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SERVICE DATE - LATE RELEASE SEPTEMBER 24, 2004

SURFACE TRANSPORTATION BOARD

DECISION

STB Docket No. 42083

GRANITE STATE CONCRETE CO., INC.
and
MILFORD-BENNINGTON RAILROAD COMPANY, INC.

v.

BOSTON AND MAINE CORPORATION
and
SPRINGFIELD TERMINAL RAILWAY COMPANY

Decided: September 24, 2004

Addressing a complaint brought by the Milford-Bennington Railroad Company, Inc. (M-B), and Granite State Concrete Co., Inc. (Granite State) (jointly, complainants), against the Boston and Maine Corp., and its subsidiary, the Springfield Terminal Railway Company (jointly, BM/ST), we find that complainants have not shown that BM/ST unreasonably interfered with M-B's ability to carry out its common carrier obligation to serve Granite State. However, we will not reinstate the exemption from regulation for Granite State's shipments of stone, crushed stone, sand and gravel, which we partially revoked in order to consider this complaint.

BACKGROUND

M-B is a Class III rail carrier that operates a railroad line in New Hampshire under a lease from the State. M-B's line runs in a generally southeasterly direction, from Bennington, NH, to Wilton, NH. At Wilton, M-B's rail line connects with a rail line of BM/ST. M-B has authority to operate over BM/ST's rail line below Wilton for a distance of about 2 miles pursuant to a 1992 trackage rights agreement. These trackage rights enable M-B to reach and serve Granite State's processing plant near Milford, NH, which is located on BM/ST's line. M-B transports stone, crushed stone, sand and gravel from Granite State's quarry and excavation site located on M-B's track a few miles north of Wilton to Granite State's processing plant located on BM/ST's track near Milford.

For many years, the operations were conducted without any reported problems. But on April 7, 2003, the Wilton Scenic Railroad (Wilton Scenic) commenced operations over the M-B track. Wilton Scenic uses passenger cars that are stored on M-B track near the point where the M-B line and the BM/ST line connect. At that point, there is a steep downhill grade that

continues over the length of the BM/ST track. The existence of this grade, along with the presence of Wilton Scenic's passenger equipment, apparently raised safety concerns for BM/ST. After BM/ST and M-B failed to reach a meeting of the minds about how to deal with those concerns, BM/ST installed a "derailment device," first on the M-B side of the point where the lines connect and subsequently, after M-B allegedly refused to activate the first derailment device, on the BM/ST side of the point of connection. The derailment device has the effect of requiring M-B to stop its trains before they move onto BM/ST's line.¹ Additionally, citing concerns that M-B allowed an unqualified engineer to operate a train on the BM/ST track and that M-B performed unauthorized work on that track, on June 20, 2003, BM/ST placed restrictions on M-B's hours of operation under the trackage rights agreement, limiting M-B's use of the BM/ST track to a 7-hour window between 1:00 a.m. and 8:00 a.m.

On July 14, 2003, Granite State and M-B filed a complaint arguing that this time restriction prevented M-B from providing adequate service to Granite State due to local restrictions on the quarry's operating hours, the lack of lighting to allow operations at night at the quarry and processing plant, and a provision in the trackage rights agreement limiting the size of M-B trains on the BM/ST track to 10 or fewer cars (thereby requiring more trips). Granite State and M-B also challenged BM/ST's use of the derailment device, they complained that BM/ST's poor maintenance of the line interfered with M-B's ability to serve, and they requested that the Board issue an emergency service order under 49 U.S.C. 11123 and 49 CFR part 1146.

In a decision served September 15, 2003 (September 2003 Decision), the Board denied the request for an emergency service order but concluded that the complaint alleging unreasonable interference with M-B's ability to provide adequate service to Granite State should be allowed to go forward. Accordingly, the Board denied BM/ST's motion to dismiss the complaint, and set a procedural schedule. In addition, to consider the complaint, the Board revoked, as to Granite State's traffic, the class exemption under which stone, crushed stone, sand and gravel have been exempted from regulation. September 2003 Decision at 7-9.

Pursuant to the September 2003 Decision, all parties have submitted opening statements, reply statements, and rebuttal statements. The parties have provided additional evidence in support of arguments raised in the prior pleadings, and they have also reported on significant new developments affecting service to Granite State. In particular, on July 15, 2003, BM/ST modified and expanded the window for M-B's operations under the trackage rights, going from a 7-hour (1:00 a.m. to 8:00 a.m.) window to a 9-hour (4:00 a.m. to 1:00 p.m.) window; and on November 10, 2003, BM/ST removed all hourly restrictions on M-B's service to Granite State

¹ A derailment device is a track safety device designed to guide rolling stock off the rails at a selected point, as a means to prevent collisions and to separate rail operations and movements. When such a device is engaged, a train cannot proceed until the device is placed in the "off" position.

and instead imposed a rule that only one carrier may be present on the BM/ST track at any one time (the “dual occupancy restriction”).² Furthermore, as of November 2003, BM/ST had performed additional maintenance on the line, which, according to the carrier, permitted removal of a 5 m.p.h. speed restriction, so that M-B can now operate over the line at 10 m.p.h.

Notwithstanding these developments, M-B and Granite State have continued to pursue their complaint maintaining that BM/ST’s previous restrictions on M-B’s operations, along with its previous and current levels of track maintenance, have unreasonably interfered with M-B’s ability to carry out its common carrier obligation to serve Granite State. They also argue that BM/ST’s current practices — restricting dual occupancy and keeping the derailment device on the BM/ST track just beyond the interchange — are unreasonable.

DISCUSSION AND CONCLUSIONS

Although BM/ST defends its actions as legitimate measures to protect its employees and others, complainants argue that in fact the safety concerns are contrived and that the actions BM/ST has taken are not safety-related. The Federal Railroad Administration (FRA) has primary responsibility over rail safety matters, and therefore, it is not the Board’s role to be the final arbiter of safety issues. At its core, the question before us is whether actions taken by BM/ST were unreasonable. The Board has reviewed the evidence and argument that the parties have filed, and the complainants have not shown that the measures taken by BM/ST to address its concerns were necessarily unreasonable.

Similarly, we cannot find on this record that BM/ST unreasonably interfered with M-B’s ability to carry out its common carrier obligation to serve Granite State. Rather, the record shows that, as the shipper’s needs became better known to it, BM/ST took steps to accommodate the shipper and M-B. We believe that BM/ST could have moved more quickly to be responsive and work out arrangements that would meet Granite State’s needs while adequately protecting BM/ST’s interests. It should not have waited until there was litigation to take into account the interests of parties other than itself. But the severe operating window was in place for only a short time, and while some of BM/ST’s actions made it more difficult for M-B to provide service, its actions did not preclude rail service. In short, M-B and Granite State have not shown that BM/ST’s actions were so egregious as to warrant a finding that they violated the statute.

² Prior to this restriction, BM/ST dispatchers had the discretion to allow M-B train crews to enter the line even when a BM/ST train or maintenance crew was operating elsewhere on the track. Since the restriction, the dispatchers have lost this discretion and may now clear M-B trains only when BM/ST trains or maintenance crews are not on the line.

When the 1:00 a.m. to 8:00 a.m. operating window was adopted, BM/ST was not aware that the Granite State facility was subject to local restrictions on its hours of operation.³ However, BM/ST took significant steps to accommodate the shipper once its needs were made clear. In response to Granite State's problems with nighttime operations and need for a longer window, BM/ST broadened the operating window to allow a significantly longer period of operation during daylight hours. M-B and Granite State complain that this broadened window, although an improvement, still reflected unfair and unlawful practices on the part of BM/ST. But the longer window in fact allowed M-B to provide substantial service to Granite State; the 261 carloads shipped in October 2003 may have been somewhat below the 4-year average for that month (379 carloads),⁴ but changing the window improved matters.

Moreover, after obtaining further experience, BM/ST removed all hourly time-of-day restrictions on M-B's service to Granite State, choosing instead operational separation as the means to ensure safety. Now, M-B can operate over the line at any hour, as long as there is no conflict with ongoing BM/ST services.⁵ Complainants argue that this operational separation is unnecessary and unfair; but they have not demonstrated that it imposes an unreasonable burden on M-B's service or that it has had a negative effect on service to Granite State. Consequently, we have no basis upon which to find the operational separation violates the law.

Complainants further allege that BM/ST acted unreasonably by allowing the track that is subject to M-B's trackage rights to deteriorate and by then limiting operations to 5 m.p.h. But carriers are not always able to remedy track problems as quickly as they would like to. Here, the track (maintenance of which was covered by the trackage rights agreement) remained usable at all times, and after the service complaint, BM/ST commenced a track maintenance program that resulted in a return to 10 m.p.h. operation in November 2003, thereby enabling M-B to serve Granite State more efficiently. Complainants assert that 25% of the track is still not up to par,⁶ but in a more recent rebuttal verified statement — which we have no basis for disbelieving, as it was made by the party responsible for repair of its track under the trackage rights agreement — BM/ST witness Bergeron insists that the entire track has been upgraded and that M-B trains may

³ BM/ST Opening Statement, Jan. 8, 2004, deposition of David A. Fink, at 46; deposition of Thomas F. Steiniger, at 22-23. BM/ST's profession of lack of knowledge is credible because Granite State is not BM/ST's customer.

⁴ Complainants' Opening Statement, Jan. 8, 2004, V.S. of John G. MacLellan, III, Exh. 1.

⁵ BM/ST enforces its dual occupancy restriction through use of the derailment device and the instructions given to its dispatchers.

⁶ Complainants' witness Leishman, Reply V.S. at 7.

operate at 10 m.p.h. Again, the carrier might have responded more expeditiously, but M-B and Granite State have not shown that BM/ST's actions were so egregious as to constitute a violation of the statute.

BM/ST urges us to reinstate the class exemption that was partially revoked in the September 2003 Decision because Granite State can ship by truck. But the revocation of the exemption reflects the Board's finding that the limitations in Granite State's permit relating to stone excavation and crushing deprive it of the competitive service options upon which the class exemption is predicated. See September 2003 Decision, slip op. at 7. While BM/ST debates the extent of these limitations, the record makes clear that Granite State's truck service options are severely restricted. See Complainants' Opening Statement, Jan. 8, 2004, V.S. of John G. MacLellan, III, at 3; Complainants' Reply Statement, Feb. 9, 2004, V.S. of John G. MacLellan, III, at 4-8.

Given that circumstance and all that has transpired recently between complainants and BM/ST, we will not reinstate the exemption at this time. Indeed, while BM/ST's conduct toward complainants has not risen to the level of violating our statute, the record of this conduct shows that Granite State does merit immediate access to the Board's processes to protect the shipper from the risk of market power abuse. In particular, complainants should be able to seek prompt relief if BM/ST were to impose unworkable restrictions. Thus, we will not reinstate the exemption at this time.

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

It is ordered:

1. The complaint is denied.
2. This decision is effective October 24, 2004.

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

Vernon A. Williams
Secretary