

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. NOR 42149

RICHARD BEST TRANSFER, INC. v. UNION PACIFIC RAILROAD COMPANY

Digest:¹ The Board denies the request of Richard Best Transfer, Inc., for a preliminary injunction in this proceeding.

Decided: December 22, 2016

On November 3, 2016, Richard Best Transfer, Inc. (RBT), a transloading company, filed a complaint and a petition for a preliminary injunction with regard to certain revisions made by Union Pacific Railroad Company (UP) to UP Tariff 4053-C. RBT states that these tariff revisions would increase rates to its Ivory, Cal. transloading facility (RBT-Ivory) by \$250 per car. (Pet. 2.) RBT alleges in its complaint that these tariff revisions constitute an unreasonable practice in violation of 49 U.S.C. § 10702 and unreasonable discrimination in violation of 49 U.S.C. §§ 10701(b) and 10741.² In its petition for preliminary injunction, RBT seeks to enjoin UP from implementing the revisions, which were effective November 1, 2016.

RBT argues an injunction is necessary because implementation of the tariff revisions will cause RBT's customers to utilize competing transload facilities not subject to the recent revisions to UP Tariff 4053-C to avoid the increased rate. (*Id.* at 20.) RBT projects that this will cause it to lose 90% of its existing business at RBT-Ivory and put RBT out of business before the case is resolved. (*Id.*) On November 8, 2016, the Board issued an order requiring UP to reply to the petition on an expedited schedule.

On November 16, 2016, UP replied to the petition, arguing that: (1) RBT has not substantiated claims it will suffer irreparable harm in the absence of an injunction; (2) Board precedent precludes RBT from succeeding on the merits of its claims; (3) UP would suffer

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. Policy Statement on Plain Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

² RBT also states that it brings its complaint under 49 U.S.C. §§ 10704 and 11701, but it does not make any specific allegations under those sections of the code.

substantial harm if an injunction is granted; and (4) RBT has not shown that an injunction would be in the public interest. (Reply 3.)

On November 29, 2016, RBT filed a motion for leave to file a surreply and a surreply, arguing that UP's reply contains several factual misstatements and legal mischaracterizations, and reiterating RBT's request that the Board grant a preliminary injunction.³ On November 30, 2016, UP filed a letter indicating that it would reply to RBT's November 29, 2016 motion by December 19, 2016.⁴ On December 12, 2016, the parties filed a joint report on their procedural conference and a request to adopt a procedural schedule.⁵ On December 19, 2016, UP filed a reply to RBT's surreply.⁶

For the reasons explained below, RBT's petition will be denied.

BACKGROUND

RBT describes itself as a full-service transloading company headquartered in Reedley, Cal. (Pet. 3.) RBT's transloading facility, RBT-Ivory, receives approximately 4,600 railcars annually, primarily consisting of bulk agricultural feed ingredients in unit-train service used to serve the Central California dairy industry. (Id. at 3, 5.) The agricultural feed ingredients RBT-Ivory receives are principally distiller's dried grains with solubles (DDGS), canola meal, and gluten feed. (Id. at 3.) RBT-Ivory is located on a San Joaquin Valley Railroad (SJVR) line and is served indirectly by UP via a handling carrier arrangement with SJVR. (Id. at 2, 6-7; see also id., V.S. Littlefield 6.) RBT also operates a transloading facility in Hollis, Cal., also served by SJVR. (Compl. 7.)

UP states that it first established unit train rates for movements to RBT-Ivory in 2010. The RBT-Ivory rate was \$125 per car higher than the rate for movements to destinations on UP's main line, including Goshen Junction, Cal. (Reply 4.) In 2011, UP eliminated that rate differential pursuant to a confidential business arrangement. (Id. at 5.) However, this confidential business arrangement was no longer in force by 2016. UP notes that RBT does not pay the freight on traffic moving to RBT-Ivory; instead, the freight is paid by RBT-Ivory's customers to UP. (Id. at 4.)

³ Also on November 29, 2016, the Tulare County Economic Development Corporation filed a letter supporting RBT's request for a preliminary injunction.

⁴ RBT's motion for leave will be granted and its surreply accepted, in the interests of a complete record.

⁵ The Board is addressing this filing in a concurrently served decision.

⁶ Because the Board is denying RBT's petition for preliminary injunction in this decision, UP's reply to RBT's surreply is rejected as moot.

On September 22, 2016, UP announced revisions to UP Tariff 4053-C effective November 1, 2016. (Reply 5.) According to RBT, UP Tariff 4053-C formerly grouped origins and destinations into broad geographic groups depending on commodity, such that all origins and destinations within the same geographic group would receive the same unit train rate. (Compl. 9.) This included the “Central Cal Train Group,” which comprised locations throughout the Central and San Joaquin Valleys of California, including RBT-Ivory and another transloading station on UP’s main line operated by RBT’s main competitor, Western Milling, at Goshen Junction. (*Id.*) With the revisions to UP Tariff 4053-C, UP removed stations served by SJVR from the Central Cal Train Group and increased the rates for shipping DDGS, gluten feed, and canola meal to these stations of \$250 per car. (Compl. 10-12; Reply 5.)

RBT argues that the revisions to UP Tariff 4053-C “specifically target RBT’s transloading facility in Ivory” to the advantage of Western Milling’s Goshen Junction facility, which is located on UP’s main line. (Pet. 2, 4. *See also* Surreply 8.) RBT argues that there is no justification for UP’s rate increase because it is more efficient and less costly for UP to service RBT-Ivory via SJVR than it is for UP to serve Western Milling directly at Goshen Junction. (Pet. 7-8.) RBT further argues that with 90% of its existing RBT-Ivory business being the three commodities affected by the tariff revisions, RBT will no longer receive those commodities at RBT-Ivory and will go out of business. (*Id.* at 20.) RBT also states that it has received notice from a major customer that UP’s tariff revisions “made it unlikely that, absent unusual product/capacity shortages, [the major customer] would be shipping feed ingredients to either the Ivory or Hollis facilities in the normal course of business.” (Surreply 2.)

In response to the petition, UP contends that the tariff revisions do not target RBT, but affect all shippers of the covered commodities at stations on SJVR. (Reply 7.) UP argues that the tariff revisions are intended to more accurately reflect UP’s costs for providing service to those stations. According to UP, providing service to RBT-Ivory requires both an extra interchange (with SJVR at Fresno), which creates delays and increases operating costs on UP’s Fresno Subdivision, and a substantial payment to SJVR to deliver each car to RBT-Ivory. (*Id.* at 6.)

UP also argues that RBT has not satisfied the standards for injunctive relief. UP argues, among other things, that RBT has not substantiated its allegation that it will go out of business if the injunction is not granted, particularly given that RBT-Ivory has continued to receive service since the tariff became effective with the same frequency it did before the tariff revisions became effective. (*Id.* at 8.) UP argues that the harm RBT alleges is not certain to occur, because “other similarly situated facilities have remained in business despite similar rate differentials.” (*Id.* at 18.) UP also argues that RBT’s unreasonable practices and discrimination claims are both barred by court and agency precedent.

In its motion for leave and surreply, RBT argues that UP’s assertions in its reply are without foundation. As relevant here, RBT claims that UP does not dispute that, before the \$125 rate differential was eliminated, it caused service to RBT-Ivory to dry up. (Surreply 2.) RBT also disputes UP’s analysis of the higher costs of serving RBT-Ivory. (*Id.* at 5-6.) On the likelihood of success on the merits prong, RBT challenges UP’s assertion that the unreasonable practice claim is, in actuality, an unreasonable rate claim. RBT also challenges the assertion by

UP that the unreasonable discrimination claim will fail because the transportation involves different routes and different destinations. (*Id.* at 7-9.)

DISCUSSION AND CONCLUSIONS

Under 49 U.S.C. § 1321(b)(4),⁷ the Board may issue an appropriate order, such as a preliminary injunction, when necessary to prevent irreparable harm. A party seeking a preliminary injunction must establish that (1) there is a likelihood that it will prevail on the merits of any challenge to the action sought to be preliminarily enjoined, (2) it will suffer irreparable harm in the absence of a preliminary injunction, (3) other interested parties will not be substantially harmed by a preliminary injunction, and (4) the public interest supports the granting of the preliminary injunction. *See, e.g., Wash. Metro. Area Transit Comm’n v. Holiday Tours, Inc. (Holiday Tours)*, 559 F.2d 841, 843 (D.C. Cir. 1977); *Va. Petroleum Jobbers Ass’n v. Fed. Power Comm’n*, 259 F.2d 921, 925 (D.C. Cir. 1958); *N. Coast R.R. Auth. & Nw. Pac. R.R. v. Sonoma-Marin Area Rail Transit Dist.*, NOR 42148, slip op. at 3 (STB served Oct. 21, 2016); *Am. Chemistry Council v. Ala. Gulf Coast Ry.*, NOR 42129, slip op. at 4 (STB served May 4, 2012). A preliminary injunction is an extraordinary remedy and will generally not be granted unless the requesting party can show that it faces unredressable actual and imminent harm that would be prevented by an injunction. *Am. Chemistry Council*, NOR 42129, slip op. at 4. The requesting party must also show that there is “more than a mere possibility” of success on the merits of its case. *Nken v Holder*, 556 U.S. 418, 434 (2009) (internal quotation marks omitted).

Here, RBT has not met its burden of showing that it faces irreparable harm or that it is likely to succeed on the merits of its complaint, and therefore the request for preliminary injunction will be denied.

Irreparable harm.

To show irreparable harm, the requesting party must demonstrate both the imminence and the irreparable nature of any purported harm. Although economic loss is not generally considered irreparable harm, where it “threatens the very existence of the movant’s business,” such a loss may be considered irreparable. *Wis. Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985). Still, a movant must prove its case. “Bare allegations of what is likely to occur are of no value since the court must decide whether the harm will *in fact* occur.” *Id.* The harm alleged “must be both certain and great; it must be actual and not theoretical. Injunctive relief ‘will not be granted against something merely feared as liable to occur at some indefinite time’ . . .” *Id.* (quoting *Conn. v. Mass.*, 282 U.S. 660, 674 (1931)). *See also Va. Petroleum Jobbers*, 259 F.2d at 925 (“Mere injuries, however substantial . . . are not enough. The possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation, weighs heavily against a claim of irreparable harm.”).

⁷ Formerly 49 U.S.C. § 721(b)(4). *See* Pub. L. No. 114-110, § 3(a)(5), 129 Stat. 2228, 2228.

The Board finds that RBT has not met its burden of showing that it will suffer irreparable harm in the absence of an injunction. RBT asserts that the revisions to UP Tariff 4053-C will cause RBT to “lose 90% of its existing business at RBT-Ivory” because RBT’s customers “will be eager” to avoid paying the differential “by taking their business elsewhere.” (Pet. 20.) But RBT has not presented evidence that customers have shifted their business. Although RBT cites to an alleged reduction in carloads in 2009, it provides no evidence that a decrease in carloads is currently taking place. (See Surreply, Ex. A at 4.) Moreover, UP states in reply that unit train service to RBT-Ivory has continued after the tariff revision at levels “consistent with” the pre-revision frequency. (Reply 8.) Finally, although RBT in its surreply states that a “major customer” has notified RBT that the rate increase made it “unlikely” that the customer would ship to RBT’s facilities in the future, RBT has neither provided evidentiary support for this assertion nor established the extent to which the loss of this single customer would impact its overall business. RBT’s statements, provided without evidentiary support, do not allow the Board to determine whether the harm alleged “will *in fact* occur.” See Wis. Gas. Co., 758 F.2d at 674. Based on the evidence of record, the harm RBT alleges is at this point theoretical, not actual or imminent. Accordingly, RBT has not shown that it will suffer irreparable harm in the absence of an injunction.⁸

Success on the merits.

Without a “substantial indication of probable success, there would be no justification for . . . intrusion into the ordinary processes of administration and judicial review.” Va. Petroleum Jobbers, 259 F.2d at 925. To show a likelihood of success on the merits, the party seeking the injunction ordinarily must show “more than a mere possibility” of success. Nken, 556 U.S. at 434 (internal quotation marks omitted).

RBT’s complaint alleges that UP’s tariff revisions constitute an unreasonable practice in violation of 49 U.S.C. § 10702, and unreasonable discrimination in violation of 49 U.S.C. §§ 10701(b) and 10741. With respect to RBT’s unreasonable practice claim, RBT alleges that: (1) UP’s differential treatment of SJVR-served destinations as compared to UP-served destinations amounts to an unreasonable classification; and (2) the rate differential applied to the SJVR-served destinations is not based on reasonable cost or commercial considerations, and does not serve any legitimate purpose. (Compl. 20-21.) RBT asserts that it is likely to succeed on this claim because UP’s use of SJVR to deliver unit trains to RBT-Ivory likely saves UP

⁸ RBT states on surreply that UP recently obtained a preliminary injunction in a proceeding in the U.S. District Court for the Northern District of California after arguing that a \$45 per car fee would cause it irreparable harm. Citing this fact, RBT argues that UP “cannot plausibly assert” that its \$250 per car rate increase would not cause RBT irreparable harm. (Surreply 2-3.) However, analyzing whether to grant relief in a specific case is a balancing test dependent on the specific facts presented; therefore, the arguments UP may have made regarding an injunction based on different facts are not controlling here.

money compared to delivering unit trains to Western Milling's Goshen Junction station on UP's main line. (Pet. 15.) Thus, according to RBT, there is no cost justification for UP's "singling out" of SJVR traffic that is otherwise identical to other UP traffic. (*Id.* at 14.)

With respect to its unreasonable discrimination claim, RBT also argues that it is likely to succeed on the merits because UP is penalizing traffic that moves to SJVR-served destinations (but not traffic to UP-served destinations) even though it "involves the same freight, service, equipment, and routes," has similar transloading facilities, and "is at least as profitable." (Pet. 17-18.) RBT alleges that UP's tariff revisions are "being done at the request and for the benefit of a competitor" to RBT, which makes them "particularly pernicious." (Pet. 18. *See also* Surreply 8.) Finally, RBT claims that the facilities at RBT-Ivory are comparable to the facilities at Western Milling's Goshen Junction location and thus are "no less deserving of protection." (Pet. 13, 18.)

UP responds that RBT's unreasonable practice claim is unlikely to succeed because it "improperly attempts to recast a challenge to Union Pacific's rate levels as an unreasonable practice challenge," citing *Union Pacific Railroad v. ICC*, 867 F.2d 646 (D.C. Cir. 1989). (Reply 10.) UP also argues that RBT inaccurately assumes that the use of the term "classification" in 49 U.S.C. § 10702 refers to "destinations," but in fact it refers to groupings of commodities. (*Id.* at 11.)

UP asserts that RBT is unlikely to succeed on its unreasonable discrimination claim because, among other reasons, 49 U.S.C. § 10741(b)(2) precludes the discrimination provisions of 49 U.S.C. § 10741 from applying to "rail rates applicable to different routes," and Board and court precedent hold that "movements to different destinations" are "movements over different routes." (Reply 13 (citations and internal quotation marks omitted).) UP also argues that RBT is unlikely to succeed on its claim of discrimination under 49 U.S.C. § 10701(b) because that provision only applies when a rail carrier is discriminating between two or more connecting railroads at a particular interchange. (Reply 15.) Here, according to UP, there is no allegation that UP is favoring one connecting carrier over another.

In its surreply, RBT argues that its unreasonable practice claim is proper and that the Board's rate reasonableness provisions are not appropriate because "RBT is not complaining about the level of the rate *per se*." (Surreply 7.) RBT instead argues that its complaint relates to: (1) the relationship between RBT's rate and the rates of RBT's competitors; (2) the existence of a rate disparity that violates UP's "prior promises and reasonably relied upon representations"; and (3) the absence of a valid justification for the rate disparity. (*Id.*) RBT argues that under UP's logic, the Board would have to dismiss a complaint involving a deceptive fuel surcharge simply because the surcharge manifests itself in the rates that are charged, a theory that RBT claims the Board rejected in *Rail Fuel Surcharges*, EP 661 (STB served Aug. 3, 2006), and *Dairyland Power Cooperative v. Union Pacific Railroad*, NOR 42105 (STB served July 29, 2008). RBT states that, instead, the Board considered that complaint as an unreasonable practice complaint, which RBT argues the Board should do here as well. (Surreply 8.) Citing *Seaboard Coast Line Railroad v. United States*, 724 F.2d 1482 (11th Cir. 1984) and a House Report to the Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1895, RBT also argues on surreply that its unreasonable discrimination claim is proper because RBT-Ivory and Western Milling's

Goshen Junction facility are “within the same geographic area,” and thus are the same route for purposes of 49 U.S.C. § 10741(b)(2). (Surreply 9, citing Seaboard Coast Line R.R., 724 F.2d at 1490 n.8, and H.R. Rep. 96-1035, Sec. 208 (1980), as reprinted in 1980 U.S.C.C.A.N. 3978, 4004.)

As discussed below, for the purposes of a preliminary injunction, RBT has not shown likelihood of success on the merits of either its unreasonable practice or discrimination claims.

Unreasonable Practice. RBT has not shown a likelihood of success on this claim because there are significant questions as to whether UP’s imposition of a rate increase is unreviewable under the unreasonable practice provisions of 49 U.S.C. § 10702(2). The U.S. Court of Appeals for the District of Columbia Circuit has held that, where a railroad’s challenged practice is “manifested exclusively in the level of the rates that customers are charged,” the challenge is to the level of the rate, and it may therefore only be challenged under the Board’s rate reasonableness procedures. Union Pac. R.R., 867 F.2d at 649. Though RBT argues that its complaint is not about the level of UP’s rates “per se,” it has not adequately distinguished its complaint from Union Pacific.

RBT argues that its claim is consistent with Rail Fuel Surcharges and Dairyland. However, in those cases, the Board made clear that it was “not limiting the total amount that a rail carrier can charge for providing rail transportation through some combination of base rates and surcharges,” but rather “addressing the manner in which railroads apply what they call a fuel surcharge” and considering whether there was misrepresentation involved. Rail Fuel Surcharges, EP 661, slip op. at 7 (STB served Jan. 26, 2007) (“If the railroads wish to raise their rates they may do so, subject to the rate reasonableness requirement of the statute, but they may not impose those increases on their customers on the basis of a misrepresentation.”); see also Dairyland, NOR 42105, slip op. at 5 (STB served July 29, 2008) (“Dairyland may not base its case only on the *level* of the fuel surcharge as applied to itself”); CF Indus. v. Ind. & Ohio Ry.—Pet. For Declaratory Order, FD 35517, et al., slip op. at 5 (STB served June 21, 2013) (distinguishing Rail Fuel Surcharges and applying Union Pacific to bar a surcharge-based claim in absence of “showing that respondents misled shippers regarding a rate or charge”). Here, RBT has not demonstrated that its allegations are likely to succeed as an unreasonable practice complaint in light of Union Pacific, Rail Fuel Surcharges, and Dairyland, as the allegations RBT makes in its filings regarding the rate increase appear to pertain to the level of the rate rather than to a misrepresentation.

Nor has RBT shown that it is likely to succeed on the merits of its argument that UP’s “reclassification” of SJVR-served destinations is unreasonable under 49 U.S.C. § 10702(1). While that provision does prohibit unreasonable “classifications for transportation and service,” the word “classifications” is not ordinarily interpreted to refer to specific geographic destinations. Rather, as UP points out, the term “classification” is generally used to refer to the assignment of freight items into commodity groups, typically for purposes of setting rates. See

49 U.S.C. § 1(6) (1976) (“It is made the duty of all common carriers subject to the provisions of this chapter to establish, observe, and enforce just and reasonable classifications of *property* for transportation, with reference to which rates, tariffs, regulations, or practices are or may be made or prescribed.” (emphasis added))⁹; see also All States Freight, Inc. v. N.Y., New Haven & Hartford R.R., 379 U.S. 343, 345 (1964) (“One tariff, the ‘classification,’ assigns each of the many thousand commodities carried by rail to one of presently some 30 categories or classes, based upon the commodity’s particular characteristics.”); Dir. Gen. of R.R.s v. Viscose Co., 254 U.S. 498, 503 (1921) (“Classification in carrier rate-making practice is grouping-the associating in a designated list, commodities, which . . . may justly and conveniently be given similar rates.”). Given that RBT has not shown why the classification provision should be applied here, it has not demonstrated a likelihood of success.¹⁰

Unreasonable Discrimination. RBT has not shown a likelihood of success on the merits of its unreasonable discrimination claim under 49 U.S.C. § 10701(b) because this section of the statute is intended to prevent discrimination by a carrier between competing carriers at an interchange, not discrimination by a carrier between destinations. See W. Pac. R.R. v. United States, 382 U.S. 237, 244 (1965) (purpose of then-section 3(4) of the Interstate Commerce Act is “to deprive railroads of discretion to apportion economic advantage among competitors at a common interchange”); Providence & Worcester R.R. v. United States, 666 F.2d 736, 740 (1st Cir. 1981) (“This statute prohibits both discriminatory routing of unrouted traffic and the inducing of shippers to discriminate in specifying their routings.”); Bangor & Aroostock R.R. v. ICC, 574 F.2d 1096, 1104 (1st Cir. 1978) (“The provision seems obviously meant to avert the anti-competitive effects of a powerful or well-positioned carrier using its influence and position in favor of one connecting line over another, and thus skewing the market as that market is structured under the Act.”)¹¹ RBT has made no showing as to how this section of the statute applies to its situation in light of the purpose of the statute.

⁹ This section was repealed and restated without substantive change as 49 U.S.C. § 10702 in 1978 by the Revised Interstate Commerce Act of 1978. Pub. L. No. 95-473, 92 Stat. 1337, 1446 (“Sections 1 and 2 of this Act restate, without substantive change, laws enacted before May 16, 1978, that were replaced by those sections. Those sections may not be construed as making a substantive change in the laws replaced.”)

¹⁰ Even if we ultimately were to view UP’s tariff provision as a “classification,” RBT would still need to address Union Pacific, which holds that a challenge to a practice which is manifested exclusively in the level of the rate amounts to a challenge to the level of the rate. (See Compl. 20 (alleging that UP reclassified SJVR-served destinations “for purposes of imposing a \$250/car penalty”).)

¹¹ What is now 49 U.S.C. § 10701(b) was originally section 3(4) of the Interstate Commerce Act, as amended. See 49 U.S.C. § 3(4) (1976). That provision was repealed and recodified in 1978 in Title 49 of the United States Code as section 10701(c). Act of Oct. 17, 1978, Pub. L. No. 95-473, 92 Stat. 1337 (1978). The ICC Termination Act of 1995 recodified section 10701(c) as 49 U.S.C. § 10701(b). ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (1995).

RBT has also failed to show a likelihood of success on the merits as to its claim of discrimination under 49 U.S.C. § 10741. Under that provision, a rail carrier may not “subject a person, place, port, or type of traffic to unreasonable discrimination.” 49 U.S.C. § 10741(a)(1). “Unreasonable discrimination” includes charging different persons different amounts “for performing a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances.” 49 U.S.C. § 10741(a)(2). This prohibition on unreasonable discrimination, however, does not apply to “rail rates applicable to different routes.” 49 U.S.C. § 10741(b)(2).

The two facilities at issue in this case are located on different rail lines, with RBT-Ivory located on a line of SJVR and Western Milling’s Goshen Junction facility located on the UP main line. Yet, in its petition for injunction, RBT failed to address the “different route” exception to § 10741(b)(2) and any relevant precedent on that point. In its reply, UP points to precedent standing for the proposition that separate destinations are on “different routes” for purposes of § 10741. See Rail Gen. Exemption Auth.—Misc. Agric. Commodities—Pet. of G. & T. Terminal Packaging Co., Inc., et al. to Revoke Conrail Exemption, 8 I.C.C.2d 674, 686 (1992)) (Rail General Exemption Authority) (finding that routes from Idaho to different destinations in the New York City metropolitan area were not the same route), aff’d by Mr. Sprout, Inc. v. ICC, 8 F.3d 118, 126 (2nd Cir. 1993).

RBT attempts to distinguish this precedent in its surreply by noting that the locations in that case were found to be “separate destinations located on different rail lines.” RBT asserts that RBT-Ivory and Goshen are on the same line because SJVR merely acts as UP’s delivering agent. (Surreply 9.) However, RBT points to no precedent establishing that being a “delivering agent” is equivalent to being on the same route under § 10741.

RBT also argues that destinations “within the same geographic area” are considered the same routes under § 10741. It cites a House Report to the Staggers Rail Act of 1980, which states that the Committee considers “end points” to mean “specific origins and destinations and broad geographic areas encompassing origins and destinations.” RBT also cites Seaboard Coast Line Railroad v. United States, 724 F.2d 1482 (11th Cir. 1984), in which a court upheld an agency finding of discrimination and concluded that, despite disparate origins of traffic arriving at a carrier’s gateway, its routes from the gateway into Atlanta were not “different” under § 10741. However, RBT fails to adequately argue how its factual circumstances are similar or dissimilar to those in Seaboard or how Seaboard rebuts UP’s reliance on Rail General Exemption Authority. As such, RBT’s arguments fall short of a showing that there is “more than a mere possibility” of success on this claim.

In sum, while the concerns raised by RBT are serious and thus not taken lightly by the Board, it has not adequately supported its request for a preliminary injunction. Because RBT has failed to satisfy the requirements that it demonstrate irreparable harm in the absence of a preliminary injunction and that it is likely to succeed on the merits of its complaint, we need not address the parties’ arguments about harm to other parties or public interest considerations. See Seminole Elec. Coop. v. CSX Transp., Inc., NOR 42110, slip op. at 4 (STB served Dec. 22, 2008) (“some showing of each of the Holiday Tours factors is necessary” to grant an injunction).

It is ordered:

1. RBT's motion for surreply is granted.
2. UP's reply to RBT's surreply is rejected as moot.
3. RBT's request for preliminary injunctive relief is denied.
4. This decision is effective on its service date.

By the Board, Chairman Elliott, Vice Chairman Miller, and Commissioner Begeman.