)(1).

KJRY contends that TP&W cannot and will not transport the traffic offered to it in a manner that properly serves the public. Specifically, KJRY claims that rail service over the La Harpe Line declined dramatically from as much as one train in each direction 6 days a week at the time of SF&L's acquisition of the Line in December 2000 to a total cessation of rail service since SF&L embargoed the Line in October 2002. KJRY contends that TP&W, after reacquiring SF&L's interest in the Line in February 2003, has effectively continued SF&L's embargo by refusing to offer commercially viable rates. Citing cost evidence in TP&W's Reply at 13-14, KJRY further contends that TP&W is financially unable to provide adequate rail service to the La Harpe-Canton line shippers.

KJRY claims that there is no reason to believe that TP&W will restore adequate rail service. In support of this argument, KJRY cites TP&W's attempt, albeit unsuccessful, to sell the Line to SF&L, TP&W's attempt (also unsuccessful) to substitute itself for SF&L in SF&L's effort to abandon the Line,⁶ TP&W's failure to provide commercially reasonable rates, and TP&W's refusal to negotiate rates with shippers or an agreement with KJRY for either the purchase or use of the Line.

KJRY states that there is a public need for rail service over the La Harpe-Canton line and that local shippers and communities are in need of immediate service. Exhibit C of KJRY's petition contains letters addressed to the Board from shippers of local and overhead traffic.⁷ These letters, dated between July 28 and August 8, 2003, charge that TP&W is reluctant to quote rates and provide rail service or simply refuses to quote competitive rates. KJRY argues that it does not matter whether the rates TP&W seeks to charge reflect its inability to offer commercially reasonable rates or its intent eventually to abandon and scrap the La Harpe Line. According to KJRY, all that matters is the La Harpe-Canton line shippers' need for rail service and TP&W's failure or inability to provide adequate rail service to them.

KJRY claims that SF&L had agreed to negotiate over KJRY's proposed purchase of trackage rights over the La Harpe Line but that those discussions became moot when TP&W reacquired the Line from SF&L and that TP&W has consistently rejected KJRY's requests to allow it to operate over the Line. On October 21, 2002, just after *SF&L Railway* was served, KJRY states that it offered to purchase the Line for more than SF&L had paid, but that RailAmerica, Inc., TP&W's corporate parent, failed to respond adequately. KJRY states that, on November 18, 2002, it offered to enter into a contract to serve the elevators

⁶ *SF&L Railway, Inc.—Abandonment Exemption—in Hancock, McDonough, Fulton and Peoria Counties, IL*, STB Docket No. AB-448 (Sub-No. 2X) *et al.* (STB served January 31, 2003).

⁷ The local shippers include Farmers Elevator Company of Sciota (Farmers), at milepost 183.5, and Blandinsville Elevator (Blandinsville), at milepost 189.3. The overhead shippers include Roquette America, Inc., Elkem Carbon-Keokuk, and Colusa Elevator Co. United Paving & Construction, Inc., gives a Canton address on its letterhead but, according to TP&W, ships from Rawalt, IL, at milepost 136.8, about 1.7 miles east of the La Harpe-Canton line. Similarly, LaHarpe Elevator gives a La Harpe address on its letterhead but, according to TP&W, ships from Keokuk.

at Blandinsville and Sciota, but that TP&W declined, stating that such an arrangement was precluded by its collective bargaining agreements.⁸

Asserting that it is ready, willing, and able to operate the La Harpe-Canton line, KJRY claims that it can do so more efficiently than TP&W, with rates that will move traffic. KJRY contends that it has not raised its rates for the affected shippers in over 3 years, that it has lower costs than TP&W, and that its route from Keokuk to Canton is more efficient. KJRY states that it will implement the same management techniques, dedicated marketing efforts, and shipper-oriented services that it employs on its own adjoining line. Additionally, KJRY states that it is familiar with applicable safety regulations, is aware of their importance, and knows how to comply with them. If its application is granted, KJRY claims that it would immediately inspect the La Harpe-Canton line in conformance with FRA standards and would work with FRA to make necessary repairs. Finally, KJRY claims that its operation of the La Harpe-Canton line will not conflict with TP&W's operations because TP&W continuously fails to provide service.

KJRY maintains that an inadequate service finding under 49 CFR 1146.1(a) may be made when traffic cannot move because rates are cost-prohibitive. Citing the concurring opinion in *ICC v. J-T Transport Co.*, 368 U.S. 81, 136-137 (1961) (which stated that the Board's predecessor, the Interstate Commerce Commission, "recognized * * * an 'embargo' exception to its usual practice of disregarding the level of rates charged by existing carriers"), KJRY contends that commercially unreasonable rates have been characterized by the Supreme Court as inadequate. KJRY also cites *H. L. & F. McBride Extension—Ohio*, 62 M.C.C. 779, 790 (1954) ("there is a real difference between rate cutting and the use of rates to avoid traffic * * * * the use of rates which will not move the commodities involved * * * has in reality effected an embargo on the traffic") and *Ewell Extension—Philadelphia*, 72 M.C.C. 645, 648 (1957) ("their rates have not and will not move the traffic; and to this extent the available motor service is inadequate to meet the shipper's requirements").

TP&W asserts that it repaired the La Harpe Line after reacquiring it from SF&L, that the Line is in FRA Class 1 condition, and that it is ready, willing, and able to provide rail service to the La Harpe-Canton line at economically remunerative rates. TP&W also asserts that it has the locomotives, equipment, and employees available to provide rail service; that at the request of the shippers it provided single-car rate quotes and offered reduced rates to shippers willing to make volume commitments or to enter into take or pay arrangements; that these rates were sufficient to cover its operating and maintenance costs and give it a

⁸ On September 2, 2003, TP&W filed a copy of a letter to KJRY offering to lease to KJRY the 11-mile portion of the La Harpe-Canton line between La Harpe and Sciota, at milepost 183.53. TP&W requested that KJRY respond by September 4, 2003, that negotiations conclude by September 8, 2003, and that action in this proceeding be stayed until September 9, 2003. Apparently the offer was withdrawn when KJRY responded that it was willing to discuss the possibility as long as all shippers on the La Harpe-Canton line could be served. See KJRY letter filed September 9, 2003, in *Keokuk Junction Railway Company—Feeder Line Acquisition—Line of Toledo Peoria and Western Railway Corporation between La Harpe and Hollis, IL*, STB Finance Docket No. 34335.

reasonable return; but that none of the potential shippers contacted it either to negotiate rates or request service.

In the absence of requests for rate negotiations or rail service, TP&W contends that there can be no service inadequacy. TP&W questions KJRY's claim that it can provide more efficient service over the La Harpe-Canton line and suggests that the emergency service relief KJRY seeks is primarily intended to permit KJRY to provide competitive overhead operations between Keokuk and Canton. Citing *Service Inadequacies*, 3 S.T.B. at 970, TP&W asserts that the emergency service rules "are not intended to address demands for more competitive service."

DISCUSSION AND CONCLUSIONS

The Board's authority under 49 U.S.C. 11123 provides an accelerated process to address serious ongoing service disruptions and inadequacies of a temporary nature. The relief available is limited in duration and is to be granted without assessing fault. Part 1146 is not intended to provide permanent relief nor to be used as a punitive or preventive measure. *Service Inadequacies*, 3 S.T.B. at 970, 973.

The alleged service inadequacy at issue here is based primarily on the rates TP&W seeks to charge for movements over, or to and from points on, the La Harpe-Canton line. Rate disputes do not constitute service disruptions or inadequacies within the meaning of 49 U.S.C. 11123. Section 11123 provides that the Board may order relief for equipment shortages, traffic congestion, and unauthorized cessation of operations. None of these is analogous to allegations of unreasonably high rates.

Rate disputes require permanent, not temporary, relief, which can be obtained only on fully developed records based on rate complaints filed under 49 U.S.C. 10701(d)(1). In contrast, the regulations at part 1146 are intended to provide temporary relief on an accelerated basis. They are not intended to be a surrogate for rate reasonableness proceedings. Indeed, a predicate for the Board's authority to address unreasonable rates is that the defendant carrier be found market dominant, something that has not been alleged, much less demonstrated, in this case. Therefore, alternative rail service relief is not available here.⁹

As noted above in footnote 7, two shippers, Farmers and Blandinsville, both grain elevators, are located on the Line. Both support KJRY's request for service, stating that they had received no service from the TP&W since October 2002. The Board requires all carriers, including TP&W, to carry out their common carrier obligation. The Board is particularly concerned when

⁹ TP&W also argues that KJRY failed to satisfy the standards for relief under 49 CFR 1146.1(a) and (b). According to TP&W, KJRY failed both to demonstrate that there has been a substantial, measurable deterioration or other demonstrated rail service inadequacy by TP&W and to discuss the service problems and the reason for them with TP&W. Having found that permanent rate relief may not be sought under part 1146, there is no need to consider whether KJRY's petition has otherwise satisfied the standards for expedited emergency relief.

7 S.T.B.

shippers on the affected Line that have no rail alternative do not get requested service, especially where, as here, they are grain shippers that might need service due to the harvest. But this record does not demonstrate that either Farmers or Blandinsville has requested service from TP&W. If either requests service and TP&W refuses to provide it, the Board can direct that carrier to provide service or permit another carrier to provide service.

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

It is ordered:

1. TP&W's motion to strike KJRY's rebuttal is denied.
2. TP&W's reply to KJRY's rebuttal and KJRY's surrebuttal are accepted into the record.
3. KJRY's petition for authority to provide alternative rail service is denied.
4. This decision is effective on its service date.

By the Board, Chairman Nober.