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SERVICE DATE - AUGUST 14, 1997

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 33315¹

MINNESOTA NORTHERN RAILROAD, INC.--EXEMPTION--
ACQUISITION AND OPERATION OF RAIL LINE AND INCIDENTAL
TRACKAGE RIGHTS FROM BURLINGTON NORTHERN RAILROAD COMPANY

STB Finance Docket No. 33316

RAILAMERICA, INC.--CONTINUANCE IN CONTROL
EXEMPTION--MINNESOTA NORTHERN RAILROAD, INC.

STB Finance Docket No. 33337

MINNESOTA NORTHERN RAILROAD, INC.--TRACKAGE RIGHTS--THE
BURLINGTON NORTHERN AND SANTA FE RAILROAD COMPANY

Decided: August 5, 1997

This decision rules on petitions filed by John D. Fitzgerald, for and on behalf of United Transportation Union-General Committee of Adjustments for certain lines of the Burlington Northern Railroad Company (UTU-GCA), to reject notices of exemption or to revoke the exemptions in three related proceedings. We will deny each of UTU-GCA's petitions.

BACKGROUND

1. *STB Finance Docket Nos. 33315 and 33316.* On December 11, 1996, in STB Finance Docket No. 33315, Minnesota Northern Railroad, Inc. (MNR) filed a notice of exemption pursuant to 49 U.S.C. 1150.31-.34 from the prior approval requirements of 49 U.S.C. 10901 to acquire and operate a total of about 204.10 miles of rail line of what is now The Burlington Northern and Santa

¹ These proceedings are not consolidated. A single decision is being issued for administrative convenience.

Fe Railway Company (BNSF).² The acquisition involved five separate lines of track.³ On the same date, in STB Finance Docket No. 33316, RailAmerica, Inc. (RailAmerica) filed a notice of exemption under 49 CFR 1180.2(d)(2) and 1180.4(g) from the prior approval requirements of 49 U.S.C. 11323 to continue in control of MNR upon MNR's becoming a Class III rail carrier.⁴ In compliance with 49 CFR 1180.2(d)(2), RailAmerica stated that: (1) MNR does not connect with any other railroads in RailAmerica's corporate family; (2) the continuance in control is not part of a series of anticipated transactions that would connect MNR with any other railroad in its corporate family; and (3) the transaction does not involve a Class I carrier.

On December 16, 1996, UTU-GCA filed a petition to reject the notices of exemption or revoke the exemptions in STB Finance Docket Nos. 33315 and 33316. UTU-GCA sought rejection of the notices on the grounds that they did not indicate the date of consummation of the transactions with the specificity required under 49 CFR 1150.33(e)(2). UTU-GCA also argued that the notice in STB Finance Docket No. 33315 did not include adequate information on incidental trackage rights over BNSF. Petitioner further argued that a failure to set out the incidental trackage rights over BNSF also impaired the validity of the notice in STB Finance Docket No. 33316 because MNR and other rail carriers owned or controlled by RailAmerica might arguably connect through the incidental trackage rights, thus making the transaction ineligible for the class exemption. Alternatively, UTU-GCA argued that the exemptions should be revoked due to MNR's alleged failure to comply with Board rules and regulations.

² On December 31, 1996, The Atchison, Topeka, and Santa Fe Railway Company (ATSF) merged with and into Burlington Northern Railroad Company (BN). The name of the surviving corporation is The Burlington Northern and Santa Fe Railway Company. In this decision, we will refer to this entity as BNSF, except where the context requires us to refer to BN.

³ The transaction in STB Finance Docket No. 33315 specifically provided for MNR to acquire the following rail lines from BNSF: (1) 33.25 miles of rail line on the MN Junction at Ada, MN, between Ada Subdivision mileposts 80.25 and 47.0; (2) 20.6 miles of rail line on the Redland Junction at Fertile, MN, between Fertile Subdivision mileposts 65.7 and 45.1; (3) 13.0 miles of rail line on the Tilden Junction at Red Lake Falls, MN, between Grand Forks Subdivision mileposts 56.84 and 13.0 miles east; (4) 44.25 miles of rail line on the MN Junction at Perley, MN, between P Line Subdivision mileposts 65.25 and 21.0; and (5) 93 miles of rail line on the St. Hilaire line at Warroad, MN, between Warroad Subdivision mileposts 11.0 and

104.0.

Concurrent with the above transaction, MNR was to acquire incidental overhead trackage rights for the sole purposes of: (1) interchanging rail freight cars and equipment between MNR and BNSF at BNSF's Crookston, MN, rail yard only; and (2) moving locomotives, cars and equipment between the rail lines over BNSF's Grand Forks Subdivision rail line between milepost 81.5 west of Crookston, and milepost 31.0 at Erskine, MN, and also over all yard tracks in BNSF's Crookston rail yard. In addition, MNR would acquire BNSF's trackage rights to operate over the Soo Line Railroad Company between milepost 273.0 at or near Erskine and milepost 309.5 at or near Thief River Falls, MN. BNSF would retain overhead trackage rights only, without serving any industries on the line, to provide rail freight service over the Perley line, between P Line Subdivision milepost 65.25 and milepost 21.0.

⁴ RailAmerica controls MNR, a corporation newly formed for the purpose of acquiring and operating BNSF rail lines in Minnesota and a noncarrier until it acquired the lines. RailAmerica controls 10 Class III railroads in addition to MNR: Evansville Terminal Company, Inc.; Huron & Eastern Railway Company, Inc.; Saginaw Valley Railway Company, Inc.; West Texas & Lubbock Railroad Company, Inc.; Plainview Terminal Company; Dakota Rail, Inc.; South Central Tennessee Railroad Company; Cascade and Columbia River Railroad Company; Gettysburg Railway Company; and Otter Tail Valley Railroad (Otter Tail).

To accommodate the concerns expressed by UTU-GCA, MNR and RailAmerica withdrew the notices in both STB Finance Docket Nos. 33315 and 33316 and filed amended notices of exemption on December 20, 1996; the notices included a discussion of the incidental trackage rights involved, as well as a date for consummation of the acquisition.

On December 24, 1996, UTU-GCA filed a supplemental petition to reject/revoke in both proceedings.⁵ In support of rejection, UTU-GCA argued that total route miles were not accurately calculated, that the subject lines and related trackage rights were not competently described, and that a map required by 49 CFR 1150.33(f) was not included in the filing. UTU-GCA also maintained that the consummation date provided in the amended notices was still not specific enough, and that the “reverse” overhead trackage rights granted to BNSF did not qualify for incidental trackage rights under 49 U.S.C. 10901 and might provide the basis for an improper haulage arrangement between MNR and an affiliate. Finally, UTU-GCA contended that revocation was warranted here because MNR and BNSF failed to include an additional .41-mile line segment of trackage rights between Crookston and Erskine in STB Finance Docket No. 33315, which omission would allegedly cause operating problems contrary to rail transportation policy (RTP) goals. MNR and RailAmerica replied. The transactions in STB Finance Docket Nos. 33315 and 33316 were consummated on December 27, 1996.

On January 13, 1997, UTU-GCA filed a second supplemental petition to revoke in STB Finance Docket No. 33315. In the petition, UTU-GCA argued that, because it appeared that BNSF would retain dispatching control over these operations, depending on the degree of BNSF’s control over MNR, the transaction could be subject to 49 U.S.C. 11323 (and thus to labor protection under 49 U.S.C. 11326). UTU-GCA also argued that there was a “causal connection” between this transaction and the 1995 merger between BN and ATSF and that labor protective conditions imposed in the merger should be applied here. MNR and BNSF replied separately to UTU-GCA’s petition.⁶ The notices of exemption in STB Finance Docket Nos. 33315 and 33316 were served and published in the *Federal Register* on March 12, 1997.

2. *STB Finance Docket No. 33337.* On January 8, 1997, MNR and BNSF filed a notice of exemption to cover overhead trackage rights between mileposts 31.0 and 33.0 near Erskine, MN, to supplement the incidental trackage rights that were part of the transaction in STB Finance Docket No. 33315, and to provide for more efficient operations by MNR.⁷ On January 13, 1997, UTU-GCA filed a petition to reject the notice or to revoke the exemption.⁸ UTU-GCA sought rejection on the grounds that BNSF was not an operating carrier and MNR could not be accorded trackage rights over a noncarrier through the trackage rights class exemption; that MNR’s map did not comply with the applicable regulations; and that MNR did not file a publicly available copy of the trackage rights agreement with its notice. UTU-GCA also argued that, if the notice was not rejected, the exemption should be revoked because the “mysteries” of the three related transactions require more than the 7-day notice under the class exemption procedures. MNR replied. This notice of exemption was also served and published in the *Federal Register* on March 12, 1997 (the March decision).

DISCUSSION AND CONCLUSIONS

⁵ UTU-GCA also filed a petition to stay the effective date of the exemption in STB Finance Docket Nos. 33315 and 33316. However, the stay requests were filed too close to the consummation date for them to be acted upon.

⁶ In its response, BNSF categorically denied (1) any dispatching control over MNR’s train operations; and (2) any causal connection between the rail merger and the subject acquisition/operation exemption.

⁷ MNR filed a motion for a protective order on January 9, 1997. The motion was granted over UTU-GCA’s objections by decision served March 6, 1997.

⁸ UTU-GCA also filed a petition to stay the effective date of the exemption. By decision served January 14, 1997, the stay petition was denied.

1. *STB Finance Docket Nos. 33315 and 33316.* As stated, UTU-GCA has filed petitions either to reject the notices or to revoke the exemptions in these two proceedings.

Rejection - To warrant rejection of a notice of exemption, a petitioner must demonstrate that the notice contains false or misleading information.⁹ UTU-GCA argues that the description of the line acquisitions is inadequate. UTU-GCA states that the notice contained proper names for the line (such as “Redland Junction”) and that UTU-GCA members were confused by these names. However, UTU-GCA does not challenge the applicability or the accuracy of the milepost descriptions, which offer a more precise description of the lines being transferred. Accordingly, we reject UTU-GCA’s argument on this issue. UTU-GCA also points to an inconsistency between the notices in STB Finance Docket Nos. 33315 (total route miles listed at 204.10) and 33316 (total route miles listed at 210.10). MNR acknowledges that a typographical error does exist in STB Finance Docket No. 33316, but notes that the actual mileage was accurately described in the STB Finance Docket No. 33315 notice and that, in any event, the mileage for each of the segments was accurately described. We conclude that the typographical error in this instance is not a material error and is of minor or no consequence.

UTU-GCA also argues that the total route miles are greater than those set out in the notice in STB Finance Docket No. 33315 because the trackage rights are not included. According to UTU-GCA, these trackage rights total 108.75 miles.¹⁰ We have reviewed the amended notice filed December 20, 1996, in STB Finance Docket No. 33315. In that notice, MNR sets out the specific trackage rights, including those retained by BNSF. Although MNR does not include the trackage rights in the total route miles, we view UTU-GCA’s argument about this issue as irrelevant to actual public notice. Indeed, inclusion of the mileage for trackage rights in the total number of miles to be transferred is not a requirement of section 1150.33(e)(4). In any event, UTU-GCA has apparently had little difficulty in understanding the amended notice of exemption and its implications. In fact, UTU-GCA found a valid discrepancy in that MNR lacked the necessary trackage rights (according to UTU-GCA, 0.41 miles) to properly operate the acquired lines. As a result, MNR acquired another two miles of overhead trackage rights from BNSF in STB Finance Docket No. 33337.

UTU-GCA also states that a map was not included with the publicly-filed notice. MNR responds that a map was filed with the original notice on December 11, 1996, but that a map may inadvertently have been omitted when the amended notices were filed on December 20, 1996. To remedy any deficiency, MNR filed additional copies of the map with a cover letter on January 6, 1997. As MNR points out, UTU-GCA had a map from the original filing. UTU-GCA essentially states only that the map was not included in the December 20, 1996 filing; it does not allege any injury. We believe that any error was *de minimis* and harmless.

UTU-GCA also claims that the consummation date is not shown with certainty in STB Finance Docket No. 33315 as required by the regulations. According to petitioner, the amended notice states that the transaction will be “consummated” on or about December 27, 1996, in a narrative portion of the notice while, in the formal section of the notice, MNR states that the transaction will “close” on or about December 27, 1996. UTU-GCA maintains that the “confusion” with the formal and narrative portions of the notice and the “vagueness of the Notice Caption” require a more definitive clarification to comply with the Board’s requirements, and that the use of the word “close” is insufficient in itself. We are of a different view. In both the notice (page 3, paragraph c) and the narrative, MNR uses the phrase “on or about December 27, 1996” to refer to consummation. Under 49 CFR 1150.33(c), the regulations require the notice to include either a statement that an agreement has been reached or details about when one will be reached. Under 49 CFR 1150.33(e)(2), the notice must provide the “proposed time schedule for consummation of the transaction.” The notice here adequately conforms to the regulations regardless of whether MNR referred to when the transaction would be “closed” or when it would be “consummated.”

⁹ Under 49 CFR 1150.32, an exemption is void *ab initio* if it contains false or misleading information.

¹⁰ Our calculation of the trackage rights mileage from the notice shows a total of 127.25 miles.

UTU-GCA also argues that BNSF improperly retained trackage rights here through an exemption in violation of 49 CFR 1150.31(a)(4). According to UTU-GCA, BNSF should instead have been required to convey the entire line to MNR, including all operations, and then MNR should have been required to seek Board approval in a separate transaction to grant trackage rights back to BNSF. We see nothing improper in the parties' approach here. The parties could have structured their agreement in the manner suggested by UTU-GCA but chose not to do so. BNSF has simply transferred less than its entire interest in the line to MNR, retaining certain overhead trackage rights for itself. BNSF had every right to do this. In this context, we do not view the trackage rights retained by BNSF as incidental trackage rights under section 1150.31(a)(4). Finally, we find that there has been no transfer here of any trackage rights from MNR to BNSF, incidental or otherwise, that would require Board approval.

Finally, UTU-GCA also speculates that the trackage rights might provide the basis for a "haulage" arrangement whereby RailAmerica would connect its MNR and Otter Tail lines. If so, UTU-GCA argues that these connecting lines would invalidate the notice of exemption in STB Finance Docket No. 33316. UTU-GCA has not, however, presented any evidence to support its position, and we cannot find for UTU-GCA solely on the basis of a speculative comment. In sum, we conclude that UTU-GCA has not demonstrated that these notices contain false or misleading information. Thus, we will deny UTU-GCA's request that they be rejected.

Revocation. To warrant revocation of an exemption, in whole or in part, a petitioner must show that regulation is necessary to carry out the rail transportation policy of 49 U.S.C. 10101. The party seeking to revoke the exemption has the burden of proof, and a petition to revoke must be based on reasonable, specific concerns demonstrating that reconsideration of the exemption is warranted and regulation of the transaction is necessary. *CSX Transp., Inc.--Aban.--In Randolph County, WV*, 9 I.C.C.2d 447, 449 (1992).

UTU-GCA offers a number of arguments for revocation of the exemptions in STB Finance Docket Nos. 33315 and 33316. The claim most relevant to UTU-GCA's interests of job retention and labor protection is that the exemption in 33315 is not properly categorized under section 10901 (where no labor protection is available), but falls under 49 U.S.C. 11323 (under which labor protection is available through 49 U.S.C. 11326). UTU-GCA offers two arguments in support of its position. First, as indicated earlier, UTU-GCA asserts that it appears that BNSF (a Class I carrier) will retain dispatching control over MNR's operation, and that, depending on the degree of BNSF's control over MNR, this could bring the acquisition/operation transaction within 49 U.S.C. 11323.

Second, UTU-GCA asserts that the acquisition and operation exemption stems from the merger between ATSF and BN, which envisioned the elimination of "excess" lines.¹¹ UTU-GCA maintains that there is a "causal connection" between the merger and BN's sale of what UTU-GCA argues are excess lines here to MNR (UTU-GCA does not further elaborate), and argues that employees adversely affected by the transaction should be covered by the labor protective conditions imposed in the merger decision.

We conclude that neither argument has merit. As to dispatching control, we note that not only has UTU-GCA not provided any evidence in support of its claim, but that BNSF has categorically denied that it will exercise any control over any aspects of MNR's operations. We further conclude that UTU-GCA has not demonstrated any connection between the merger and the lines at issue in STB Finance Docket No. 33315 that would bring that transaction within the coverage of the merger and the labor conditions. In this regard, we note BNSF's statements to the effect that the former BN's branch lines at issue are not located near lines of the former ATSF; that no merger-related rail operating coordinations between the two former rail systems were identified in the BNSF merger application on the rail lines in issue or anywhere near them; and that no such coordinations have occurred.

¹¹ *Burlington Northern Inc. and Burlington Northern R.R. Co.--Control and Merger--Santa Fe Pacific Corp. and The Atchison, Topeka and Santa Fe Ry. Co.*, Finance Docket No. 32549, Decision No. 38 (ICC served Aug. 23, 1995).

In addition, UTU-GCA seeks revocation of the exemptions in STB Finance Docket Nos. 33315 and 33316 because MNR has allegedly failed to comply with the Board's regulations and because MNR has failed to include a .41-mile segment of trackage rights, the exclusion of which would make for inefficient operations contrary to the RTP. Neither of these arguments has merit. The first is an argument for rejection (that has already been discussed and found not to warrant rejection), not for revocation, and the second relates to a potential problem that has been cured by MNR's notice in STB Finance Docket No. 33337, that covers a transaction in which BNSF has granted MNR an additional two miles of trackage rights.

In sum, we conclude that UTU-GCA has not sustained its burden of showing that reconsideration of these exemptions is warranted and regulation of the transactions is necessary. As such, we will deny UTU-GCA's request that these two exemptions be revoked.

2. *STB Finance Docket No. 33337.* MNR and BNSF filed this notice of exemption for an additional two miles of trackage rights because the notice in STB Finance Docket No. 33315 did not include all of the trackage rights necessary for an efficient operation. Unlike the petition in STB Finance Docket Nos. 33315 where the parties sought exemption from 49 U.S.C. 10901, this petition was filed for exemption from 49 U.S.C. 11323(a)(6) and applicant agreed to the imposition of labor conditions imposed in *Norfolk and Western Ry. Co.--Trackage Rights--BN*, 354 I.C.C. 605 (1978), as modified in *Mendocino Coast Ry., Inc.--Lease and Operate*, 360 I.C.C. 653 (1980).

Rejection. As previously stated, to warrant rejection of a notice of exemption, a petitioner must demonstrate that the notice contains false or misleading information. In its petition to reject the notice of exemption, UTU-GCA argues that BNSF is not an operating carrier. Because BNSF is, in fact, an operating carrier, UTU-GCA's allegation cannot serve as a basis for rejection. UTU-GCA also complains about the map, stating that it is confused about the extent of the trackage rights granted. However, we note that the map clearly shows the location of the rights granted and, additionally, that the involved trackage is on the identical line over which UTU-GCA suggested that BNSF convey additional trackage to MNR. Finally, UTU-GCA also contends that MNR did not file a publicly-available copy of the required trackage rights agreement. A protective order was served in this proceeding on March 6, 1997, which permits inspection of the agreement upon an undertaking to ensure that the terms remain confidential. Apparently UTU-GCA has not availed itself of the opportunity to inspect the agreement, suggesting that UTU-GCA does not believe the agreement to be of any import to its position in this proceeding. Accordingly, we need not further consider this argument, except to note that the agreement is "publicly" available, but only under certain conditions. In sum, we conclude that UTU-GCA has failed to demonstrate that the notice contains false or misleading information requiring rejection. As such, we will deny UTU-GCA's petition to reject.

Revocation. As stated, UTU-GCA also has petitioned to have this exemption revoked, along with those in the other proceedings. As previously discussed, to warrant revocation of an exemption, a petitioner must show that regulation is necessary to carry out the rail transportation policy of 49 U.S.C. 10101. UTU-GCA maintains that, when this proceeding is considered in conjunction with STB Finance Docket Nos. 33315 and 33316, MNR's noncompliance with the exemption requirements and the "mysteries" of the three related transactions require revocation of all three exemptions and closer Board scrutiny. We have concluded, however, that such rule "violations" are grounds for rejection, not revocation, and that, in any event, MNR has substantially complied with all Board requirements in STB Finance Docket Nos. 33315, 33316, and 33337. Moreover, UTU-GCA has failed to demonstrate that there is anything improper about these three filings or that they fail to qualify for processing under the respective class exemption procedures pursuant to which they were filed. Further, it is hard to understand how employees will be injured by the transaction we authorized in STB Finance Docket No. 33337 because applicants agreed to, and we imposed, the required labor protective conditions in the March decision. Accordingly, UTU-GCA's petition to revoke the exemption in STB Finance Docket No. 33337 will be denied as well.

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

It is ordered:

1. UTU-GCA's petitions in STB Finance Docket Nos. 33315, 33316, and 33337 to reject the notices of exemption or to revoke the exemptions are denied.

2. This decision is effective on the service date.

By the Board, Chairman Morgan and Vice Chairman Owen.

Vernon A. Williams
Secretary