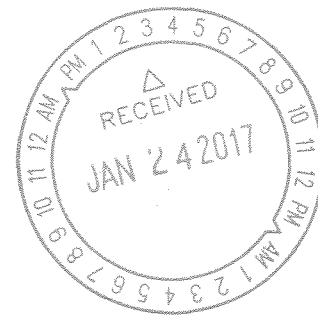


ORIGINAL

Before the
SURFACE TRANSPORTATION BOARD



Docket No. EP 665 (Sub No. 1)

RAIL TRANSPORTATION OF GRAIN, RATE REGULATION REVIEW

242514

PETITION FOR RECONSIDERATION

ENTERED
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Part of
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GORDON P. MacDOUGALL
1025 Connecticut Ave., N.W.
Washington, DC 20036

Attorney for Larry R. Miller, Jr.

January 24, 2017

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PETITION FOR RECONSIDERATION

Preliminary Statement

Larry R. Miller, Jr.^{1/} for and on behalf of SMART/TD General Committee of Adjustment GO-386 (SMART/TD GO-386), submits this Petition for Reconsideration of the rulemaking:policy statement, issued by the Surface Transportation Board (STB or Board), decided December 28, 2016 (served December 29, 2016), 82 Fed. Reg. 805-9 (Jan. 4, 2017).^{2/} SMART/TD GO-386, asks the

^{1/}General Chairman for SMART/TD, with offices at 1436 A Street, Washougal, WA. Mr. Miller is the successor to previous General Chairman GO-386 participants (John D. Fitzgerald; Jay L. Schollmeyer) in these Ex Parte 665 proceedings. SMART/TD GO-386 is the successor to UTU GO-386. Merger of United Transportation Union and SMART/TD was implemented in August 2014.

^{2/}The rulemaking:policy statement was jointly issued with Docket EP 528 (Sub-No. 1), Publication Requirements For Agricultural Products. This petition does not comment on the proposals advanced in EP 528 (Sub-No. 1).

Board to reopen, reconsider, and vacate that part of the decision which establishes the agency's policy statement that announces complainants with only indirect damages must show a higher level of damages to acquire standing to progress their complaint. The decision suggests the Lujan standard.^{3/} The agency's policy statement is not restricted to grain rate matters, but applies generally to all complaint proceedings. 49 U.S.C. 11701, et seq.

This petition for reconsideration of the policy statement is brought pursuant to 49 CFR 1110.10, and is based upon material error. It is timely. It does not seek review or address portions of the December 29, 2016 rulemaking decision dealing with aggregation of claims.

The December 29, 2016 decision at the outset, pp. 1,3,5, announces its policy statement for "aggregation of claims and standing." However, the "standing" policy is not codified for publication in the Code of Federal Regulations. See: Decision, 12/29/16, Appendix B. The "standing" policy to be followed is set forth in the decision's text at 7. In essence, the Board will now

^{3/}(Decision, 7). Lujan v. Defs. of Wildlife, 504 U.S. 555, 560-61 (1991).

impose the "standing" requirement for most judicial actions governing Article III federal courts, to be likewise applicable to Board complaint proceedings.

The Standing Policy Statement

The policy statement is set forth at Decision, 7:

Under 49 U.S.C. § 11701(b), a person, including a governmental authority, may file a complaint with the Board about a violation of part A, subtitle IV of title 49 by a rail carrier providing transportation or service subject to the Board's jurisdiction. Under § 11701(b), the Board may not dismiss such a complaint because of the "absence of direct damage to the complainant." Thus, the statute permits parties to bring a rate complaint, even if they have not been directly harmed or did not directly pay for the transportation for which relief is sought. Accordingly, grain producers (and other indirectly harmed complainants) that file rate complaints cannot be disqualified due to the absence of direct damage.

At the same time, complainants that allege indirect harm in rate complaints must still have standing in order to proceed with a complaint, which is determined by the Board on a case-by-case basis. In making such determinations, the Board is "not bound by the strict requirements of standing that otherwise govern judicial proceedings," but it may still look to the courts' test to determine whether a party has standing to bring an action. See Riffin-Aquis. & Operation Exemption-in York Cty., Pa., FD 34501, et al., slip op. at 5 (STB served Feb. 23, 2005) (citing N.C.R.R.-Pet. to Set Trackage Comp. & Other Terms & Conditions-Norfolk S. Ry., FD 33134, slip op. at 2n.9 (STB served May 29, 1997); Mo.Pac.R.R.-Aband.-in Douglas Champaign & Vermillion Cty., Pa., AB 3 (Sub-No. 103), slip op. at 3n.4 (ICC served Nov. 3, 1994)). When a complainant files a rate complaint, the Board may consider, for instance, whether the complainant has suffered an injury in fact, whether the injury is fairly traceable to the defendant's challenged conduct, and

whether the injury is one likely to be addressed through a favorable decision. See Riffin, FD 34501, et al., slip op. at 5.(citing Lujan v. Defs. of Wildlife, 504 U.S. 555, 560-61 (1991)). Indirect damage, therefore, is not a bar to grain producers or other indirect purchasers of rail transportation bringing a complaint, but such complainants must still establish that they have standing to proceed with a complaint.

Interest of SMART/TD GO-386

This petitioner, as well as other employee organizations, frequently participate in STB proceedings, often as complainants or intervenors. Although such parties may not be seeking damage awards for themselves, they still have an interest in the outcome of proceedings, such as those involving discontinuance of lines or services, or carrier unification or financial transactions, as such may affect carrier operations, and otherwise affect employment opportunities or conditions. Employee interests run throughout Part IV, Title 49 U.S.C., and employee interests also are embraced in several criteria of the rail transportation policy. 49 U.S.C. § 10101.

The inclusion of U.S. Constitution Article III court standing requirements into administrative proceedings would substantially curtail employee participation in

Board proceedings and prevent relief in numerous situations.

ARGUMENT

I. THE STANDING DECISION DOES NOT FULLY REFLECT RAIL INDUSTRY VIEWS.

The December 29, 2016 decision does not adequately set forth the various positions of the rail carriers on the standing issue. As an example, the decision asserts the carriers generally do not oppose shippers' request for clarification on standing. (Decision, 6). To the contrary, there are apparent differences of opinion in the industry, with the decision appearing to commingle issues of standing, reparations, aggregation of claims, etc., and apparently overlooking contrary or inconsistent views. For example, the decision asserts rail carriers generally do not oppose shippers' request for clarification on standing. (Decision, 6). However, BNSF opposes the request for clarification. (Decision, 7). BNSF stated that no valid guidance on standing could be based on the current record. (BNSF, 8/25/14, at 36-37; ID 236508). The Association of American Railroads considered standing clarification to be "unnecessary." (AAR, 8/25/14

at 24-28; ID 236531). Thus, the decision does not fairly reflect the industry position.

The Board's May 8, 2015 Notice of Public Hearing listed six specific subjects for discussion for the June 10, 2015 hearing, none of which included standing. Also, in its August 31, 2016 decision, the Board said it was not including the issue of standing in that decision. (Decision, 8/31/16, at 3n.3).

It appears the standing subject was first raised by two shipper organizations, predicated upon court standing requirements, particularly the McCarty Farms, Inc. litigation. It is unclear why these shipper interests sought to bring the court standing requirement into STB administrative proceedings, since for many decades the ICC, followed by STB, have not tried to impose the federal court standing requirement, owing to federal legislation, particularly §13 of the original Interstate Commerce Act. ICC v. Baird, 194 U.S. 25, 39 (1904). The Board's decision opined that agricultural producers and grain producers should be able to establish standing anyway. (Decision, 7). Thus, the net effect of the Board's discussion of its standing requirement would be

to impose an unneeded requirement for grain producers, yet pose a harmful requirement for other interests, such as rail employees and members of the public who now would be unable to receive the absence of direct damage protection of 49 U.S.C. § 11701(b).

II. THE DECISION ERRS AS A MATTER OF LAW IN ADOPTING A POLICY TO DENY STANDING TO PROCEED WITH A COMPLAINT UNDER THE FEDERAL LUJAN STANDARD.

The Board's December 29, 2016 decision acknowledges that grain producers and other indirect purchasers of rail transportation can file or bring a complaint, but the decision claims that such indirect interests must still establish standing to proceed with a complaint. Such distinctions between "file," "bring" and "proceed," are absurd and ridiculous. The statute has plain meaning: § 11701(b):

..(t)he Board may not dismiss a complaint made against a rail carrier providing transportation subject to the jurisdiction of the Board under this part because of an absence of direct damage to the complainant.

The above provision has been in place for over one hundred years by the former ICC and now by STB without

substantive change. It has been upheld by the Supreme Court. Interstate Commerce Commission v. Baird, 194 U.S. 25, 39 (1904). The STB does not have discretion to strike out this statutory language, and then impose the Lujan requirement that the Board consider whether a party, such as SMART/TD GO-386, must establish injury in fact, whether the injury is fairly traceable to the carrier's conduct, and whether an injury is likely to be addressed through favorable decision.^{4/}

The Board's decision on this point, at p. 7, cites its own Riffin decision 12 years ago, which did not decide the case on the this standing issue, but rather referred to two other agency cases, both citing an unpublished case, decided 21 years ago, in 1994, involving the United Transportation Union's Illinois Legislative Board, Mo.Pac.R.R.-Aban.-in Douglas, Champaign & Vermilion Ctys, Ill., AB 3 (Sub-No. 103); slip op. at 3n.4 (ICC served Nov. 3, 1994)). This single ICC decision on the standing issue, states the exact opposite from that now contended by the Board in the

^{4/}(Decision, 7). Lujan v. Defs. Of Wildlife, 504 U.S. 555, 560-61 (1991).

instant decision, and recognized standing for the labor representative. It is attached hereto as Appendix A.^{5/}

Clearly, the Board's legal reasoning for issuance of its standing policy statement is invalid.

CONCLUSION

The Board should find material error. The policy statement for standing to proceed with a complaint should be reconsidered, and the proceeding reopened so as to vacate the Board's new policy statement for standing.

Respectfully submitted,



GORDON P. MacDOUGALL
1025 Connecticut Ave., N.W.
Washington DC 20036

Attorney for Larry R. Miller, Jr.

January 24, 2017

^{5/} See: Appendix A, p.3n.4. The decision is unavailable on the STB's website, as the latter indicates decisions generally are restricted to the prior six years. The STB has not issued printed volume reports since 2004.

EC

SERVICE DATE

INTERSTATE COMMERCE COMMISSION

NOV 3 1994

DECISION

Docket No. AB-3 (Sub-No. 103)

MISSOURI PACIFIC RAILROAD COMPANY--ABANDONMENT--
IN DOUGLAS, CHAMPAIGN AND VERMILION COUNTIES, IL
(WESTVILLE AND JAMAICA BRANCHES)

Decided: October 20, 1994

On March 28 and April 8, 1994, Grand Prairie Coop. Inc. (Grand Prairie) and Patrick W. Simmons, Director of the Illinois Legislative Board of the United Transportation Union (Simmons) filed petitions to reopen this abandonment proceeding. Subsequently, Grand Prairie and Missouri Pacific Railroad Company (MP) jointly requested the Commission to withhold action on Grand Prairie's petition to reopen, unless otherwise requested by Grand Prairie or MP. We will hold this proceeding in abeyance, subject to a status report due 90 days from the service date of this decision.

BACKGROUND

By decision served December 8, 1992, we granted MP's application to abandon 16.92 miles of rail line in Illinois. Grand Prairie sought reconsideration of the decision insofar as it applied to a 9.2-mile segment of the line between Willis Grove and Broadlands, IL. After we denied its petition for reconsideration, Grand Prairie filed an offer of financial assistance (OFA) under 49 U.S.C. 10905 to subsidize MP's continued operations over the 9.2-mile line. In a decision served June 4, 1993, we set terms and conditions for the subsidy. See 9 I.C.C.2d 873. Grand Prairie refused to accept those terms and on July 3, 1993, we issued a CITU for the Willis Grove-Broadlands segment.

On judicial review, the Court of appeals upheld the abandonment decision, but remanded our OFA subsidy determination. *Grand Prairie Coop. Inc. v. ICC*, 16 F.3d 789 (7th Cir. 1994). By decision served March 24, 1994, we vacated MP's certificate of abandonment and reopened the proceeding relative to the subsidy issue. On March 28, 1994, Grand Prairie filed a petition asking that the underlying abandonment decision be reopened, citing an increase in traffic subsequent to the record closing. Simmons also filed a petition to reopen on the grounds that MP's train costs were lower than those noted in our abandonment decision. MP replied in opposition to both petitions. On April 22, 1994, we held the schedule for submitting evidence on the subsidy issue in abeyance pending action on the petitions to reopen.

On July 13, 1994, Grand Prairie requested, with MP's concurrence, that its petition to reopen be held in abeyance. Grand Prairie states that: (1) Grand Prairie and MP have entered into a transportation contract under 49 U.S.C. 10713 for MP to provide certain rail transportation services on this line segment; (2) neither the contract nor the service to be provided under it constitutes an offer of financial assistance or a resumption of MP's common carrier service; (3) the contract memorializes the efforts of both parties to achieve a long-term resolution of the issues presented in this proceeding; and (4)

On January 22, 1993, we issued a Certificate of Interim Trail Use or Abandonment (CITU) for the 27.7-mile line portion not opposed by Grand Prairie. That segment is no longer at issue in this proceeding.

Docket No. AB-1 (Sub-No. 101)

The contract should not be construed as an admission against either party's interest.

Simmons replied. He opposes holding this case in abeyance. He argues that the arrangement between Grand Prairie and MP is contrary to the financial assistance procedures at 49 U.S.C. 10905 and that MP's continued service for Grand Prairie constitutes common carriage. Simmons contends that he is speaking on behalf of shippers besides Grand Prairie who may want service in the future and that therefore his interests in this case go beyond employee protection.

MP opposes Simmons' request to proceed on the petitions to reopen. MP argues that Simmons lacks standing because his interest in labor protection does not bring him within the zone of interests protected by the Interstate Commerce Act, citing Simmons v. I.C.C., 900 F.2d 1023 (7th Cir. 1990). MP also argues that even if Simmons has standing, his opposition to the abandonment and alternative service arrangement is irrelevant because the Commission may not impose labor protection in OFA proceedings, and because post-abandonment transportation on a non-common carrier basis is not within the Commission's jurisdiction and does not create labor protective obligations.

DISCUSSION AND CONCLUSIONS

At the outset, we must determine whether we have jurisdiction in this case. Once a railroad consummates abandonment and no longer holds itself out as a common carrier, the abandoned line no longer functions in interstate or foreign commerce and we lose jurisdiction over it. Application for Reinstatement, Abandonment of Grand Prairie Line, 365 I.C.C. 516, 518 (1982); Hawfield Northern RR. v. Chicago & N.W. Transportation Co., 467 U.S. 627, 633-34. In arguing that its post-abandonment service arrangement with Grand Prairie is outside our jurisdiction, MP cites Consolidated Rail Corp. - Petition for Declaratory Order, 1 I.C.C. 2d 384 (1981), where we held that the Commission lacks jurisdiction over, and labor protective obligations do not apply to, a carrier's reinstatement of overhead or bridge operations under contract on an abandoned line. In that decision the carrier had consummated the abandonment authority we granted and our jurisdiction ceased. Here, although we authorized MP to abandon its line, we have retained jurisdiction both through our extensions of the trail use negotiating period and the OFA process remanded by the court of appeals.

Having found that the Villa Grove-Broadlands line has not been abandoned, we turn to the issue of whether holding this proceeding in abeyance--the subsidy portion is already in

At the request of MP and the potential trail user, the negotiating period under the Villa Grove-Broadlands CITC has been extended several times. Most recently, it was extended to June 27, 1994. We retained jurisdiction over the property during these negotiating periods because MP had not abandoned the line and was willing to continue trail use negotiations beyond the previously imposed terms. Thus, at the parties' request, we were able to extend the negotiating period. If an agreement is reached, we continue to have jurisdiction over the property during the period of interim trail use. See Rail Abandonments--Supplemental Trails Act Procedures, 4 I.C.C. 2d 152, 157-58 (1987); Presault v. ICC, 853 F.2d 145, 151 (2d Cir. 1988), aff'd, 110 S. Ct. 914 (1990).

See Bushong Grain Co., Inc. v. ICC, 830 F.2d 74, 76 (7th Cir. 1987). "A judgment setting aside the ICC's [abandonment] decision restores the status quo ante . . ."

Docket No. AB-1 (Sub-No. 103)

abeyance by virtue of our April 22, 1994 order--would injure the interests represented by Simmons' or contravene the statute. Simmons is concerned about the effect of the MP/Grand Prairie arrangement on labor protection. Simmons' concern seems to be that MP will resume service on the line now and at some future day might abandon the line and disavow any obligation to protect employees pursuant to Oregon Short Line. Any future abandonment, whenever it occurs, may only be effected pursuant to authority we grant in this proceeding. By statute, that authority requires the imposition of Oregon Short Line conditions.

The sole protesting shipper and the carrier are not asking us to dismiss this proceeding or otherwise abrogate the OFA process. They merely ask us to withhold action in this reopened case pending their use of an alternative transportation arrangement. The OFA process would remain available if the Commission decided to resume consideration of this case at some time in the future. Postponing consideration of the section 10903 process now will not harm the interests of labor because, as MP points out, we may not impose labor protective conditions for section 10903 transactions. Simmons v. I.R.T., 760 F.2d 126 (7th Cir. 1985), cert. denied 474 U.S. 1055 (1986), and Simmons v. I.R.T., 766 F.2d 1177 (7th Cir. 1985), cert. denied 474 U.S. 1055 (1986). If the OFA phase is unsuccessful and MP abandons the line, labor protection automatically applies to adversely affected employees.

The request to hold this proceeding in abeyance will be granted. Because there are apparent inconsistencies in the record as to the status of the line, Grand Prairie's and MP's description of their contractual arrangement, and the impact of that arrangement on rail labor, we will require Grand Prairie and MP to submit a status report on these issues 90 days from the service date of this decision. Any party, including Simmons, may submit information at the same time. Any party may then file a reply 20 days thereafter.

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

It is ordered:

1. This proceeding is held in abeyance.
2. Grand Prairie and MP must submit a status report 90 days after the service of this decision and any party may submit information at the same time. Replies may be filed 20 days thereafter.
3. This decision is effective on the date of service.

By the Commission, Chairman McDonald, Vice Chairman Phillips, and Commissioners Simmons, Morgan and Owen. Vice Chairman recused herself in this proceeding.

(SYAL)
Vernon A. Williams
Secretary

* Because the Commission is an administrative agency and does not act in a strictly judicial capacity, Simmons is correct in stating that we do not exclude parties for lack of standing.