

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 33311

KANSAS CITY SOUTHERN INDUSTRIES, INC., KCS TRANSPORTATION COMPANY,
AND THE KANSAS CITY SOUTHERN RAILWAY COMPANY—CONTROL—GATEWAY
WESTERN RAILWAY COMPANY AND GATEWAY EASTERN RAILWAY COMPANY

Decided: August 4, 1997

In a decision served May 1, 1997, we approved an application by Kansas City Southern Industries, Inc. (KCSI), KCS Transportation Company (KCSTC), The Kansas City Southern Railway Company (KCSR), Gateway Western Railway Company (GWR), and Gateway Eastern Railway Company (GWER) for authority under 49 U.S.C. 11323-25 for KCSI to acquire control of GWR and GWER (jointly, Gateway).

The May 1 decision addressed several objections to the transaction raised by Joseph C. Szabo, Illinois Legislative Director for the United Transportation Union (UTU-IL). UTU-IL had claimed that the application was deficient because the public version of the application omitted a February 28, 1996 agreement between KCSI and Gateway setting the terms for the transaction. The applicants considered the agreement to be confidential and submitted a copy to the Board under seal with the application as Exhibit 2. UTU-IL contended that the agreement should be made available to the public.

We found that UTU-IL's assertions did not have merit. We determined that UTU-IL could have obtained the agreement under a protective order that the Board had issued, but that it did not do so, and that UTU-IL could not claim that the agreement was deficient simply because the agreement was not in the public version of the application.

UTU had also asserted that KCSR's president, Mr. Michael R. Haverty, had recently served as a director of Gateway, raising the question whether KCSR and Gateway may have already been under common control. Applicants noted that the Board's Secretary had issued an informal opinion that KCSI was sufficiently insulated from premature control of Gateway under a voting trust arrangement. We rejected UTU-IL's claims of premature control.

On May 21, 1997, UTU-IL filed a petition for reconsideration alleging material error under 49 CFR 1115.3. UTU-IL again argues that the Board erred by placing the entire agreement under seal. It contends that the applicants should have submitted a redacted copy of the agreement with the application. It notes that applicants concede that most of the contents of the agreement were not confidential. By being denied access to the agreement, UTU-IL claims that it was unable to determine whether standard employee protective conditions would be appropriate.

Applicants respond that the protective order they asked the Board to approve allowed the agreement to be held in confidence for legitimate business reasons and to be filed under seal. They note that UTU-IL did not oppose this request when it was filed with the Board. Applicants further state that the protective order did not prevent any party from viewing the agreement, but merely contained procedures to be followed by a party that wished to view the agreement. Applicants indicate that the protective order they submitted did not have a "Highly Confidential" designation under which only counsel and outside consultants could view a document. Instead, they allegedly designated it as "Confidential", permitting any party, including UTU-IL and other members of the public, to view a document by agreeing to abide by the terms of the protective order.

Applicants submit that, if UTU-IL or any other party needed information in the agreement to present its case, that party could have signed the undertaking in the protective order, received the agreement, and viewed the confidential version of the control application. Applicants note that

UTU-IL chose not to sign the protective order, never requested a copy of the agreement, and never contacted the applicants to see if there was a redacted copy available for viewing. Applicants note further that they previously indicated that they would provide a redacted copy of the agreement to a party who requested one.

UTU-IL's petition for reconsideration also repeats the argument that we erred in finding that there was no premature control of Gateway resulting from Mr. Haverty's seat on Gateway's board of directors. Applicants respond that at the time of the transaction, an officer or director of a Class I railroad, such as Mr. Haverty, could be a director of a Class II or Class III railroad without obtaining prior approval by the former Interstate Commerce Commission (ICC). 49 CFR 1185.1(a) (1995). Contrary to UTU-IL's claims, applicants argue, having such a joint position was not considered unlawful control per se. Applicants note that the ICC rejected a similar argument by UTU-IL with respect to the GWR's board.¹ Applicants further state that this principle was recently reaffirmed, re-adopted, and updated by the Board in the current exemption for interlocking directors found in 49 CFR 1185.1(b).² Applicants maintain that Mr. Haverty did nothing illegal or otherwise contrary to the exemption.

Applicants further aver that, even though Mr. Haverty was exempt from the interlocking director requirements when the agreement between KCS and Gateway was reached, Mr. Haverty resigned from the Gateway board of director as a precautionary measure to prevent any claims of unlawful control. In addition, KCS placed the Gateway shares in an independent voting trust, which, in the expressed view of the Board's Secretary, effectively insulated KCS from any unauthorized premature control of GWR.

DISCUSSION AND CONCLUSIONS

We will deny UTU-IL's appeal. Under 49 CFR 1115.3, a discretionary appeal will be granted only upon a showing that the prior action will be materially affected because of new evidence or changed circumstances or that the prior action involves material error. UTU-IL has not shown that reconsideration of the May 1 decision is warranted under these standards.

Our May 1 decision considered UTU-IL's objections to the transaction but found that they did not have merit. UTU-IL has not presented any justification for us to reconsider the May 1 decision. Applicants filed a copy of the agreement with the Board under seal, and consistent with our rules, and the fact that applicants did not also file a redacted copy for public viewing did not render the application fatally defective. Rather, UTU-IL and other parties had ample opportunity to view the agreement by following the procedures in the protective order. Moreover, UTU-IL could have obtained a redacted version of the agreement from the applicants, but UTU-IL did not request a copy. Nor has UTU-IL submitted any basis for us to reevaluate our determination on the issue of premature control.

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

It is ordered:

1. UTU-IL's petition for reconsideration is denied.
2. This decision is effective on the date served.

By the Board, Chairman Morgan and Vice Chairman Owen.

¹ *Gateway Eastern Railway Company – Acquisition and Operation Exemption – Lines of Consolidated Rail Corporation*, Finance Docket No. 32858 (ICC served July 6, 1995).

² *Revision of Regulations for Interlocking Rail Officers*, Ex Parte No. 543 (STB served Jan. 15, 1997).

Vernon A. Williams
Secretary