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SERVICE DATE – AUGUST 16, 2010

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 35348

CSX TRANSPORTATION, INC. AND DELAWARE AND HUDSON RAILWAY
COMPANY, INC.—JOINT USE AGREEMENT

MOTION TO COMPEL

Decided: August 13, 2010

By decision served and published in the Federal Register on May 27, 2010 (75 Fed. Reg. 29,805-10), the Board accepted for consideration the application filed by CSX Transportation, Inc. (CSXT), and Delaware and Hudson Railway Company, Inc. (D&H) (together, Applicants), seeking Board approval under 49 U.S.C. §§ 11321-26 for CSXT and D&H to commence operations pursuant to an agreement between them, known as the New York Joint Use Agreement (Joint Use Agreement). The Board found that the proposed transaction is a “minor transaction” under 49 C.F.R. § 1180.2(c) and that the application, as supplemented, is complete.¹ The proposal is referred to as the transaction.

The transaction

The transaction involves the joint use of certain rail lines owned by CSXT or D&H, located between Rouses Point Junction, N.Y., and Fresh Pond Junction, N.Y. The joint use rights granted to D&H and CSXT in the Joint Use Agreement are for overhead traffic only. Pursuant to the Joint Use Agreement, D&H has granted CSXT the non-exclusive right to use, jointly with D&H, the Saratoga Springs-Rouses Point Segment² and the Albany-Saratoga Springs Segment,³ both in New York. CSXT has reciprocally granted to D&H the non-exclusive

¹ By a letter dated May 11, 2010, Applicants supplemented their application with additional information regarding the environmental and passenger service impacts of the proposed transaction.

² The Saratoga Springs-Rouses Point Segment extends between D&H’s Saratoga Springs Yard, located at D&H milepost 36.10 ± near Saratoga Springs and the United States-Canada border at D&H milepost 192.08 ± in the vicinity of Rouses Point Junction, a total distance of approximately 155.98 miles.

³ The Albany-Saratoga Springs Segment extends between a point of connection with CSXT’s rail lines near D&H’s Kenwood Yard located at D&H milepost 0.0 ± in the vicinity of Albany and D&H’s Saratoga Springs Yard, a total distance of approximately 42.52 miles.

right to use, jointly with CSXT, the Albany-Fresh Pond Segment in New York.⁴ Applicants state that, under the Joint Use Agreement, CSXT would perform operations over the Albany-Fresh Pond Segment with its own trains and crews. D&H currently has the right to operate between Albany and Fresh Pond Junction and to access shippers in the New York City metropolitan area under the trackage rights and switching arrangements obtained in connection with Norfolk Southern Railway Company (NS) and CSXT's acquisition of control of Conrail. See CSX Corp.—Control and Operating Leases/Agreements—Conrail, Inc., 3 S.T.B. 196, 282-83 (1998).⁵ Under the transaction, D&H's traffic volumes would be added to CSXT's larger trains on the Albany-Fresh Pond Segment.

Likewise, D&H would perform all train operations over the Saratoga Springs-Rouses Point Segment, with D&H crews handling CSXT cars. D&H would also handle traffic beyond Rouses Point, to and from the Montreal terminal area, thus eliminating the need for physical interchange between CSXT and Canadian National Railway Company (CN) at Huntington, Que. D&H currently handles traffic for both NS and CN over the Saratoga Springs-Rouses Point Segment. Applicants state that CSXT having access to the Saratoga Springs-Rouses Point Segment would greatly reduce the one-way mileage for CSXT/CN interchange traffic moving between Selkirk, N.Y., and Montreal, Canada, from 403 miles to 261 miles. Overall, Applicants state that the fundamental purpose of the proposed transaction is to address certain inefficiencies in the current north-south operations of CSXT and D&H in New York.

The motion to compel

On June 28, 2010, New York & Atlantic Railway Company (NYA) filed a motion to compel production of 3 categories of information: (1) fees and charges that D&H currently pays to third parties for the exercise of its existing trackage rights over the Albany-Fresh Pond segment (NYA Interrogatory No. 3); (2) for years 2002-2004, commodity-specific traffic volumes moved by D&H via trackage rights on a line unrelated to this transaction and, for the years 2006-2009, commodity-specific traffic volumes handled by NS for D&H via a haulage arrangement on the same unrelated line (NYA Interrogatory Nos. 4 and 5);⁶ and (3) all haulage agreements currently in effect between D&H and another railroad and the fee paid or received by D&H under each such arrangement (NYA Interrogatory No. 7). NYA also seeks production of

⁴ The Albany-Fresh Pond Segment extends between a point of connection between CSXT's and D&H's rail lines near D&H's Kenwood Yard at CSXT milepost QCP 7.1 in the vicinity of Albany, and CSXT's Oak Point Yard and milepost QVK 8 in the vicinity of Fresh Pond Junction, a total distance of approximately 146.31 miles.

⁵ Applicants note that, while D&H would retain its existing trackage rights over CSXT's lines, it would not exercise those rights but would have all traffic along the Albany-Fresh Pond Segment handled by CSXT pursuant to the Joint Use Agreement. Upon termination of the Joint Use Agreement, D&H would have the right to reinstitute immediately operations under its trackage rights and switching agreements with CSXT.

⁶ In 2005, D&H discontinued its trackage rights in favor of a haulage arrangement, as discussed in more detail below. Thus, NYA does not seek information concerning 2005.

documents identified in, related to, consulted, reviewed, or relied upon in making, or otherwise supporting, any of D&H's responses to the first and third categories of information listed above (NYA Request for Production No. 1). NYA requests that it be permitted to supplement its comments within 7 days after D&H provides additional responses.

On July 12, 2010, D&H filed a reply in opposition to NYA's motion to compel. D&H argues that none of the information sought by NYA is relevant to any issue the Board must decide in this minor application proceeding. It also argues that NYA has not provided a persuasive basis for burdening D&H with producing such information, which D&H claims would require it to perform special studies to ascertain the specific data requested.

DISCUSSION AND CONCLUSION

NYA's motion to compel will be granted in part and denied in part. In Board proceedings generally, parties are entitled to discovery "regarding any matter, not privileged, which is relevant to the subject matter involved in a proceeding..." 49 C.F.R. § 1114.21(a)(1). Further, it "is not grounds for objection that the information sought will be inadmissible as evidence if the information sought appears reasonably calculated to lead to the discovery of admissible evidence." 49 C.F.R. § 1114.21(a)(2). "The requirement of relevance means that the information might be able to affect the outcome of a proceeding." Waterloo Ry.—Adverse Aband.—Lines of Bangor and Aroostook R.R. and Van Buren Bridge Co. In Aroostook Cnty., Me., AB 124 (Sub-No. 2), et al. (STB served Nov. 14, 2003). Under 49 C.F.R. § 1114.21(c), discovery may be denied if it would be unduly burdensome in relation to the likely value of the information sought.

1. Fees and charges to third parties

In its motion to compel related to NYA Interrogatory No. 3, NYA requests that D&H:

Identify and provide the amount of all fees and charges currently paid by D&H to third parties in connection with handling D&H trains over the ... [Albany- Fresh Pond Segment] for interchange with NYA at Fresh Pond Junction including (i) trackage rights fees paid to CSXT, and (ii) trackage rights fees or other charges paid to National Railroad Passenger Corporation, Metro North Commuter Railroad, or the New York State Department of Transportation.

NYA argues that, in assessing the Applicants' claims that the transaction will make D&H a more effective competitor, it is essential to understand the amount of third party fees that currently apply to D&H's operations under the CSXT trackage rights agreement and those that may apply under the Joint Use Agreement. D&H replies that NYA makes no showing that the requested fees and charges are necessary for NYA or the Board to evaluate the issue of whether the transaction will result in a "substantial lessening of competition, creation of a monopoly, or restraint of trade," as is the standard under 49 U.S.C. § 11324(d). That standard, however, is for approval of an application; it is not the standard for evaluating a request for discovery. See generally 49 C.F.R. § 1114.21(a)(1).

D&H's own use of similar evidence shows that the requested information is relevant and may lead to admissible evidence. In its reply to NYA's comments on the transaction, D&H included an analysis that contained the third party fees and charges for 2007, which was part of a study that D&H performed (based upon its 2007 operations) comparing the total cost of D&H's current trackage rights operations (which included both payments to third parties and the cost of D&H's locomotives, fuel, and crews) to the costs that D&H would incur under the proposed Joint Use Agreement.⁷ Moreover, D&H relies upon the study to show that the Joint Use Agreement will reduce D&H's operating costs and that the transaction will not result in any lessening of competition, but rather will improve D&H's competitive position. Although NYA does not seek all of the costs that D&H used in its 2007 study, there is good reason to believe that the current third party fees and charges sought by NYA may lead to admissible evidence.

On its face, the request does not appear unreasonably burdensome. D&H argues that production of the fees and charges (during years 2006-2009) would require a special study, but does not explain why such a study would be necessary. Rather, records of such fees and charges are presumably kept in the ordinary course of business. Moreover, the request is limited to the "traffic for interchange with NYA." Therefore, D&H will be directed to produce the information requested in NYA Interrogatory No. 3 and NYA Request for Production No. 1 pertaining to that interrogatory.

2. Commodity-specific traffic

Under NYA Interrogatory Nos. 4 and 5, NYA seeks commodity-specific traffic data from D&H related to a 2005 transaction on an unrelated line in which D&H was authorized to substitute a haulage rights arrangement for its trackage rights over the so-called "Southern Tier" line between Binghamton and Buffalo, N.Y. (Southern Tier transaction). See Del. and Hudson Ry.—Discontinuance of Trackage Rights—In Susquehanna Cnty., Penn. and Broome, Tioga, Chemung, Steuben, Allegany, Livingston, Wyoming, Erie and Genesee Counties, N.Y., AB 156 (Sub-No. 25X), et al. (STB served Jan. 19, 2005). In the Southern Tier transaction, D&H discontinued operations via trackage rights and began operations via a haulage arrangement. NYA contends that the net effect of the Southern Tier transaction was substantially identical to the transaction here because D&H ceased train operations conducted pursuant to trackage rights and replaced those operations with a haulage arrangement. Based on the alleged similarities, NYA offers that it would be "instructive" to determine if the Southern Tier transaction resulted in D&H becoming more competitive.

D&H replies that the information sought related to the Southern Tier transaction and whether it made D&H more competitive over that distinct corridor has nothing to do with the competitive impact of the Joint Use Agreement. D&H points out that, unlike the Southern Tier transaction, in which D&H obtained (and later consummated) authority to discontinue its trackage rights over that line, here, D&H is retaining its trackage rights. D&H may reinstitute

⁷ D&H states that it already provided this study to NYA in response to NYA's discovery requests.

separate train operations between Albany and Fresh Pond in the event that CSXT fails to handle D&H's traffic in accordance with customer requirements or D&H traffic volumes increase to the point where separate train operations become more cost effective for D&H than moving its traffic under the Joint Use Agreement. D&H provides several additional reasons why the Southern Tier Transaction is not a valid measure for the transaction here.

As D&H has demonstrated, the circumstances of the Southern Tier transaction are neither relevant nor analogous to the transaction here. Therefore, NYA's motion to compel D&H to produce commodity-specific traffic data related to the Southern Tier transaction is denied.

3. Haulage agreements

Under Interrogatory No. 7, NYA seeks identification of all haulage arrangements currently in effect between D&H and another railroad and all haulage fees paid or received by D&H under these arrangements since 2002. It argues that these arrangements are relevant to the issue of whether the fees in the Joint Use Agreement are customary and reasonable and are likely to make D&H more competitive. D&H replies that the economic terms of haulage agreements are the product of the unique circumstances of each transaction and that there is no such thing as a "customary" haulage fee. Further, D&H argues that the amounts that D&H pays for (or receives for performing) haulage services in other corridors have no bearing on how the Joint Use Agreement will affect D&H's competitive capability in the Albany to New York City corridor.

NYA fails to explain how all other D&H haulage arrangements are relevant to the transaction here. The Board has rejected similar blanket requests for an applicant's haulage agreements with other carriers where there was no showing that the agreements were relevant to whether the proposed transaction was anticompetitive. See Canadian Pac. Ry.—Control—Dakota, Minn. & E. R.R., FD 35081, Decision No. 8, slip op. at 5-6 (STB served Mar. 27, 2008). Especially here, where the evidence resulting from the requested information is unlikely to be relevant to whether the transaction satisfies the requirements of 49 U.S.C. § 11324, the burden of producing the agreements that make up these many arrangements weighs against compelling the discovery sought. Therefore, NYA's motion to compel D&H to produce all haulage arrangements is denied.

NYA's request that it be permitted to supplement its comments will be granted, but it will be limited to comments directly related to the results of the discovery request being compelled in this decision. D&H will have an opportunity to reply. We have set the comment deadline to ensure that comments are received by the deadline set forth in 49 U.S.C. § 11325(d)(2).

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

It is ordered:

1. NYA's motion to compel is granted in part and denied in part, as discussed above.

2. D&H is directed to produce the information sought in NYA Interrogatory No. 3 and NYA Request for Production No. 1 (as it pertains to NYA Interrogatory No. 3) by August 23, 2010.

3. NYA's supplemental comments, based solely on the information that D&H is directed to produce in this decision, are due August 30, 2010.

4. D&H's reply to NYA's supplemental comments is due by September 2, 2010.

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

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