

SERVICE DATE – AUGUST 16, 2011

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 35081(Sub-No. 1)

CANADIAN PACIFIC RAILWAY COMPANY, ET AL—CONTROL—DAKOTA
MINNESOTA & EASTERN RAILROAD CORP., ET AL.

Digest:¹ United Transportation Union, Local 911 (the Local) asserts by petition for enforcement that there has been an improper increase in the number of Dakota, Minnesota & Eastern Railroad (DM&E) trains running over a line between St. Paul and La Crescent, Minnesota. (the Line). The Local claims that, in a 2008 merger proceeding, Canadian Pacific Railway Company (CP), in response to the Local's comments regarding CP's application seeking Board approval to acquire control of DM&E, represented that it would negotiate an agreement with the Local to implement any decision to increase the number of trains DM&E runs over the Line. The Local wants the Board to make CP comply with its alleged commitment to negotiate an agreement, and it wants the Board to halt the added trains in the meantime. The Board rejects two of the Local's arguments—that DM&E represented that it would not run more than one train per day and that DM&E lacks the appropriate trackage rights authority to do so. In addition, the Board declines to consider the Local's argument that the challenged operational change is one that requires an implementing agreement because this question must first be submitted to arbitration.

Decided: August 11, 2011

United Transportation Union, Local 911 (the Local), which represents employees of the Soo Line Railroad Company (Soo), a subsidiary of Canadian Pacific Railway Company (CP), petitions the Board to enforce representations allegedly made during a merger approved in Canadian Pacific Railway – Control – Dakota, Minnesota & Eastern Railroad, FD 35081 (STB served Sept. 30, 2008) (the Control Transaction). The Local argues that (1) Dakota, Minnesota & Eastern Railroad (DM&E) does not have the right to operate more than one train per day in each direction on a line owned by Soo, (2) CP has breached representations made during that proceeding and has violated the New York Dock conditions² by allowing its newly acquired

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

² N.Y. Dock Ry.—Control—Brooklyn E. Dist. Terminal, 360 I.C.C. 60, aff'd sub nom. New York Dock Ry. v. United States, 609 F.2d 83 (2d Cir. 1979).

subsidiary, DM&E, to operate more than one train per day on that line, and (3) the Local has lost work because CP has shifted traffic from Soo to DM&E crews. For relief, the Local asks the Board to halt the increased traffic until CP negotiates an implementing agreement pursuant to the New York Dock labor conditions imposed on the merger.

We find that the Local has not shown that the relief it seeks is warranted. First, an increase in the number of trains being run by DM&E is permissible under the terms of the applicable trackage rights agreement. Second, the Local has failed to show that CP represented in the Control Transaction that it would never increase the traffic in question above one train per day. Finally, we decline to address any dispute over whether the increased traffic is the type of change in operations that requires an implementing agreement. Under the New York Dock labor protective conditions, which we imposed in the Control Transaction, such disputes, as well as disputes as to whether employees have been adversely affected by the Control Transaction, must be submitted to arbitration before they are subject to review by the Board.

BACKGROUND

Soo owns a 133.3-mile line of railroad running on a diagonal southeast from the St. Paul, Minn. area to La Crescent, Minn. (the “St. Paul-La Crescent line” or “the Line”). DM&E asserts that it has trackage rights that allow it to run up to six trains per day over the Line.

In the Control Transaction, the Board approved the application by Soo’s parent company, the Soo Line Holding Company, also an indirect subsidiary of CP, to control the DM&E and DM&E’s wholly owned rail subsidiary, the Iowa, Chicago & Eastern Railroad Corporation (IC&E). The Board imposed the standard New York Dock labor protective conditions.

Under New York Dock, labor changes related to approved acquisition-of-control transactions are to be implemented by agreements negotiated before the changes occur. If the parties cannot agree on the terms of an implementing agreement or are unable to resolve disputes that arise under that agreement, the issues are to be resolved by arbitration, subject to appeal to the Board under its “Lace Curtain” standard of review codified at 49 C.F.R. § 1115.8.³ The New York Dock conditions provide benefits, including up to six years of wage protection, for employees who are adversely affected by the approved transaction.

The Board also imposed a condition in the Control Transaction requiring the applicants to adhere to the representations that they made on the record during the course of the proceeding.

By petition filed on September 20, 2010, the Local asks the Board to enforce the agency’s decision in the Control Transaction by requiring CP to negotiate an implementing arrangement under New York Dock pertaining to what the Local believes to be CP’s substitution of lower-wage DM&E-crewed trains for Soo-crewed trains for transportation over the St.

³ See Chi. & N. W. Transp. Co. — Aban.—Near Dubuque & Oelwein, Iowa, 3 I.C.C.2d 729 (1987), aff’d sub nom. Int’l Bhd. of Elec. Workers v. ICC, 826 F.2d 330 (D.C. Cir. 1988) (Lace Curtain).

Paul-La Crescent line. The Local argues that: (1) prior to the Control Transaction, DM&E's subsidiary, IC&E, operated only one train per day over this route; (2) in the Control Transaction, CP agreed to refrain from exceeding this usage without first negotiating an implementing agreement under New York Dock; and (3) CP is refusing to negotiate such an implementing agreement. The Local asks that the Board enjoin the extra service until CP has entered into an implementing agreement.

On November 19, 2010, CP, Soo, and DM&E (collectively, "the Railroads") filed a reply to the Local's petition for enforcement. The filing argues that the Local lacks standing to pursue the relief sought in its petition because only the United Transportation Union (UTU), and not a subordinate unit such as the Local, may represent Soo employees. The Railroads further state that Soo, rather than CP, owns and operates the Line. As to the merits, the Railroads argue that: (1) an order to negotiate an implementing agreement would be premature, because the Local's claim regarding the substitution of crews must first be resolved in arbitration under Article I, § 11 of New York Dock; (2) in the Control Transaction, the Board did not limit DM&E to operate only one train per day and, in fact, refused to limit the six trains per day DM&E was allowed to operate under its 1997 trackage rights agreement; and (3) Soo employees have not been adversely affected by DM&E's exercise of its trackage rights after the transaction,⁴ and no Soo operating employee has claimed to the contrary.⁵

On December 4, 2010, the Local filed a rebuttal. It asks the Board to clarify whether DM&E can run more than one train per day over the Line. The Local argues that DM&E does not have the trackage rights it claims to have, and that the increased DM&E operations on the Line is "resulting in a loss of work for Local 911 members."⁶ On December 21, 2010, the Railroads filed a motion to strike this filing as a reply to a reply.

DISCUSSION AND CONCLUSIONS

The Local's complaint revolves around the fact that there is increased DM&E traffic between St. Paul and Kansas City, Mo. running over the Line owned by Soo. The Local asks us to order CP to negotiate an implementing agreement pursuant to New York Dock concerning the increased use of the Line by DM&E. It claims that CP agreed to enter such negotiations as part of the Control Transaction before it would increase DM&E's use of the Line above one train per day.

⁴ The Railroads admit that there has been an increase in DM&E-crewed trains over the Line since the transaction, but respond that: (1) the increase resulted from new business obtained as a result of the transaction, and not from the shifting of existing Soo traffic; and (2) as the economy recovered in 2010, more Soo trains have been added to the Line than DM&E trains.

⁵ Some of the evidence was submitted under seal pursuant to a protective order the Board issued on November 17, 2010. In this decision, we discuss certain confidential information only to the extent necessary to render a thorough and well-reasoned decision.

⁶ Local's Reply 4, Dec. 4, 2010.

As the petitioner, the Local has the burden to demonstrate that the requested enforcement actions are warranted. However, as discussed below, the Local has not met that burden. Because we deny the Local's petition for enforcement, we need not rule on the Railroads' standing argument, and we deny as moot their motion to strike the Local's rebuttal.

At the outset, we conclude that the terms of the trackage rights agreement authorized DM&E to operate up to six trains per day over the Line. As part of a line sale in 1997, Soo granted I&M Rail Link (I&M) nonexclusive trackage rights over the St. Paul-La Crescent line.⁷ The trackage rights agreement provides at Section 2.14 that "I&M's use of the subject trackage . . . shall not exceed on a regular basis six (6) trains per calendar day." Although certain overhead traffic is excluded from the grant of authority, traffic from St. Paul to Kansas City is not subject to that restriction.⁸ On July 29, 2002, the rail assets of I&M (including its trackage rights over the Line) were acquired by IC&E, a newly created indirect subsidiary of DM&E.⁹ IC&E utilized the trackage rights through 2008. After IC&E merged into DM&E as part of an intra-corporate family transaction, DM&E acquired the trackage rights.¹⁰ The Soo-to-I&M rights (up to six trains per day) were thus transferred first to IC&E and then to DM&E.¹¹ The Local's claim that DM&E does not possess trackage rights to run up to six trains per day is incorrect, and thus the Board would not halt the increase in traffic on that basis.

Nor has the Local shown that CP represented in the Control Transaction that CP would, without qualification, limit DM&E traffic on the Line from St. Paul to La Crescent to one train per day in each direction. In the Control Transaction, the Local raised concerns that, should the Board approve the merger, CP would funnel traffic to DM&E or reroute Soo traffic to DM&E to

⁷ See I&M Rail Link—Acquis. & Operation Exemption—Certain Lines of Soo Line R.R. d/b/a Canadian Pac. Ry., 2 S.T.B. 167, 179 (1997) (denying petitions to stay or revoke exemption authorizing acquisition).

⁸ See Railroads' Motion to Strike 3, Dec. 21, 2010; Railroads' Confidential Reply Exhibit 1, § 1.3a, Nov. 19, 2010.

⁹ See Iowa, Chi. & E. R.R.—Acquis. & Operation Exemption—Lines of I&M Rail Link, FD 34177, slip op. at 2 (STB served July 22, 2002) (denying requests to stay exemption); Iowa, Chi. & E. R.R.—Acquis. & Operation Exemption—Lines of I&M Rail Link, 6 S.T.B. 499 (2003) (denying petitions to revoke exemption).

¹⁰ See Canadian Pac. Ry.—Corporate Family Transaction—Iowa, Chi. & E. R.R., FD 35202 (STB served Dec. 12, 2008).

¹¹ The Railroads explain that DM&E only runs a total of three to four trains a day on the Line, a level that is well within the six train per day limitation set forth in the trackage rights agreement. See Railroads' Confidential Reply 14, Nov. 19, 2010. Although the Local attaches a list of crew assignments for the Line, this list does not show otherwise. The Local makes no attempt to correlate the list with actual train movements, and, as explained by the Railroads, there are instances when the number of assignments exceeds the number of movements.

take advantage of the lower wages paid to DM&E employees.¹² The Local asked the Board to limit the IC&E/DM&E trackage rights to one train per day in each direction and to require that all additional work on the Line be allocated to Soo crews.¹³ In reply, CP stated that it had no plans to shift traffic handled by Soo crews to IC&E/DM&E crews, and that Soo crews would not be involved with the traffic in question, because Soo does not operate between the Twin Cities and Kansas City.¹⁴ CP further noted that, if the carrier did decide to carry out an unforeseen operational change in implementing the merger, that change would be addressed as part of an implementing agreement under the New York Dock conditions.¹⁵ The Board was assured by CP's statements and did not impose those conditions sought by the Local. The agency noted that, "should [CP] make changes to its operations in the course of implementing the proposed transaction that adversely affect employees, New York Dock protections would be available."¹⁶ The Local did not petition the Board for reconsideration, nor did it challenge that decision in court.

It is true that the increased DM&E traffic does represent a departure from the operating plan put forward by CP when it filed its application in 2007.¹⁷ However, while the Board requires that operating plans be presented in good faith, it has never required carriers to hold to every detail of the operating plan when circumstances warrant otherwise.¹⁸ The 2007 operating plan was a projection, and not an absolute restriction on how traffic could move over CP's system into the future. Carriers cannot be expected to predict future business needs with absolute precision.

¹² See Local's Petition 4-5, Sept. 20, 2010; the Control Transaction 19.

¹³ Local's Petition 5, Sept. 20, 2010; the Control Transaction 18-19.

¹⁴ See Local's Petition 6, Exh. C 1-2, Sept. 20, 2010.

¹⁵ Id.

¹⁶ The Control Transaction 19.

¹⁷ See Railroad's Confidential Reply 24-25, Nov. 19, 2010.

¹⁸ See Major Rail Consolidation Procedures, 5 S.T.B. 539, 561 (2001) ("It is not our objective to hold railroads to every detail of an operating plan in implementing an approved transaction, nor would we impose after-the-fact remedies lightly.") This does not mean, however, that the statement of anticipated operations provided by the parties during a merger is without significance. For example, in CSX Corporation—Control and Operating Leases/Agreements—Conrail Inc., FD 33388 (Decision No. 186) (served May 21, 2001) the Board ordered the railroad to show why it should not be held to its representation during the merger proceedings that it would keep a specific railcar repair shop open. After further review, the Board found that, among other things, worsened business conditions did in fact constitute good cause to subsequently permit the shop closure (despite the representation). At the same time, the Board imposed enhanced labor protective conditions to protect affected employees. CSX Corporation—Control and Operating Leases/Agreements—Conrail Inc., FD 33388 (Decision No. 198), slip op. 6-7 (served Sept. 19, 2001).

The question that remains is whether the increase in trackage-rights traffic that is challenged here constitutes the type of operational change that requires an implementing agreement under New York Dock. Pursuant to the New York Dock conditions imposed by the Board in the Control Transaction, railroads must negotiate an agreement with employees prior to implementing a transaction that “may cause the dismissal or displacement of any employees, or rearrangement of forces.”¹⁹ Disputes about whether a particular operational change requires an implementing agreement are to be addressed initially by arbitrators.²⁰ If the Local (or its employees) believes that the increase in DM&E trains over the Line constitutes the type of “operational change”²¹ that warrants an implementing agreement, or any protective benefits, under New York Dock, it is free to submit that factual question for arbitration under New York Dock. The arbitration panel’s decision would then be subject to an appeal to this agency. See 49 C.F.R. § 1115.8. The Board will not intervene in matters subject to arbitration under New York Dock before they have been considered in arbitration.²²

For these reasons, we will not order the Railroads to halt DM&E’s increased traffic on the St. Paul-La Crescent line.

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

It is ordered:

1. The Local’s petition is denied.
2. The Railroads’ motion to strike is denied and the Local’s supplement is accepted.

¹⁹ The Board does not view CP’s statement in its pleadings in the Control Transaction proceeding—that it would handle any problems resulting from unforeseen operational changes affecting existing Soo Line traffic in the course of negotiating an implementing agreement—as a “representation” subject to the general representations condition imposed in the Control Transaction, because New York Dock requires carriers to negotiate an implementing agreement in such a situation. Thus, CP was merely articulating its obligations under New York Dock.

²⁰ See Canadian Nat’l. Ry.—Control—Wis. Cent. Transp. Corp., FD 34000 (STB served June 6, 2008) (Board declines to consider question of whether employment changes are being taken to implement a transaction because question must first be submitted for arbitration); Kan. City S. Indus., Inc.—Control—Gateway W. Ry., FD 33311 (STB served Dec. 4, 1997) (Board declines to consider, prior to arbitration, question of whether employees were adversely affected by control transaction so as to require the negotiation of an implementing agreement).

²¹ See supra note 15, and accompanying text.

²² Walsh v. ICC, 723 F.2d 570 (7th Cir. 1983) (upholding the agency’s refusal to hear a dispute prior to arbitration).

3. This decision is effective on its date of service.

By the Board, Chairman Elliott, Vice Chairman Begeman, and Commissioner Mulvey.