

35097
EB

SERVICE DATE – LATE RELEASE SEPTEMBER 27, 2004

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 34555

CITY OF TACOMA, DEPARTMENT OF PUBLIC UTILITIES, BELTLINE DIVISION
D/B/A TACOMA RAIL OR TACOMA MUNICIPAL BELTLINE OR TMBL
—ACQUISITION AND OPERATION EXEMPTION—
LAKEVIEW SUBDIVISION, QUADLOK-ST. CLAIR, AND BELMORE-OLYMPIA
RAIL LINES IN PIERCE AND THURSTON COUNTIES, WA

[REQUEST FOR WAIVER OF 49 CFR 1150.42(e)]

Decided: September 27, 2004

On September 20, 2004, the City of Tacoma, Department of Public Utilities, Beltline Division, d/b/a Tacoma Rail, Tacoma Municipal Beltline or TMBL (TMBL) filed a verified notice under 49 CFR Part 1150, Subpart E – Exempt Transactions Under 49 U.S.C. 10902 for Class III Rail Carriers to acquire and operate approximately 28 miles of rail line, and to obtain approximately 22 miles of incidental trackage rights, in Pierce and Thurston Counties, WA. Related to that notice, this decision denies: (1) TMBL's request for waiver of the Board's employee notice regulations at 49 CFR 1150.42(e); and (2) a request to stay the effectiveness of TMBL's notice of exemption filed by John D. Fitzgerald, for and on behalf of United Transportation Union – General Committee of Adjustment (UTU/GO-386).

BACKGROUND

TMBL is seeking to acquire a freight service easement from The Burlington Northern and Santa Fe Railway Company (BNSF) from milepost 2.15 at South Tacoma to milepost 8.92 at Lakeview Junction, and from milepost 0.0 at West Lakeview to milepost 10.98 at Nisqually, a total distance of 17.75 miles in Pierce County. TMBL also plans to lease BNSF's right-of-way from milepost 3.27 at Quadlok to milepost 0.0 at St. Clair, and from milepost 16.0 at Belmore to milepost 9.07 at Olympia, a total distance of 10.2 miles in Thurston County. Pursuant to the foregoing transactions, TMBL also plans to obtain incidental trackage rights from BNSF from milepost 23.0 at Nisqually to milepost 37.00 at East Olympia, and TMBL would be assigned incidental trackage rights from BNSF over Union Pacific Railroad Company's (UP) rail line from milepost 0.0 at East Olympia to milepost 9.07 at

Olympia. The parties are scheduled to consummate the transaction on September 30, 2004, effective October 1, 2004.

On September 22, 2004, UTU/GO-386 filed a petition to stay the effectiveness of the exemption. Petitioner argues that TMBL did not comply with 49 CFR 1150.42(e) because it failed to certify to the Board 60 days before the exemption was scheduled to become effective that TMBL had notified affected employees of the transaction. Petitioner also contends that TMBL did not provide effective notice to employees by merely sending a letter to local BNSF personnel in Tacoma, requesting that they post notice of the transaction. According to UTU/GO-386, TMBL should have also provided notice to UP employees because the trackage rights are over UP trackage and because UP and BNSF interchange freight with each other. UTU/GO-386 states that it intends to file a petition to reject or revoke TMBL's notice of exemption.

TMBL replied on September 23, 2004, opposing the stay request. In addition, TMBL also seeks a waiver of the requirements of 49 CFR 1150.42(e)¹ to permit the exemption it is seeking in this proceeding to become effective without awaiting the expiration of the 60-day notice period, measured from the date of certification to the Board, specified in section 1150.42(e).

TMBL states that, on July 29, 2004, it sent notice of its intent to undertake the proposed transaction to BNSF to be posted at the workplace of the employees on the rail line and served a copy of the notice of intent on the national offices of the labor unions representing the employees on the line. According to TMBL, there was no need for it to notify UP employees of the transaction as BNSF operates the trackage rights using only its own employees. Because of an oversight, however, TMBL states that it failed to certify to the Board that it had complied with the requirements of 49 CFR 1150.42(e) until September 16, 2004, only 14 days prior to the effective date of the transaction.² TMBL states that, under the parties' agreement, it is required to have all necessary approvals in place by October 1, 2004. Consequently, to consummate the transaction on the intended consummation date, or as soon thereafter as possible, TMBL seeks waiver of the requirements of 49 CFR 1150.42(e)

¹ "If the projected annual revenue of the rail lines to be acquired or operated, together with the acquiring carrier's projected annual revenue, exceeds \$5 million, the applicant must, at least 60 days before the exemption becomes effective, post a notice of applicant's intent to undertake the proposed transaction at the workplace of the employees on the affected line(s) and serve a copy of the notice on the national offices of the labor unions with employees on the affected line(s), setting forth the types and numbers of jobs expected to be available, the terms of employment and principles of employee selection, and the lines that are to be transferred, and certify to the Board that it has done so."

² Certification was made to the Board on September 17, 2004.

insofar as they relate to certifying to the Board that it has complied with the relevant notice requirements at least 60 days prior to effectiveness of the exemption.

According to TMBL, it has substantially complied with 49 CFR 1150.42(e) by giving the required 60-day advance notice to the potentially affected BNSF employees and to the national labor organizations representing them. TMBL points to Board precedent where waivers have been granted from 49 CFR 1150.42(e), such as M&B Railroad, L.L.C.– Acquisition and Operation Exemption – CSX Transportation, Inc., STB Finance Docket No. 34423 (STB served Nov. 3, 2003), Fort Worth and Western Railroad Company, Inc.–Acquisition and Operation Exemption–Union Pacific Railroad Company, STB Finance Docket No. 34286 (STB served Dec. 20, 2002), and Puget Sound & Pacific Railroad–Lease and Operation Exemption–Union Pacific Railroad, STB Finance Docket No. 34213 (STB served Dec. 6, 2002). TMBL states that delaying the closing date could have adverse effects on the transaction. TMBL thus requests that the Board waive the remainder of the 60-day certification requirement of 49 CFR 1150.42(e), accept the certification that has been given, and allow TMBL and BNSF to consummate the transaction on or after September 30, 2004.

UTU/GO-386 replied to TMBL's request for waiver on September 23, 2004. UTU/GO-386 contends that TMBL has not demonstrated special circumstances justifying a waiver from the Board's regulations and that as a policy matter such waivers should not be granted.

DISCUSSION AND CONCLUSIONS

Request for Waiver of 49 CFR 1150.42(e)

The purpose of 49 CFR 1150.42(e) is to ensure that rail labor unions and employees who would be affected by the transfer of the line are given sufficient notice of the transaction before consummation. See Acq. Of R. Lines Under 49 U.S.C. 10901 and 10902–Advance Notice of Proposed Transactions, 2 S.T.B. 592 (1997). The 60-day certification to the Board is an important aspect of the notice requirements. Despite the fact that the Board has consistently interpreted 49 CFR 1150.42(e) to include certification to the Board 60 days before the effective date of the transaction, we have granted waivers from the certification requirement when the facts and circumstances have warranted. See, e.g., Arkansas and Missouri Railroad Company–Lease and Operation Exemption–Union Pacific Railroad Company, STB Finance Docket No. 33843 (STB served June 29, 2000). Such circumstances have included actual notice given to employees in excess of 60 days, demonstrated adverse effects of a delay, and the fact that the petition for waiver has not been contested.

Contrary to the situation in this proceeding, all of the cases cited by TMBL to justify a waiver lacked opposition. Rather, when there has been opposition, we have looked at all of the facts

surrounding the waiver request. In Reading Blue Mountain and Northern Company–Lease and Operation Exemption–Norfolk Southern Railway Company and Pennsylvania Lines LLC, STB Finance Docket No. 34048 (STB served Aug. 1, 2001), we granted such a waiver request despite opposition where the petitioner made a showing that actual notice was given, that a delay would prevent service to an additional shipper, and that extra power and personnel had been mobilized for the proposed effective date. Here, however, TMBL has not provided any reason to grant a waiver other than that a delay “could jeopardize the agreements that TMBL and BNSF have reached to the detriment of TMBL.” TMBL petition at 5. TMBL has not provided any evidence that justifies our deviating from the existing regulations. Conversely, petitioner appears to be seeking the waiver based more on convenience than on operational or other necessity. Further, the fact that TMBL has sought a similar waiver in the past undermines its assertion that its failure to timely certify to the Board its compliance with 49 CFR 1150.42(e) was a mere oversight. See Belt Line Division of Tacoma Public Utilities–Operation Exemption–In Pierce, Thurston and Lewis Counties, WA, STB Finance Docket No. 33666 (STB served Oct. 30, 1998). Accordingly, we will deny the waiver request.³

Request for Stay

In light of the Board’s action denying waiver of the 60-day certification requirement of 49 CFR 1150.42(e), UTU/GO-386’s request for stay will be denied on the grounds that it is not necessary in the circumstances. Here, the notice of exemption cannot become effective until 60 days after TMBL certified compliance with 49 CFR 1150.42(e) to the Board, or November 16, 2004. UTU/GO-386 is free to file a petition to reject or revoke the notice in the absence of a stay.

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

It is ordered:

1. TMBL’s waiver request is denied.
2. UTU/GO-386’s request for stay is denied.
3. TMBL (with the cooperation of BNSF as necessary) shall, within 5 days after service of this decision, post a copy of this decision at the workplace of the employees on the rail line and serve a

³ Because the record indicates that no UP employees could potentially be adversely affected by this transaction, we agree with TMBL that those employees are not entitled to notice in the circumstances.

copy of the decision on the national offices of the labor unions representing the employees on the line, and certify to the Board that it has done so.

4. This decision is effective on its service date.

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

Vernon A. Williams
Secretary