

SERVICE DATE – MARCH 27, 2013

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 35412

MIDDLETOWN & NEW JERSEY RAILROAD, LLC—LEASE AND OPERATION
EXEMPTION—NORFOLK SOUTHERN RAILWAY COMPANY

Digest:¹ After a small railroad filed a notice of exemption to lease and operate certain rail lines, a labor union representative asked the Board to reject the notice or revoke the exemption, which would have required the railroad to seek Board authorization under a more extensive process. The Board denied that request. Thereafter, the Board denied the labor representative's request to reconsider that decision. In this decision, the Board denies the labor representative's request to reopen this proceeding and reject the notice.

Decided: March 26, 2013

Middletown & New Jersey Railroad, LLC (M&NJ), a Class III rail carrier, filed a verified notice of exemption on August 31, 2010, invoking the class exemption at 49 C.F.R. § 1150.41 to lease and operate certain rail lines in New York from Norfolk Southern Railway Company (NSR). The class exemption, which provides a more streamlined process than a full application under 49 U.S.C. § 10902, applies when, among other things, a Class III rail carrier seeks to acquire or operate an additional rail line. United Transportation Union-New York State Legislative Board (UTU-NY) filed a petition to reject the notice or revoke the exemption. In a decision served on September 23, 2011 (September 2011 decision), the Board denied both requests. UTU-NY petitioned the Board to reconsider the denial of the request to reject the notice. In a decision served on May 2, 2012 (May 2012 decision), the Board denied that petition for reconsideration. On May 22, 2012, UTU-NY again petitioned the Board, requesting that the proceeding be reopened on the basis of material error and that the exemption be rejected. M&NJ replied to that petition on June 8, 2012. For the reasons discussed below, the Board will deny the petition to reopen.

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).

BACKGROUND

In 2009, M&NJ, which at the time was not a rail carrier, filed a notice of exemption to acquire and operate 6.5 miles of rail line (the Middletown-Slate Hill Line) from Middletown & New Jersey Railway Co., Inc. See Middletown & N.J. R.R.—Acquis. & Operation Exemption—Middletown & N.J. Ry., FD 35227 (STB served Mar. 20, 2009). Notice of the exemption was served and published in the Federal Register on March 20, 2009 (74 Fed. Reg. 11,995), and the exemption took effect on April 5, 2009.

On August 31, 2010, M&NJ filed the notice of exemption at issue in this docket, involving M&NJ's lease of certain NSR lines.² On September 27, 2010, UTU-NY filed a petition to reject the notice or revoke the exemption. On February 4, 2011, UTU-NY filed supplemental evidence and argument in which it claimed that the notice contained false or misleading information—namely, the declaration that M&NJ was a rail carrier at the time the notice was filed.³ According to UTU-NY, although M&NJ had obtained an exemption to acquire and operate the Middletown-Slate Hill line and had acquired the line pursuant to that exemption, it had not yet commenced operations on that line at the time it filed the notice of exemption concerning the leased lines. UTU-NY maintained that M&NJ therefore was not a

² The leased lines are: (1) the Hudson Secondary located between mileposts LX 2.1 and LX 20.6 (18.5 miles in length); (2) the Walden Secondary located between mileposts DJ 5.0-DJ 10.5 and WI 29.1-WI 32.9 (9.3 miles in length); (3) the Maybrook Industrial Track located between mileposts RT 1.3 and RT 7.5 (6.2 miles in length); (4) the Greycourt Industrial Track located between mileposts IL 52.5 and IL 53.4 (1.0 mile in length); and (5) the EL Connection Track located between mileposts QK 0.0 and QK 0.8 (0.8 mile in length) (collectively, the leased lines). In conjunction with leasing these lines, NSR also granted to M&NJ: (1) a sublease of connecting track owned by New York, Susquehanna & Western Railway (NYS&W) located between milepost JS 63.14, at Hudson Jct., N.Y., and milepost LX 2.1, at Hudson Jct. (approximately 0.35 mile in length); (2) incidental overhead trackage rights over NSR's rail line located between mileposts JS 67.50 and JS 63.14 (4.36 miles in length); and (3) a partial assignment of all of NSR's rights under the NYS&W Trackage Rights Agreement for NYS&W's continued trackage rights operations over the Hudson Secondary track between Hudson Jct. and Warwick, N.Y.

³ Under 49 C.F.R. § 1150.42(c), the exemption is void ab initio if the notice contains false or misleading information. In initially challenging the notice, UTU-NY also argued that the petition should be revoked on a variety of grounds, including its competitive impact. UTU-NY did not raise any of these alternative revocation grounds in its petition for reconsideration, nor does it raise them in its petition to reopen.

“rail carrier providing transportation subject to the jurisdiction of the Board” under 49 U.S.C. § 10902 and thus could not use the class exemption at 49 C.F.R. § 1150.41 for Class III carriers acquiring or operating an additional rail line.

In response, M&NJ provided interchange reports on February 22, 2011, indicating that, beginning on April 7, 2009, it had commenced rail operations and interchanged rail cars (both loaded and empty) with NSR, some 16 months before it filed its notice of exemption in this docket in August 2010.

The Board held in the September 2011 decision, among other things, that M&NJ became a rail carrier when it acquired the Middletown-Slate Hill line pursuant to the Board’s authorization and that, in any event, M&NJ had held itself out as a common carrier and interchanged traffic with NSR shortly thereafter, as reflected in the interchange reports M&NJ filed. September 2011 decision, slip op. at 4. The Board concluded that the notice was neither false nor misleading and therefore denied the request to reject it.

In its October 13, 2011 petition to reconsider the September 2011 decision, UTU-NY argued that the Board erred as a matter of law in concluding that M&NJ became a rail carrier on the date it acquired the Middletown-Slate Hill line. UTU-NY asserted that, under 49 U.S.C. § 10902, an acquiring entity must actually begin service over an acquired line before it becomes a carrier. M&NJ responded to the petition to reconsider on October 26, 2011.

In the May 2012 decision, the Board reaffirmed its earlier holding and found that M&NJ’s interchange reports showed that it began common carrier service over the Middletown-Slate Hill line—and thus was a carrier even under UTU-NY’s theory—before it filed its notice of exemption in this proceeding. May 2012 decision, slip op. at 5. The Board therefore denied UTU-NY’s petition for reconsideration and request to reject the notice.

DISCUSSION AND CONCLUSIONS

Under 49 U.S.C. § 722(c) and 49 C.F.R. § 1115.4, the Board will grant a petition to reopen upon a showing of material error, new evidence, or substantially changed circumstances. UTU-NY argues that the May 2012 decision involves material error. As explained below, the Board did not materially err in denying UTU-NY’s petition for reconsideration.

UTU-NY argues that, although the Board “initially” ruled in the September 2011 decision that M&NJ became a rail carrier on the date it acquired the Middletown-Slate Hill line, the Board “did not follow” that view in the May 2012 decision, but rather “referred” to interchange reports showing the interchange of rail cars between M&NJ and NSR. UTU-NY suggests that in the May 2012 decision the Board abandoned its September 2011 ruling that M&NJ became a carrier when it acquired the Middletown-Slate Hill line and instead adopted

UTU-NY's view that M&NJ's common carrier status depends on when (if ever) M&NJ actually began common carrier operations on that line.

UTU-NY, however, is mistaken. In the May 2012 decision, the Board noted that the interchange reports showed that M&NJ had begun common carrier service before filing its notice of exemption in this docket, "and thus was a common carrier *even under UTU-NY's theory*."⁴ The Board did not disavow its earlier holding or adopt UTU-NY's theory as its own; it found that, even assuming for the sake of argument that UTU-NY's theory were correct, the record evidence failed in any event to support UTU-NY's assertion that M&NJ was not a carrier.

To avoid any further misunderstanding, we reiterate here that, after obtaining acquisition authority from the Board, an entity that goes forward and acquires an existing railroad line becomes a rail carrier authorized to use 49 U.S.C. § 10902 as of the date of the acquisition, even if it is not actually called upon to provide service until some later time.

The provisions of 49 U.S.C. § 10902 apply to a "rail carrier providing transportation subject to the jurisdiction of the Board." The Board has jurisdiction over "transportation by rail carrier." 49 U.S.C. § 10501(a)(1). A "rail carrier" is defined as a "person providing common carrier railroad transportation for compensation." 49 U.S.C. § 10102(5). Viewing these three provisions together, it is evident that the coverage of § 10902 can best be determined by reference to the definitional provision at § 10102(5), which can only apply to a rail carrier that provides transportation subject to the jurisdiction of the Board. In the context of railroad line acquisitions, there is no distinction between a "rail carrier" and a "rail carrier providing transportation subject to the jurisdiction of the Board;" therefore, the only question in this case is whether M&NJ was a rail carrier as defined by § 10102(5) at the time it filed its notice of exemption.⁵

There is no question that the previous owner of the Middletown-Slate Hill Line was a rail carrier under § 10102(5) subject to our jurisdiction, with a common carrier obligation even during periods when there were no actual requests for service. Because the common carrier obligation cannot be terminated without abandonment authorization from the Board, the transfer of the railroad line and the common carrier obligation that goes with it immediately imposed upon the new owner the continuing obligation to provide common carrier rail transportation

⁴ May 2012 decision, slip op. at 5 (emphasis added).

⁵ UTU-NY itself recognized in its February 4, 2011 supplemental evidence and argument that its argument rests on the definition of a "rail carrier" in 49 U.S.C. § 10102(5). Thus, UTU-NY argued (at page 8) that M&NJ could not obtain an exemption from 49 U.S.C. § 10902 because M&NJ was not a rail carrier under § 10102(5).

service over the line upon reasonable request. As was the case with the prior owner, it does not matter whether the line has been inactive for a time, or even if it remains inactive after it is acquired. Either way, because a rail line itself is part of “transportation,”⁶ on the date that an acquiring entity (here M&NJ) consummates a Board-authorized transaction by acquiring a common carrier railroad line, it becomes a “rail carrier” as defined by § 10102(5) (i.e., a “person providing common carrier railroad transportation for compensation”), and a “rail carrier providing transportation subject to the jurisdiction of the Board” that is eligible to use 49 U.S.C. § 10902 (or the relevant exemption procedures). M&NJ’s eligibility to use 49 U.S.C. § 10902 did not turn on when it began physical rail operations, but rather when it carried out its Board-authorized acquisition of the Middletown-Slate Hill line.

UTU-NY’s contrary interpretation—that M&NJ was not a “rail carrier providing transportation subject to the jurisdiction of the Board” when it filed its notice of exemption in this docket because, although it had acquired the Middletown-Slate Hill line, it had not begun operating over it—is inconsistent with the statutory scheme for exit licensing as well. Under the Interstate Commerce Act, the Board has exclusive jurisdiction over the abandonment of railroad lines. Chi. & N. W. Transp. Co. v. Kalo Brick & Tile Co., 450 U.S. 311, 320-21 (1981); see 49 U.S.C. § 10903(a), (d). A railroad line may only be abandoned if the Board finds that the present or future public convenience and necessity require or permit it. 49 U.S.C. § 10903(d). Under UTU-NY’s theory, a noncarrier could acquire from a carrier a railroad line with active shippers and then, upon acquiring ownership, decide never to begin serving those customers. By choosing not to respond to requests for service, the acquiring party, under UTU-NY’s theory, would never become a “rail carrier providing transportation subject to the jurisdiction of the Board,” would never acquire a common carrier obligation,⁷ and would thereby accomplish a de facto abandonment of the line without Board authority, leaving shippers without recourse. Apart from its inconsistency with the entry-licensing scheme discussed above, UTU-NY’s theory creates an untenable gap in the common carrier obligation in the context of exit licensing, and we therefore reject that interpretation.

⁶ “Transportation” embraces facilities and instrumentalities related to the movement of passengers or property, or both, by rail, 49 U.S.C. § 10102(9)(A), including tracks. See Louisville & Ind. R.R.—Pet. for Declaratory Order, FD 35536, slip op. at 3 (STB served Feb. 22, 2012) (the Board’s jurisdiction over “transportation by rail carrier” includes tracks).

⁷ The common carrier obligation applies to “rail carrier[s] providing transportation or service subject to the jurisdiction of the Board,” 49 U.S.C. § 11101(a)—essentially the same statutory formulation as in § 10902.

UTU-NY's original request to reject or revoke M&NJ's notice of exemption here was based on a claim that the exemption under 49 C.F.R. § 1150.41 et seq.—which applies to acquisitions or operations by Class III rail carriers—was not properly available to M&NJ at the time because it had not yet begun operations over the Middletown-Slate Hill line and thus, in UTU-NY's view, was not yet a carrier. UTU-NY's request to reopen the May 2012 decision rests on a claim that the Board materially erred in concluding that the proffered interchange reports demonstrated that M&NJ began its common carrier operations over the Middletown-Slate Hill line before it filed its notice of exemption here. Because, however, M&NJ became a carrier “providing transportation subject to the jurisdiction of the Board” under § 10902 not when it began operations over the Middletown-Slate Hill line, but earlier when it acquired that line, the issue of when M&NJ began those operations is irrelevant to UTU-NY's claim that the exemption here should be rejected.⁸ As the issue is immaterial, the Board cannot have committed any material error on that point; nor has UTU-NY demonstrated any other material error in the May 2012 decision. The petition to reopen therefore is denied.

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

It is ordered:

1. The petition to reopen is denied.
2. UTU-NY's June 28 motion to strike is denied as moot.
3. This decision is effective on its date of service.

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

⁸ Because the issue of when M&NJ began operating over the Middletown-Slate Hill line is immaterial, we need not, and do not, rely on any of the evidence proffered by either party regarding M&NJ's alleged operations on that line. UTU-NY's June 28 motion to strike will therefore be denied as moot.