

SERVICE DATE – MAY 18, 2023

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 36695

THE WENGER GROUP, INC., AND ESBENSHADE, INC.
—PETITION FOR DECLARATORY ORDER AND INJUNCTIVE RELIEF—
RAIL SERVICE TO PENNSYLVANIA FEED MILLS AND OTHER FACILITIES

Digest:¹ The Board grants the request of Kellogg Company (Kellogg) to intervene and lifts the abeyance order in this proceeding with respect to the relief sought by Kellogg. The Board also orders the submission of supplemental information and sets forth procedural deadlines.

Decided: May 18, 2023

On April 24, 2023, The Wenger Group, Inc., and Esbensshade, Inc. (collectively, Petitioners), filed a petition under 5 U.S.C. § 554(e) and 49 U.S.C. § 1321, requesting certain declaratory and injunctive/directed service relief related to rail service to their facilities provided by Norfolk Southern Railway Company (NSR) over a rail line owned by the National Railroad Passenger Corporation (Amtrak) between Rheems, Pa., and Lancaster, Pa. (the Line). (Pet. 3.) Petitioners state that Amtrak intends to block all freight rail service on the Line for at least six weeks, scheduled to begin on May 20, 2023, to allow for a planned track project. (*Id.* at 3-4, 4 n.4.) Petitioners seek a declaration that the cessation of freight rail service during Amtrak's track project would be a violation of their right to receive rail service upon reasonable request under 49 U.S.C. § 11101(a). (Pet. 9.) Petitioners also request that the Board enjoin Amtrak from carrying out its planned shutdown of the Line until the Board approves a freight rail service plan filed by Amtrak and NSR that preserves service to Petitioners on the same terms and with the same frequency that NSR currently provides. (*Id.* at 12.) In the alternative, Petitioners request that the Board issue a directed service order under 49 U.S.C. § 11123 that would preserve the status quo for at least 30 days to allow for Amtrak and NSR to work out a feasible way to accomplish necessary track work while providing freight rail service. (Pet. 17-18.) Petitioners further request that, should the track project go forward without continued freight service, the Board provide guidance and direction on the categories of damages that Petitioners may pursue from Amtrak and/or NSR. (*Id.* at 19.)

¹ 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. See Pol'y Statement on Plain Language Digs. in Decisions, EP 696 (STB served Sept. 2, 2010).

By decision served April 26, 2023, Amtrak and NSR were directed to reply to Petitioners' requests for injunctive relief and a directed service order by May 1, 2023, and to Petitioners' request for declaratory relief by May 15, 2023. In its May 1, 2023 reply, NSR stated that it had "retained consultants . . . to better understand the reasonable alternatives to Amtrak's plan that would also accommodate the needs of the customers on the Line" and intended to provide recommendations from these experts in its May 15, 2023 submission. (NSR Reply 3.)

On May 4, 2023, Kellogg Company (Kellogg), which owns and operates a facility on the Line and is also served by NSR, filed a petition for leave to intervene for the purpose of becoming a party of record in this proceeding and requesting the same declaratory and injunctive relief as Petitioners. (Kellogg Pet. 1.) Kellogg states that it adopts and incorporates by reference from the petition the requested declaratory, injunctive, and other relief sought by Petitioners. (*Id.*) Kellogg also submitted information regarding its claim that it would be irreparably harmed by the planned shutdown of the Line. (*Id.*, V.S. Brice 3-4.)

In a letter jointly filed May 10, 2023, Petitioners, Amtrak, and NSR indicated that Petitioners and Amtrak have reached a confidential settlement in principle and requested that the Board place the proceeding in abeyance, pending confirmation from Petitioners and Amtrak that the settlement has been finalized. By decision served May 11, 2023, this proceeding was placed in abeyance, and all deadlines were tolled until further order of the Board.²

By letter filed May 12, 2023, NSR and Kellogg request that the Board: (1) modify its order to lift the stay of proceedings as to Kellogg; (2) set a May 30, 2023 deadline for responses to the petition for declaratory relief; (3) grant Kellogg's petition to intervene; and (4) set a May 30, 2023 deadline for responses to Kellogg's request for injunctive relief and a directed service order. NSR and Kellogg indicate that Amtrak and Petitioners do not oppose their request.

The Board will grant Kellogg's petition for leave to intervene in this proceeding and will grant NSR's and Kellogg's request to lift the abeyance order with respect to Kellogg. Replies to the petition for declaratory order and responses to Kellogg's request for injunctive relief and a directed service order are due by May 30, 2023.

Supplemental Information. Additionally, Kellogg is directed to provide the following supplemental information: (1) identify what, if any, of its traffic at issue moves pursuant to common carrier tariff and what, if any, moves under contract; (2) state whether the track work impacting its facility has begun or, if not, when it is expected to begin; and (3) state whether, to Kellogg's knowledge, there has been any change in the potential impact on its facility from the track work, in light of the settlement in principle between Amtrak and Petitioners. Lastly, Kellogg is directed to address Amtrak's arguments concerning the Board's authority to issue a directed service order under 49 U.S.C. § 11123 or to enjoin Amtrak under 49 U.S.C. § 1321 in light of the statutory language exempting Amtrak from much of the Interstate Commerce Act, *see* 49 U.S.C. § 24301. Kellogg is directed to submit this information by May 23, 2023.

² Petitioners and Amtrak were directed to notify the Board (jointly, if possible), by no later than May 30, 2023, as to the progress of their settlement negotiations.

Further, NSR should submit its recommendations regarding feasible alternatives to Amtrak's approach to the track work that would allow for continued freight rail service, as noted in NSR's May 1, 2023 reply, by May 23, 2023.

It is ordered:

1. Kellogg's petition for leave to intervene is granted.
2. The abeyance order in this proceeding is lifted with respect to the relief sought by Kellogg.
3. The supplemental information described herein is due by May 23, 2023.
4. Replies to the petition for declaratory order and responses to Kellogg's request for injunctive relief and a directed service order are due by May 30, 2023.
5. This decision is effective on its service date.

By the Board, Board Members Fuchs, Hedlund, Oberman, Primus, and Schultz.