

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. NOR 42176

VICTOR INSULATORS, INC. v. FINGER LAKES RAILWAY CORP. AND
ONTARIO CENTRAL RAILROAD CORP.

Digest:¹ This decision grants in part and denies in part a joint motion filed by Finger Lakes Railway Corp. and Ontario Central Railroad Corp. to dismiss an amended complaint filed by Victor Insulators, Inc.

Decided: November 9, 2023

On March 24, 2023, Victor Insulators, Inc. (VI), filed with the Board an amended complaint against Finger Lakes Railway Corp. (FGLK) and Ontario Central Railroad Corp. (ONCT) (collectively, the Carriers),² alleging that the Carriers violated, and continue to violate, (1) 49 U.S.C. § 11101 by failing to provide transportation or service upon reasonable request and (2) 49 U.S.C. § 10744 by entering into an arrangement to prevent the continuous carriage of freight.³ On April 13, 2023, the Carriers jointly filed an answer and motion to dismiss the amended complaint. For the reasons discussed below, the Board will grant in part and deny in part the motion to dismiss.

BACKGROUND

VI states that it is engaged in the business of manufacturing high-voltage porcelain electric insulators and that it relies on rail service for delivery of key ingredients, such as certain types of clay, to manufacture these products. (Amended Compl. ¶¶ 1, 15, 17.) According to the amended complaint, VI's manufacturing facility is served by a spur (the Spur) extending from a rail line running from Shortsville, N.Y., to Victor, N.Y., owned by Ontario County, N.Y., and operated by ONCT (the Victor Rail Line or Line). (*Id.* ¶¶ 8, 14.) VI states that it received clay

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).

² FGLK acquired control of ONCT in Finger Lakes Railway—Control Exemption—Ontario Central Railroad, FD 35062 (STB served Oct. 5, 2007).

³ VI filed its original complaint on December 27, 2022, and incorporated it by reference into the amended complaint. On February 9, 2023, the Carriers filed a joint motion to dismiss VI's initial complaint, and on March 1, 2023, VI filed a reply in opposition to the Carriers' joint motion to dismiss.

by rail at its facility for production of high-voltage porcelain electric insulators until November 4, 2021, when it was informed by representatives of the Carriers that the Victor Rail Line required repairs⁴ and that, as a result, rail service to the facility would cease. (*Id.* ¶ 20.) VI maintains that no repairs have been made, and although no embargo has been issued, service on the Line has permanently ceased. (*Id.* ¶¶ 24-25, 33.)

According to VI, instead of providing continuous rail service to VI's facility, the Carriers have been transloading VI's shipments of clay to its facility via truck from Seneca Falls, N.Y., approximately 30 miles away. (*Id.* ¶¶ 28-29.) VI states that it has repeatedly objected to the transloading service and has had discussions with the Carriers regarding repairs. (*Id.* ¶¶ 32, 46.) VI also states that the Carriers have been involved in negotiations with the Town and Village of Victor, N.Y., to remove part of the Victor Rail Line, including the segment from which the Spur extends, to facilitate construction of a road where the current railbed lies. (*Id.* ¶¶ 36-37.)

In their joint motion to dismiss, the Carriers first argue that the Board should dismiss FGLK as a party because ONCT was the sole operator on the Victor Rail Line pursuant to a modified certificate of public convenience and necessity. The carriers claim that, in addressing service to VI, the personnel shared between the companies were acting in their roles as representatives of ONCT, not FGLK, and they point out that the waybills applicable to the deliveries show ONCT as the delivering carrier. (Mot. to Dismiss 7-9, Apr. 13, 2023.) In support of their position, the Carriers cite CSX Corp.—Adverse Abandonment Application—Canadian National Railway, AB 31 (Sub-No. 38), slip op. at 3 (STB served Feb. 1, 2002), where the Board granted an unopposed motion to dismiss a parent company as a party to that proceeding. Additionally, the Carriers contend that the amended complaint should be dismissed insofar as it seeks relief for events occurring after April 10, 2023, the effective date on which ONCT terminated its modified certificate for service over the segment of the Victor Rail Line used to access the Spur. (*Id.* at 9-10); ONCT Notice, Feb. 9, 2023, Ontario Cent. R.R.—Modified Rail Certificate, FD 29761. The Carriers further argue that the amended complaint should be dismissed because ONCT mitigated any potential damages to VI by providing the transloading service at no additional cost. (Mot. to Dismiss 10-15, Apr. 13, 2023.) The Carriers argue that terminating service over that segment was reasonable under the circumstances because the cost of restoring service cannot be justified given the limited amount of traffic, (*id.* at 12), and because they did not act with intent to drive VI off the segment, (*id.* at 13).

VI replied in opposition to the Carriers' joint motion to dismiss on May 3, 2023, referencing its reply to the Carriers' February 9, 2023 motion to dismiss the initial complaint, (*see supra* note 2). VI asserts that the Carriers have not met the Board's standard for granting a motion to dismiss. (VI Reply 3-4, Mar. 1, 2023.) VI argues that while FGLK may be a separate corporate entity from ONCT, the two are operationally one and the same. (*Id.* at 5.) VI asserts that FGLK has held itself out to be a common carrier on the Victor Rail Line and that the corporate website for the entities makes no distinction between the operations of FGLK and

⁴ VI states that in other conversations with FGLK, it was informed that the Victor Rail Line remained operational at that time, and that only the Spur required immediate repairs. (Amended Compl. ¶ 21.)

ONCT. (Id. at 5-7.)⁵ Further, VI argues that the Carriers’ failure to provide service was unreasonable. (Id. at 11-15.)⁶

The Board also received two comments from members of the community urging the Board to prevent the termination of service. (See G. Heltz Ltr., Mar. 2, 2023; D. Fisher Ltr., Mar. 23, 2023.)

DISCUSSION AND CONCLUSIONS

The Board may dismiss a complaint that “does not state reasonable grounds for investigation and action.” 49 U.S.C. § 11701(b). When reviewing a motion to dismiss, the Board views the alleged facts in the light most favorable to the complainant. Cent. Valley Ag Grinding, Inc. v. Modesto & Empire Traction Co., NOR 42159, slip op. at 4 (STB served July 25, 2018). A complaint is dismissed under § 11701(b) only when the Board finds that there is no basis upon which it could grant the relief sought. Grain Land Coop. v. Canadian Pac. Ltd., NOR 41687, slip op. at 2-3 (STB served Dec. 8, 1999).

Even when viewing the allegations of the amended complaint in the light most favorable to VI, the Board must grant the motion to dismiss under these particular circumstances insofar as it seeks relief for alleged violations occurring after ONCT’s notice of termination became effective on April 10, 2023. As noted above, ONCT operated the Victor Rail Line pursuant to a modified certificate of public convenience and necessity. A carrier operating under a modified certificate may terminate its service obligations by filing a 60-day notice of its intent to do so. 49 C.F.R. § 1150.24. ONCT did so on February 9, 2023, filing its 60-day notice of termination over the segment of the Victor Rail Line that is used to access the Spur. See ONCT Notice, Feb. 9, 2023, Ontario Cent. R.R., FD 29761. Thus, ONCT’s common carrier obligation over the portion of the Line directly serving VI’s facility ended on April 10, 2023. See Wis. & Calumet R.R.—Notice of Interim Trail Use & Termination of Modified Certificate, FD 30724 (Sub-No. 2), slip op. at 2 (STB served Mar. 11, 1998) (noting that a notice of termination is self-executing); see also Waccamaw Coast Line R.R.—Modified Rail Certificate, FD 34064, slip op. at 2 (STB served Feb. 3, 2014) (“Because the railroad has issued its 60-day notice to terminate rail service on the [l]ine, no case or controversy remains regarding continuation of the modified certificate.”).

The Board, however, will deny the motion to dismiss with respect to the remaining arguments. First, the Board denies FGLK’s request that it be dismissed as a party to the proceeding. Based on the record before the Board, it appears that the operations of FGLK and ONCT are highly intertwined. Cf. CSX Corp.—Adverse Aban. Appl.—Canadian Nat’l Ry., AB 31 (Sub-No. 38), slip op. at 3 (STB served Feb. 1, 2002) (finding good cause to dismiss parent because the parent did not own, operate, or have a possessory interest in the relevant track

⁵ FGLK owns and operates other lines in the nearby area.

⁶ VI also argues that ONCT must comply with the offer of financial assistance process for rail lines not part of the Final System Plan. (VI Reply 9-11, Mar. 1, 2023.) As this argument does not speak to whether the amended complaint states reasonable grounds for investigation and action, the Board need not address this argument at this time.

or elsewhere in the vicinity). FGLK controls and shares equipment and personnel with ONCT, (Mot. to Dismiss 8, Apr. 13, 2023), and the parties dispute whether certain individuals acted in their capacity as representatives of FGLK or ONCT at various stages, (compare Amended Compl. ¶ 9 with Answer ¶ 9). Moreover, the Carriers’ motion to dismiss indicates that VI’s shipments move first “over the lines of FGLK and then to the [Victor Rail Line] for delivery to VI” and that the transloading service currently being provided occurs “at an available location on FGLK.” (See Mot. to Dismiss 5 n.8, Apr. 13, 2023.) While sharing some personnel and equipment with a parent company does not, by itself, bestow a common carrier obligation on the parent company, given FGLK’s extensive involvement here, the Board cannot determine at this time that there is “no basis upon which relief could be granted” for a claim against FGLK. The Carriers’ reliance on CSX Corp.—Adverse Abandonment Application in support of dismissing FGLK is misplaced. In that case, not only was the request to dismiss the parent company unopposed, but the parent company—unlike FGLK here—was completely uninvolved in the situation, including having no possessory interest in the track and no right to conduct rail operations on, or in the vicinity of, the track at issue. See CSX Corp.—Adverse Aban. Appl., AB 31 (Sub-No. 38), slip op. at 3.

The Board also finds that the amended complaint states reasonable grounds for investigation or action with respect to the alleged violations occurring between November 4, 2021, and April 9, 2023.⁷ As operator of the Victor Rail Line pursuant to a then-active modified certificate, ONCT had a common carrier obligation to provide service upon reasonable request. 49 C.F.R. § 1150.22. Neither party disputes that VI received no rail service between those dates. Rather, the Carriers transloaded and transferred via truck, at no additional transportation charge, the seven rail cars of clay shipped to VI during that time period. (See Mot. to Dismiss 11, Apr. 13, 2023.) According to VI, the Carriers’ decision to transload its shipments resulted in delays, spillage, and contamination of its materials. (Amended Compl. ¶¶ 30-31.) These allegations could provide a reasonable basis for the Board to investigate whether the Carriers violated 49 U.S.C. §§ 10744 and 11101, and if so, whether they are liable to VI for any damages VI suffered during that period. See generally Groome & Assoc., Inc. v. Greenville Cnty. Econ. Dev. Corp., NOR 42087, slip op. at 12-16 (STB served July 27, 2005) (outlining the standards for determining the reasonableness of a carrier’s failure to serve and for proving damages if the failure is not reasonable).

For the reasons discussed above, the Carriers’ joint motion to dismiss will be granted in part and denied in part. The Board thinks that mediation could be beneficial in this case. Because the Board favors the resolution of disputes through alternative dispute resolution whenever possible, 49 C.F.R. § 1109.1, the Board requests that the parties inform the Board by

⁷ VI’s allegations that FGLK held itself out as a common carrier are based only on its alleged control over ONCT’s operations. As such, any liability FGLK incurred would necessarily be derivative of ONCT’s common carrier obligation under its modified certificate for service. Under these circumstances, the Board finds there are no reasonable grounds to investigate further whether FGLK had a common carrier obligation over the line after ONCT terminated its modified certificate.

November 20, 2023, whether they are interested in participating in Board-sponsored mediation.⁸ If the parties elect not to pursue mediation, then the parties are directed to confer and to file by November 27, 2023, either jointly or separately, a report setting forth a proposed procedural schedule to govern future activities and deadlines in the case. See 49 C.F.R. § 1111.11(a).

It is ordered:

1. The Carriers' motion to dismiss is granted in part and denied in part.
2. The parties shall inform the Board whether they agree to participate in Board-sponsored mediation by November 20, 2023.
3. If the parties elect not to pursue mediation, they are directed to confer and to file a report setting forth a proposed procedural schedule by November 27, 2023.
4. This decision is effective on its service date.

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

⁸ While parties participating in mediation are encouraged to work out as many issues as possible, the scope of the mediation could not, under 49 C.F.R. § 1109.1, encompass any grant, denial, stay, or revocation of regulatory authority.