9-20-2007

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Latin America Data Base
News & Educational Services
NotiCen
LADB Article Id: 51303
ISSN: 1089-1560

Guatemala's Only Railroad Shuts Down Amid Hints of a Conspiracy Under Cover of CAFTA

by Mike Leffert
Category/Department: Guatemala
Published: 2007-09-20

Guatemala's one and only railroad has shut down operations in what appears to be an attempt by powerful local sectors to take back the system from a US company. The railroad officially shut down in September, as Pittsburgh-based Railroad Development Corporation (RDC) announced it would do in July. Henry Posner III, the company's owner, said then the company would operate until Sept. 30 to fulfill certain legal obligations.

Ferrovias, as the RDC company in Guatemala is called, operates a single line between Puerto Barrios and Guatemala City. The railroad moves 15% of the cargo from the Caribbean port bound for the capital and 90% of the iron imported to the country. The business began in 1998, when the government entered into a 50-year contract with the company (see EcoCentral, 1997-06-17).

In 2005, the company sued the government, alleging failure to comply with the state's obligation to remove squatters from the right-of-way and pay US$3 million to maintain the line. The government responded by announcing that continuation of the concession was no longer in the interest of the country. With its legal basis under a cloud, the company lost clients, access to credit, and police protection.

The company sued, asking US$65 million in the US courts. The company, through its lawyer Juan Pablo Carrasco, said this amount was the total of US$15 million it had invested in restoring 200 km of track and US$50 million it would lose in revenues and fines for canceling its contracts. Government spokesperson Julio Corado called the company decision "an internal decision that the Guatemalan government respects."

The company gains international legal support from the provisions of the Central America Free Trade Agreement (CAFTA) in the lawsuit. It has filed the claim against the government with the International Center for the Settlement of Investment Disputes (ICSID) for three separate violations of CAFTA investor-protection clauses. Carrasco said under the circumstances, the curtailment of operations strengthens the RDC case because it demonstrates the damaging results of the government's public declaration that the contract went against the country's interests.

In Guatemalan law, a governmental declaration of this kind (lesivo) carries tremendous weight. The RDC went to the ICSID only after unsuccessfully trying to have the case heard in Guatemalan courts, according to the company's US lawyer, Ruth Espy Romero, of the firm Greenberg Traurig. That firm is working with the Guatemalan firm Diaz-Duran. The way the ICSID process works is that each side chooses an arbitrator, and those two plus a third assigned by ICSID hear the case in Washington. A final decision could take two years.

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Indications are that the company wants, at this point, to collect what damages it can and withdraw. "Enough is enough," said owner Posner. "It's clear that at every level of Guatemalan society there is, at best, a lack of respect and, at worst, an outright hostility to everything that we have been trying to accomplish." Posner is upset by more than just the government attitudes. His company runs short lines elsewhere in the world, including Malawi, Mozambique, and Estonia, and none has been as difficult as this, with squatters living on the right-of-way, scrap-metal thieves stealing the tracks, and rainy-season washouts burying what is left. Not that the government has been a pushover.

When Posner went after the government to get it to pony up the US$3 million, the government sought to repossess the locomotives and railcars. CAFTA is specifically supposed to prevent expropriation of foreign investors' assets. "We can't succeed in a country that doesn't want us," said the frustrated entrepreneur. Meanwhile, some say Guatemala would be the real loser in this. "The implications for foreign investors are not good," said political analyst Carlyle Johnson, host of the radio program Good Morning Guatemala. "Who is going to come in after this fiasco?" The government saw a logic in its actions that escaped the analysts. It claimed that somehow it had not breeched its original contract with the company, just the one in 2003 that awarded the use of the equipment.

Carrasco tried to explain that the one could not exist without the other. The company needs the system and the equipment, both. "It would be illogical to have put the system out to bid without the equipment. RDC did not come to Guatemala to establish a real estate business." He said it was further argued that the original contract was negotiated by the comptroller of Ferrocarriles de Guatemala (FEGUA) and that he lacked the authority to sign the documents. "As an autonomous entity, FEGUA has clear authority to sign. FEGUA signed the contract, which was ratified by the Congress to give it more juridical certainty and support to the investor in this case."

The sides lay out their cases

Carrasco gave an interview to the country's largest daily, Prensa Libre, in which the lawyer began to hint at some of the issues that underlay the government's strange behavior. He said that part of the contract permitted the company to distribute electricity, which the electric company did not like. Furthermore, there were other local players who wanted the concessions for themselves. But he wouldn't name names. "We have to keep that information secret so that we can present it in the context of the international process that is ongoing in Washington because this is a case of discrimination against the foreign investor to protect special, private, and sectorial interests," he said.

The government sees the case differently. Attorney General Mario Gordillo explained, "From the state's point of view, the contract suffers from defects that make it against its interests." He said that the 2003 contract was for 44 years, "but we consider it to be a concession of public services and, therefore, cannot be for more than 25 years. It was not put out to bid, and the state would only receive 1.25% of total receipts. Also, the equipment was undervalued."

Gordillo said the contracts were nevertheless still in effect and it still had right-of-way and use of the equipment, and the state had the right to legal action against the company for noncompliance. He

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denied company allegations that the state was trying to take the business back. "If they believe that is the objective, all I can say is that Guatemala needs a train, and we have not seen that Ferrovias has done anything to make it function. They are pursuing their actions because they could not do what they had contracted to do, and now the only defense is to try to extract some profit. I'm sure that they have not been caused damage for which they can demand US$65 million."

While it may be true that Guatemala needs a train, it is not clear to all that the country needs the one that has just gone out of business. Representatives of several private business sectors, including the Camara Guatemalteca de la Construccion (CGC), the Agencia de Exportacion (AGEXPORT), and others agree the single line that takes about 27 hours to go 300 km is not very attractive. "The railroad is a very profitable means of transport, but not as it has been run in Guatemala," said a spokesman for the paper industry. CGC director of statistics Enrique Maldonado said that the only industry that would notice the loss would be steel and that prices to consumers would probably rise between 2% and 4%. The end effect would be minimal, he said, since steel only accounts for about 4% of construction costs.

Putting that in perspective, he noted, "This doesn't mean construction is going to come to a halt. In the last year, because of the world situation, the prices of steel have risen more than 10% and nothing has happened." Most of the steel the country imports comes into Puerto Quetzal, on the Pacific side of the country; the railroad is not even involved. In 2005, 50,000 tons of steel came through Atlantic ports, while more than 400,000 tons came through the Pacific. The oligarchy conspires Carrasco's client, the company, remains entitled to do business in the country even though it has lost its right to the machinery with which to do it.

This odd fact adds up to a conspiracy, says the lawyer. "To want to declare the contract for the use of the machinery, railcars, etc., is only an excuse to expel Ferrovias from the country. The company is not going to want to continue operating the line if it is not going to be able to use the equipment." So something else is going on, he contends, and the something else is that a single family, with the help of the government, is behind the company's problems. He would not reveal the name of the family, but it was enough that he identified it as a sugar family.

The sugar sector would be one that could benefit immensely from a railroad expansion, and there is nothing at all unusual about a lawyer or anyone else in Guatemala being reluctant to accuse a member of the oligarchy. As the weekly publication Inforpress Centroamericana looked into the suggestion, it found several experts and analysts in agreement with the basics, that this is a confrontation between different families of the oligarchy for control of one of the country's strategic service industries. One analyst who declined to give his name confirmed that sugar-industry heavyweights have obstructed the Ferrovias project from the beginning with the help of President Oscar Berger.

Berger is related to the Widmann family, one of the principal names in sugar. The source told Inforpress, "They are interested in having their own line in the south, between Escuintla and Puerto Quetzal, to export sugar without the Ferrovias monopoly imposing their tariffs." The train would be an enormously valuable acquisition for the sugar industry. According to the Asociacion de Azucareros de Guatemala (AZASGUA), 99% of the harvest is exported through Puerto Quetzal.

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The cost of transporting it by train, at about US$1 per km/t, would be far less than by road, as is presently the case. "Everybody wants the railroad because it is the most efficient form of land transport," said Mariano Diaz of the Agencia de Exportacion de Guatemala (AGEXPORT). Sugar is the country's second-most-important source of foreign exchange and represents almost 25% of the total agricultural export.

Economist Fernando Solis is another observer who agrees that what is happening here is another round in the ongoing battles for power among the great families. He recalled that it was the Paiz Andrade family that first attracted RDC in 1997 and that this enraged the sugar sector, which was in the process of modernizing and wanted the system for its own. Given the proximity of the president to the sector, Solis said it is no coincidence that the government has moved against the beneficiary of the privatization of FEGUA as his time in office runs out. "The great families of the country are resetting their position against the prospect of a change of government," said Solis. The economist also noted that the Widmanns and another sugar family, the Vilas, are the principal financiers of the Gran Alianza Nacional (GANA), the ruling party of Berger.

The railroad dispute, and the way it pans out in future months, provides a rare glimpse into the relationships between the oligarchy and individuals and structures of government. As Solis sees it, the railroad will be a bargaining chip as the Widmanns and Vilas on one side and the Paiz Andrades on another divide up power in the new legislature and executive after the November elections. "The thing is to have elements that locate each family relative to the new government to get access to the pieces of the state privatization pie. The lawsuit before the ICSID [the Paiz Andrade leverage in the dispute] is not important, given that it will be the taxpayers who pay," he said. That is the real payoff to the foreign investors, courtesy of CAFTA, the US$65 million.

Timing the suit to the start of CAFTA, Posner and company walk away with what one anonymous analyst calls "a juicy profit at the expense of the taxpayers, while the local investors, the sugar people, get their railroad and millions in free appurtenances, courtesy of the state, and those same taxpayers."

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