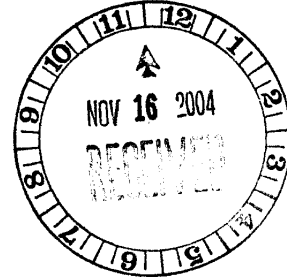


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INDIANA SOUTHWESTERN RAILWAY CO.
1318 S. JOHANSON ROAD
PEORIA, ILLINOIS 61607
(309) 697-1400



November 15, 2004

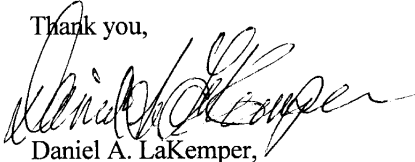
Vernon A. Williams, Secretary
Surface Transportation Board
1925 K Street, N.W.
Washington, D.C. 20423

RE: Docket No. FD-34486 (Ohio Valley Railroad Company - Petition for Expedited Relief for Service Emergencies) ³⁴⁶⁰⁸

Dear Secretary Williams:

Enclosed are an original and ten copies of ISW's Reply to the above-referenced Petition. Please file same, and return the extra copy to me, "file-stamped". Please call me if you have any questions.

Thank you,


Daniel A. LaKemper,
General Counsel.

ENTERED
Office of Proceedings

NOV 16 2004

Part of
Public Record

Encs.

212560

BEFORE THE SURFACE TRANSPORTATION BOARD

34608
FINANCE DOCKET NO. 34486



OHIO VALLEY RAILROAD COMPANY

-ACQUISITION AND OPERATION EXEMPTION-

HARWOOD PROPERTIES, INC.

REPLY TO
PETITION FOR EXPEDITED RELIEF
FOR SERVICE EMERGENCIES

INDIANA SOUTHWESTERN RAILWAY CO.

Daniel A. LaKemper, Esq.
General Counsel
1318 S. Johanson Road
Peoria, Illinois 61607
Tel.: (309) 697-1400
Fax: (309) 697-8486

ENTERED
Office of Proceedings

NOV 16 2004

Part of
Public Record

Dated: November 15, 2004.

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 34486

OHIO VALLEY RAILROAD COMPANY
-VERIFIED NOTICE OF EXEMPTION-
HARWOOD PROPERTIES, INC.

REPLY TO
TO PETITION FOR EXPEDITED RELIEF
FOR SERVICE EMERGENCIES

Comes now INDIANA SOUTHWESTERN RAILWAY CO. ("ISW"), and for its reply to Ohio Valley Railroad Company's ("OVR") Petition for Expedited Relief for Service Emergency, states as follows:

OVR filed this Petition for Expedited Relief under 49 C.F.R. §1146 and §1147, alleging there is a service emergency at its Harwood Yard facility in Evansville, Indiana (this yard constitutes OVR's entire railroad).

The standards to be met under §1146 and §1147, are essentially identical as far as the contents of the Petition, and include, among other things:

1. Petitioner must show "that, over an identified period of time, there has been a substantial, measurable deterioration or other demonstrated inadequacy of rail service provided by the incumbent carrier." [subsection (a)]
2. The Petition must include "A summary of the petitioner's discussions with the incumbent carrier of the service problems and the reasons why the incumbent carrier is unlikely to restore adequate rail service consistent with current transportation needs within a reasonable period of time;" [subsection (b)(ii)]

3. The proposed alternative service must be provided “safely” and “without unreasonably interfering with the incumbent’s overall ability to provide service;” [subsection (b)(iii)] and

4. The Petition must be served on the Federal Railroad Administration” [subsection (b)(iv)]

OVR alleges that this service emergency involves the need to “free a car for a Mid-America customer which is presently trapped on OVR tracks in Harwood Yard.”

Initially, it should be pointed out that Mid-America is not a customer of ISW. OVR is its carrier. Further, the reality is, this one car has never been waybilled, and is not even a common carrier movement. It is a passenger car, to be moved on its own wheels.

ISW has never received any waybill, for any car to move in or out of OVR’s Harwood Yard. OVR has never attempted to provide any service whatsoever. Therefore, by definition, there is no “service emergency”.

OVR justifies this filing with the false allegation that ISW “illegally removed two interchange switch tracks.” The reality is, ISW removed two switches that connected its trackage with OVR’s Harwood Yard. These tracks were never interchange tracks. They were used to serve the Harwood Yard facility when it was industrial trackage owned by an ISW customer. OVR now claims that track is its railroad. At the time of the removal, there was no interchange agreement between OVR and ISW, nor had did OVR have valid reporting marks (as OVR attempts to gloss over, its reporting marks were not valid until January 1, 2005). ISW had no right to enter OVR’s yard, nor did OVR have the right to enter onto ISW’s tracks. This situation was not created by ISW. It was created by OVR.

Nevertheless, ISW was informed and believed that OVR represented to the AAR that it had interchange agreements with ISW and CSX. ISW contacted CSX, and confirmed that they had no such agreement. ISW was justifiably concerned that OVR might attempt to come out onto ISW tracks, without authority, thus creating a dangerous situation. In addition, the change in status from a yard served by ISW to another railroad, made two switches unnecessary. Interchange can be accomplished with one switch.

OVR did not make any reasonable attempt to resolve this matter. After threatening to have ISW personnel arrested, its counsel faxed one threatening letter to ISW demanding various things be agreed to in a matter of hours, or OVR would file this action (See Petitioner's Exhibit C). ISW faxed a response that same day (See Petitioner's Exhibit D), but OVR did not pursue further negotiations. It ran to the Board with this Petition.

OVR even admits that the "Draft Interchange Agreement" attached to its Petition as Exhibit F, was never even presented to ISW, prior to the filing.

ISW did, however, promptly after the filing of the Petition, take further steps to resolve the matter for the customer (See Exhibit 1, attached). OVR's response (See Exhibit 2, attached) was vague and continued to make various demands unrelated to the alleged "emergency". It is clear that OVR did not file this Petition in an attempt to resolve the status of this car, but rather, as an effort to force other concessions from ISW. There is no need, for instance, for two interchange switches to handle one car.

OVR also ignores the issue of safety, and interference with ISW's other business. As pointed out by CSX, in its response, there are numerous safety and operating issues. Were OVR to be granted trackage rights over ISW, it would seriously interfere with ISW's ability to provide service to its other customers. ISW has very limited yard space

in Evansville, and already has to accommodate CSX on a regular basis. ISW does not have extra tracks to accommodate OVR. Granting trackage rights to OVR would seriously hamper ISW's ability to serve its other customers.

Nor is there any basis for imposing trackage rights. Contrary to the allegations made by OVR, the agreement between Evansville Terminal Company and Mid-America Locomotive & Car Repair, Inc. does not contain any conveyance of "interchange rights," whatever that is (a later filing of OVR referred to a so-called "easement"). By whatever name, Mid-America was not a carrier, and could not have received trackage rights, even if they were offered, which they were not. Nor did OVR's exemption filing mention any claim to trackage rights. It is also interesting to note that the alleged document conveying these "rights" to OVR, is actually in favor of Harwood Properties, Incorporated, another non-carrier, and ISW, while it purchased certain assets from Evansville Terminal, did not assume Evansville Terminal's contracts or liabilities.

The Board does not impose trackage rights lightly, particularly over switch carriers such as ISW. The Petition utterly fails to make any showing of the need for trackage rights. ISW is providing service to all of its customers. Mid-America is no longer a customer of ISW. OVR has yet to offer a car to ISW.

ISW is willing to negotiate an interchange agreement with OVR, as evidenced by the intermediate switch tariff filing on April 13, 2004 (See Petitioner's Exhibit B). ISW is merely unwilling to be blackmailed into an interchange agreement dictated by OVR. The unfounded allegations that ISW's "conduct is blatantly anticompetitive," and so forth, are rubbish. ISW is not a public charity, and has a right to a reasonable return on its assets.

ISW is ready, willing, and able to provide service, not only to its customers, but to the passenger car currently located on OVR's tracks. It made that clear. As shown by the Verified Statement of Jon Clark, the car owner, attached hereto as Exhibit 3, it is OVR that is ignoring the customer, not ISW. To OVR, this car is only a pawn in its larger scheme of forcing ISW to provide unreasonably low rates for non-common carrier moves, or sell its railroad to OVR (which OVR has already suggested).

ISW is prepared to install a switch (only one switch is needed to interchange the low volume of cars which Mid-America receives), and move the car at issue, as soon as it receives the appropriate documentation, and has authority from OVR to enter its trackage.

Finally, it is worth noting that the requirement that the Federal Railroad Administration be served with OVR's Petition was apparently not complied with. One could speculate that OVR would prefer the FRA not be reminded of its status as a railroad.

CONCLUSION

There is no service emergency or service inadequacy. OVR has taken a single non-common carrier equipment movement, which has yet to be billed, and attempted to parlay it into an excuse to make various unwarranted demands on Indiana Southwestern Railway, and CSX. This Petition was filed in bad faith, and for the improper purpose of obtaining negotiating advantages to which OVR is not entitled. ISW respectfully asks that the Petition be denied.

Respectfully submitted,



Daniel A. LaKemper, Esq.

General Counsel

Indiana Southwestern Railway Co.

1318 S. Johanson Road

Peoria, Illinois 61607

Tel.: (309) 697-1400

VERIFICATION

I, Daniel A. LaKemper, General Counsel of Indiana Southwestern Railway Co., verify under penalty of perjury that I have read the above and foregoing Reply to Petition for Expedited Relief for Service Emergencies; that I have knowledge of the facts stated therein; and that those facts are true and correct to the best of my knowledge and belief. Further, I certify that I am qualified and authorized to file the foregoing document.



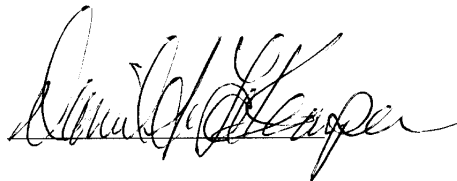
CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing instrument was served by sending it via UPS Next Day Air courier service, all charges paid, this 15th. Day of November, 2004, to the following:

Richard R. Wilson, Esq.
Vuono & Gray, LLC
2310 Grant Building
Pittsburgh, PA 15219-2383

Louis E. Gitomer
Ball Janik, LLP
1455 F Street, N.W.,
Suite 225
Washington, D.C. 20005

Federal Railroad Administration
Region 4
200 W. Adams St.
Chicago, Illinois 60606

A handwritten signature in black ink, appearing to read "Louis E. Gitomer", written over a horizontal line.

INDIANA SOUTHWESTERN RAILWAY Co.

1318 SOUTH JOHANSON ROAD • PEORIA, ILLINOIS 61607 • (309) 697-1400

October 22, 2004

Richard R. Wilson, Esq.
Vuono & Gray, LLC
2310 Grant Bldg.
Pittsburgh, PA 15219

Dear Mr. Wilson:

We received your STB filing today. While we believe it is without merit, and a single passenger car moving out of storage on its own wheels is not a common carrier movement, we have done some additional investigation into the circumstances of this move, and we would like to avoid any further inconvenience to the car owner.

Therefore, we are prepared to reinstall one switch, pick up the car in question and deliver it to CSX interchange, upon receipt of billing, if OVR will authorize ISW to do so. OVR will have to collect its switch charges, if any, from the car owner (or shipper).

Sincerely yours,



Daniel A. LaKemper,
General Counsel

BY FAX AND U.S. MAIL.

"EXHIBIT 1"

Law Offices

VUONO & GRAY, LLC

2310 Grant Building

Pittsburgh, PA 15219-2383

John A. Vuono
William A. Gray
Mark T. Vuono
Dennis J. Kusturiss
Christine M. Dolfi
Louise R. Schrage
Susan C. Indrisano
Also Admitted in Florida
Also Admitted in Maryland

Richard R. Wilson
of Counsel

Telephone
412-471-1800

Facsimile
412-471-4477

October 26, 2004

Re: Ohio Valley Railroad Company - Petition for Expedited Relief
STB Finance Docket No. 34486

Daniel A. LaKemper
General Counsel
Indiana Southwestern Railway Co.
1318 S. Johanson Road
Peoria, IL 61607

BY FACSIMILE (309-697-8486)

Dear Mr. LaKemper:

I am in receipt of your letters of October 22, 2004 to myself and to the Honorable Vernon A. Williams of the Surface Transportation Board. While OVR will certainly cooperate with ISW's efforts to interchange the car which was trapped by your client's unwarranted conduct, your letter does not address numerous other issues which must be resolved in order to eliminate the service emergency which ISW created. Your letter makes no representation or guarantee that the switch which is to be reinstalled will not be subsequently removed. Moreover, two switches were removed by ISW and both must be reinstalled for efficient rail operations. Finally, Mid-America has advised that it is negotiating for additional car repair business that will require continued common carrier rail services.

Your letter also fails to address ISW's willingness to engage in good faith negotiations for an interchange agreement with OVR. Rather, you have advised the STB that ISW intends to seek reconsideration of the Board's decision which authorized OVR common carrier status. Your October 22, 2004 correspondence to the Board is in itself an acknowledgement that OVR is and has been a common carrier railroad since the Board's initial publication of its notice of exemption.

RECEIVED

OCT 23 2004

"EXHIBIT 2"

Daniel A. LaKemper

Page 2

October 26, 2004

We appreciate ISW's recognition of that fact and its willingness to address the immediate need for reinstallation of the switch and the reinstitution of common carrier rail service with OVR.

Sincerely yours,

VUONO & GRAY, LLC



Richard R. Wilson, Esq.

Attorney for Ohio Valley Railroad Company
and Mid-America Locomotive
and Car Repair, Inc.

RRW/bab

xc: Ohio Valley Railroad Co.
Mid-America Locomotive & Car Repair, Inc.
Hon. Vernon A. Williams, STB
Office of Proceedings, STB

VERIFIED STATEMENT OF JON CLARK

My name is Jon Clark and I am the owner of a railroad passenger car that is currently located at the Mid-America Locomotive facility in Evansville, Indiana.

This car is identified as the "RPCX 2459" and will be moving in regular freight train service on its own wheels.

I wish to move this car on CSX from Evansville to Cincinnati, OH for interchange to the Norfolk Southern for delivery to the Rochester, NY area.

I am agreeable to the proposal by Indiana Southwestern Railway ("ISW") to pick up and deliver the car to CSX. I have not heard anything from Ohio Valley Railroad since ISW offered to move the car. CSX has all of the information from me that is required to move the car, but has not yet issued billing for the move. CSX approval for the move should be forthcoming shortly.

Ohio Valley has not as of yet provided any assistance to me in arranging this move, nor do I believe there is any reason that two switches are required at their yard in order to permit the movement of my car to ISW. Finally, I prepaid the transportation charges to ISW and CSX several months ago, and thus I need no service from Ohio Valley, and see no need to pay Ohio Valley any transportation charge.

VERIFICATION

I, Jon Clark, declare under the penalty of perjury that to the best of my knowledge the foregoing is true and correct. Further, I certify that I am qualified to file this Verified Statement. Executed this 12th day of November, 2004.


Jon Clark

"EXHIBIT 3"