

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 36197

UNION PACIFIC RAILROAD—PETITION FOR DECLARATORY ORDER AND
PRELIMINARY INJUNCTION

Digest:¹ The Board denies Union Pacific Railroad Company's request for a declaratory order and preliminary injunction directing BNSF Railway Company to allow contested switching operations pending the conclusion of a related arbitration proceeding.

Decided: June 29, 2018

On May 16, 2018, Union Pacific Railroad Company (UP) filed a petition requesting a declaratory order and preliminary injunction in order to prevent BNSF Railway Company (BNSF) from restricting UP's ability to perform a switching movement at Longview, Wash. (UP Pet. 2-5, 15.) Longview is located on BNSF's mainline between Vancouver, Wash., and South Tacoma, Wash. (the Line). UP operates over the Line pursuant to a trackage rights agreement entered into by the parties' predecessors in 1909 (the Agreement). (UP Pet. 6 & Ex. 1.)

In its petition, UP alleges that BNSF is improperly prohibiting UP from switching on the mainline at Longview Junction in violation of its rights under the Agreement. (UP Pet. 6; Ex. 1, Art. I, § 4.)² UP demanded arbitration under the Agreement seeking to restore its ability to switch on the mainline. (UP Pet. 1.) UP asks the Board to issue a declaratory order and enter a preliminary injunction directing BNSF to allow the contested switching operations pending resolution of the arbitration process because, according to UP, BNSF's actions have "placed in immediate peril continued rail service to [UP] customers" and resulted in "serious disruption to rail service." (UP Pet. 1.)

BNSF filed its reply in opposition to the petition on May 30, 2018. BNSF contends that UP has not shown irreparable harm or met the other requirements necessary to justify the

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

² UP's citation to this and other sections of the Agreement failed to include the pertinent article number. For purposes of clarity, the article number has been added herein.

extraordinary remedy of preliminary injunctive relief. (BNSF Reply 15-24.) BNSF also argues that the petition should be denied on statutory and prudential grounds.³

For the reasons explained below, UP's petitions for declaratory order and injunction will be denied.

BACKGROUND

UP operates over the Line pursuant to the Agreement, which was entered into by the parties' predecessors in 1909.⁴ (UP Pet. 6 & Ex. 1.) The Agreement grants UP "equal joint possession and use" of the Line and authorizes BNSF to direct movements over the Line in a manner that is "equal, just and fair" and "shall not unjustly discriminate." (UP Pet., Ex. 1, Art. I, §§ 1 & 4.) Disputes arising under the Agreement are governed by an arbitration clause, which includes a provision directing that the status quo be maintained pending resolution of the dispute. (UP Pet. 6; Ex. 1, Art. III, § 5.)⁵

UP contends that in 2014, it agreed to temporarily cease mainline switching operations at Longview to accommodate BNSF's construction of a third mainline track, and that UP resumed the switching operation in November 2017 when construction was complete. (UP Pet. 3-4.) According to UP, BNSF directed UP in April 2018 to stop performing the switching operation by May 3, 2018, and thereafter refused to permit UP to switch on the mainline. (UP Pet. 4-7.)

BNSF contends that the parties agreed in 2014 to implement service plans that would eliminate routine switching on the mainline at Longview Junction and that UP abided by that agreement for more than two years (including more than seven months after completion of the third mainline track in March 2017) by running additional shorter trains. BNSF asserts that on October 21, 2017, UP unilaterally introduced new service plans that called for regular UP switching on the mainline at Longview, giving rise to the current dispute. (BNSF Reply 2-3, 7-8.)⁶

³ Specifically, BNSF contends that the Federal Arbitration Act requires UP to seek an injunction from the arbitral panel rather than the Board. (BNSF Reply 9-10.) BNSF also argues that the petition should be denied on prudential grounds because consideration of UP's claim would require the Board to interpret a private contract when, as UP itself acknowledges (see UP Pet. 8), the Board has expressed a general preference to avoid involvement in disputes over the interpretation of private contracts, leaving such issues for courts or arbitrators to decide. (BNSF Reply 11-15.)

⁴ Because the Agreement predates passage of the Transportation Act of 1920, 41 Stat. 456, the parties were not required to submit it to the agency for authorization.

⁵ UP acknowledges that "[t]he ultimate issue to be decided in arbitration is whether BNSF may prohibit [UP] from performing the switching operation." (UP Pet. 10.)

⁶ BNSF disputes UP's assertion that the parties' 2014 arrangement was a temporary protocol limited to the period it would take to construct a third mainline track. (See BNSF Reply 3-4, asserting that construction of the third track did not interfere with the parties' prior

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On May 11, 2018, UP demanded arbitration under the Agreement to resolve the dispute. (UP Pet. 1, 7.) UP filed its petition with the Board five days later, on May 16, 2018, asserting that “BNSF’s callous indifference to its obligations combined with the serious disruption to rail service resulting from that indifference requires extraordinary Board intervention” and requesting that the Board issue a preliminary injunction “preserving the *status quo*...until the arbitration process has concluded.” (UP Pet. 1 & 8.)

PRELIMINARY INJUNCTION

Under 49 U.S.C. § 1321(b)(4), the Board has authority to 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) it is likely to prevail on the merits of any challenge to the action sought to be preliminarily enjoined, (2) it will be irreparably harmed in the absence of the requested relief, (3) issuance of the injunction will not substantially harm other parties, and (4) granting the injunction is in the public interest. See, e.g., Wash. Metro. Area Transit Comm’n v. Holiday Tours, Inc., 559 F.2d 841, 843 (D.C. Cir. 1977); 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 the party seeking it “carries the burden of persuasion on all of the elements required for [such] extraordinary relief.” BP Amoco Chem. Co. v. Norfolk S. Ry., NOR 42093, slip op. at 4 (STB served June 6, 2005) (quoting San Joaquin Valley R.R.—Aban. Exemption—In Tulare & Kern Ctys., Cal., AB 398 (Sub-No. 5X), slip op. at 4 (STB served Apr. 3, 1998)).

UP has not met its burden to show that it will be irreparably harmed in the absence of a preliminary injunction pending the arbitration panel’s ruling. UP asserts that BNSF’s refusal to permit regular mainline switching operations at Longview requires UP “to use more trains, locomotives, and crews to move the same amount of traffic.” (UP Pet. 12.)⁷ That claim, however, does not by itself amount to irreparable harm. Moreover, UP has not provided evidence that prohibition of the switching movement has prevented or is likely to prevent UP from being able to serve its customers.⁸

(. . . continued)

switching practices and was not the primary impetus for the parties’ agreement to halt mainline switching at Longview Junction.) BNSF also disputes UP’s claim that the third track was intended to provide additional mainline capacity to relieve freight rail congestion. (Id. 6-7.)

⁷ UP states that it made similar adjustments during the earlier time when it had discontinued mainline switching operations (2014 to November 2017). (UP Pet. 3-4.) UP asserts that these earlier adjustments increased transit time, but provides no evidence of specific irreparable harm sustained by UP or any of its customers.

⁸ UP describes various service disruptions that purportedly resulted from BNSF’s recent refusals to permit mainline switching operations. (UP Pet. 4-6.) However, UP acknowledges that it is adjusting its transportation plan to avoid significant disruptions in the future. (Id. at 6.) UP does not claim that it has been unable to continue to serve its customers, or that it has lost any customers as a result.

The Board acknowledges that UP has faced service challenges across portions of its network this year, at least in part due to shortages of crew and locomotives. But UP has not provided evidence to demonstrate that the suspension of mainline switching operations at Longview directly contributed to its recent service challenges or is impeding its ongoing recovery efforts. The Board notes that the metrics UP files weekly with the Board indicate that UP's service has generally been improving over recent months,⁹ although UP is working through recent service setbacks, as noted in a public announcement to customers dated June 28, 2018 (available on UP's website).

Furthermore, as UP concedes, any injuries resulting from BNSF's conduct may "be measurable in dollars, and thus susceptible to redress in the form of legal damages." (UP Pet. 12.) The Board has consistently held that monetary or economic loss by itself does not constitute irreparable harm. See, e.g., Kessler—Pet. for Injunctive Relief, FD 35206, slip op. at 5 (STB served June 12, 2009); N. Coast R.R. Auth. v. Sonoma-Marín Area Rail Transit Dist., NOR 42148, slip op. at 3 (STB served Oct. 21, 2016); Am. Chemistry Council, NOR 42129, slip op. at 4 (additional costs and disruption of business operations caused by carrier's newly imposed requirements were not irreparable harms because they constituted "[i]njuries in terms of money, time, and energy," which are "economic in nature").

UP asserts that while its alleged direct injury may be redressable in damages, "the indirect and secondary injuries for [UP] clearly rise to the level of irreparable injury." (UP Pet. 12.) While UP states that "[i]f [UP] is unable to find sufficient train crews, it may have cascading effects across the region and the entire network," and that "if [UP] is unable to provide timely, reliable service to customers it is likely to lose those customers," (*id.*), it has not presented evidence that those impacts have actually occurred or are likely to occur. A preliminary injunction is an extraordinary remedy and will generally not be granted unless the requesting party shows that it faces "unredressable actual and imminent harm." N. Coast R.R. Auth., NOR 42148, slip op. at 3 (citing Am. Chemistry Council, NOR 42129, slip op. at 4). UP has not made that showing here.

Nor has UP shown that a preliminary injunction is necessary to protect shippers at this time. UP has not presented evidence that any shipper has sustained (or will sustain) irreparable harm. Rather, as UP explains, it has been able to avoid significant impacts on customers. (UP Pet. 12.) While UP contends that shippers "continue to experience longer transit times and less reliable service" (UP Pet. 13), it provides no details or evidence regarding this claim. UP also asserts that "the full service impacts and enduring operational consequences for our customers at Longview" have not yet been fully felt but that "the harm to shippers is inevitable and self-evident." (*Id.*) Again, UP presents no evidence to substantiate these claims, and fails to present evidence that any shippers were harmed when a comparable situation persisted for more than two years (2014 to November 2017).

⁹ These metrics are published on the Board's website at https://www.stb.gov/stb/railserviceissues/rail_service_reports.html. The weekly updates filed by UP are located under the "UP" tab.

In sum, UP has not made a showing of irreparable harm warranting a grant of the extraordinary relief it seeks. Because the Board concludes that UP has failed to demonstrate that it will suffer irreparable harm in the absence of a preliminary injunction, UP's arguments regarding the other requirements for a preliminary injunction need not be addressed. N. Coast R.R. Auth., NOR 42148, slip op. at 4; Am. Chemistry Council, NOR 42129, slip op. at 5. Likewise, the Board need not consider the statutory and prudential grounds advanced by BNSF in opposition to the petition for injunctive relief.

DECLARATORY ORDER

The Board has discretionary authority under 5 U.S.C. § 554(e) and 49 U.S.C. § 1321 to issue a declaratory order to terminate a controversy or remove uncertainty. See Intercity Transp. Co. v. United States, 737 F.2d 103 (D.C. Cir. 1984); Delegation of Auth.—Declaratory Order Proceedings, 5 I.C.C. 2d 675 (1989). The Board will decline to exercise its discretionary authority to issue a declaratory order here. UP's declaratory order request appears to be largely premised on its request for injunctive relief, which has been denied. Moreover, the controversy between the parties is in arbitration per the terms of the Agreement. The associated issues are best left to that forum at this time and can proceed independently without the need for a declaratory order from the Board. Therefore, UP's petition for declaratory order will be denied.

It is ordered:

1. UP's petition for preliminary injunction is denied.
2. UP's petition for declaratory order is denied.
3. This decision is effective on its service date.

By the Board, Board Members Begeman and Miller.