

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 34608

OHIO VALLEY RAILROAD COMPANY—PETITION TO RESTORE SWITCH
CONNECTION AND OTHER RELIEF

Decided: July 13, 2007

On October 22, 2004, Ohio Valley Railroad Company (OVR) and Mid-America Locomotive & Car Repair, Inc. (Mid-America) (collectively, petitioners) filed a petition asking that two switches connecting OVR's lines with those of Indiana Southwestern Railway Co. (ISW) be restored. Petitioners also requested temporary emergency and alternative service relief under 49 CFR 1146 and 1147 and asked the Board to confirm that OVR possesses a contractual right to engage in direct interchange with CSX Transportation, Inc. (CSXT), over ISW's track. By decision served February 23, 2005, the Board ordered ISW to restore the south end switch connection with OVR but denied petitioners' other requests for relief.

On May 16, 2005, OVR and Mid-America sought to supplement their petition by alleging that ISW was engaging in unreasonable and discriminatory practices against them in violation of 49 U.S.C. 10701, 10741, and 10742. Petitioners sought various types of relief, including the prescription of an interchange agreement, proper reinstallation by ISW of the switch connection (which petitioners claimed had not been reinstalled properly), and other relief directed toward ISW's interchange pricing practices.

The Board, in a decision served on August 29, 2005, directed the parties to participate in a meeting to address the service issues, clarify the factual record, and explore the possibility of narrowing their areas of disagreement. On September 27, 2005, the parties met with the director of the Board's Office of Compliance and Enforcement (now the Office of Compliance and Consumer Assistance (OCCA)). In December 2005, OVR filed a letter stating that the parties had not yet resolved their differences.

In a decision served on February 22, 2007, the Board directed petitioners to show cause by March 14, 2007, why the proceeding should not be dismissed, and gave ISW until April 3, 2007, to file a response.

In their response, the petitioners take issue with the order to show cause. The petitioners dispute the Board's statement that the Board had not received any written communication from the parties in 13 months and that this suggested that the parties were able to address the issues raised in this proceeding without formal Board intervention. In support of their argument that the proceeding had not become dormant, the petitioners submitted two documents, both of which

are dated June 15, 2006: an email between OVR and ISW (on which the Director of OCCA was copied) and an email from OVR to the Director of OCCA. The emails submitted by the petitioners demonstrate a continuing attempt by OVR, at least as of June 2006, to negotiate with ISW and a desire that the Director of OCCA facilitate those discussions.

Petitioners' response to the show cause order affords no basis upon which to continue this proceeding. OVR filed a complaint, which the Board resolved in the February 23, 2005 decision. OVR later sought to augment its original complaint via a "supplemental" petition filed more than 80 days later, which Board staff has sought to mediate and, as the show cause order noted, continues to make itself available to mediate.¹ It is unclear from the docket whether there are any remaining issues to be resolved.

Petitioners failed to provide a specific and detailed statement regarding the nature of any outstanding issues, the relief sought and the basis for their claim(s). Instead, they focused on the commercial acceptability of ISW's rates,² and provided only a vague statement that the Board should "... provide OVR and ISW with an opportunity to update the record and then address service issues which have been presented to the Board by Petitioners." This response was not adequate under the circumstances of this case.

Moreover, the emails upon which petitioners rely were generated, not as part of this formal proceeding, but rather as part of informal negotiations in which the Director sought to facilitate an agreement among the parties. This sort of negotiation often provides an alternative to, and may obviate, pursuit of a formal complaint. The emails were not accompanied or followed by any pleading in the formal docket.

Nothing has prevented petitioners from updating the record or addressing service issues during calendar year 2006 or during the present year. The fact that they have not done so, combined with a response to the show cause order that sheds no further light on the issues they wish to put before the Board, suggests that this proceeding is not a vehicle by which petitioners are actively pursuing a specific service complaint cognizable under the statutory provisions cited in their supplemental petition. In short, OVR has failed to justify keeping a formal proceeding open.

¹ In a response filed June 21, 2005, ISW objected to the supplemental petition on the grounds that the proceeding had concluded and that the supplemental petition impermissibly sought to introduce new claims. ISW notes that Mid-America was not even a party to the original proceeding. Because OVR has failed to show cause why the proceeding should not be dismissed, the Board does not need to rule on that challenge.

² Petitioners complain that "... ISW continues to refuse to negotiate rates which will move traffic to and from the shipper served by OVR." The appearance that petitioners are concerned chiefly, if not exclusively, with rates, rather than service issues, is buttressed by a letter submitted as correspondence by Mid-America on March 12, 2007, which complains solely about the rates charged by ISW.

If OVR or Mid-America believes that ISW has committed a dereliction of service-related duty in violation of the statute, either (or both) can file a new complaint, stating with specificity the violation and the relief sought. Mid-America may file a complaint challenging the reasonableness of ISW's rates if it is dissatisfied and can show that the rates are subject to the Board's rate reasonableness jurisdiction. Petitioners may not convert this proceeding into a rate reasonableness case. See Union Pacific R.R. v. ICC, 867 F.2d 646, 649 (D.C. Cir. 1989).

This proceeding will be dismissed without prejudice to either or both petitioners filing a new complaint in a new docket.

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

It is ordered:

1. This proceeding is dismissed without prejudice.
2. This decision is effective on August 12, 2007.

By the Board, Chairman Nottingham, Vice Chairman Buttrey, and Commissioner Mulvey.

Vernon A. Williams
Secretary