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SERVICE DATE — NOVEMBER 1, 2016

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 35187 (Sub-No. 1)

GRAND ELK RAILROAD, INC.—ACQUISITION OF INCIDENTAL TRackage RIGHTS
EXEMPTION—NORFOLK SOUTHERN RAILWAY COMPANY

Digest:¹ The Board denies a request to reject the verified notice of exemption or, in the alternative, to stay the effective date of the exemption sought in this proceeding.

Decided: October 31, 2016

On August 25, 2016, Grand Elk Railroad, Inc. (GDLK), a Class III rail carrier, filed a verified notice of exemption under 49 C.F.R. § 1150.41 to acquire by assignment from Norfolk Southern Railway Company (NSR) trackage rights over approximately 3.3 miles of rail line owned by CSX Transportation, Inc. (CSXT) in Grand Rapids, Mich. (CSXT Line).² GDLK concurrently filed a petition to partially revoke the notice of exemption under 49 U.S.C. § 10502(d) to allow the notice for the acquisition of incidental trackage rights that GDLK has filed in this docket to take effect retroactively; and a petition for waiver of the 60-day labor notice requirements of 49 C.F.R. § 1150.42(e) in conjunction with its verified notice.

The trackage rights at issue here derive from two trackage rights agreements for track located in Grand Rapids, Mich. negotiated by the predecessors of CSXT and NSR in 1980 and 1984. As relevant here, these agreements gave NSR's predecessor trackage rights over the CSXT Line. The trackage rights under these agreements were eventually inherited by NSR (as the grantee) and CSXT (as the grantor). Each agreement contains a provision providing that neither party may assign its rights under that agreement unless the other party has given its prior written consent to the assignment. The agreements also expire after 30 years.

In 2008, GDLK acquired authority to lease from NSR and operate approximately 122.9 miles of rail line from Grand Rapids, Mich., to Elkhart, Ind. in Grand Elk Railroad—Lease & Operation Exemption—Norfolk Southern Railway (GDLK Lease), FD 35187 (STB served Nov. 17, 2008). GDLK states that at that time, NSR also agreed to assign its CSXT Line

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 The CSXT Line extends from milepost CH 151.3± at Pleasant Street through milepost CH 151.6/CGE 0.0 to milepost CGE 3.0± north of Ann Street in Grand Rapids, Mich.

trackage rights as part of the lease, but that the 3.3 miles of rail line at issue in this proceeding were inadvertently omitted from GDLK's notice of exemption for the 122.9-mile rail line filed in the GDLK Lease proceeding. (See GDLK Pet. to Partially Revoke 9-10.) Nevertheless, according to GDLK, it contemporaneously executed with NSR the "Grand Rapids Assignment and Assumption Agreement," in which NSR assigned its CSXT Line trackage rights to GDLK. (See id. at 10, see also id. at Ex. E.)

GDLK contends that it operated pursuant to the assigned trackage rights from its start-up in 2009 until August 10, 2016, when CSXT denied GDLK access to the CSXT Line. (Id.) According to GDLK, CSXT has denied access because it disputes the validity of the 2009 assignment of trackage rights from NSR to GDLK. In response, GDLK and NSR have brought a state court suit against CSXT to determine whether NSR may assign its trackage rights to GDLK, and if so, whether NSR has in fact done so. In addition, GDLK now seeks, through the filing of its notice of exemption, to obtain proper authority for the trackage rights it claims it received from NSR at the time it acquired lease authority in GDLK Lease. GDLK also requests, through its petition for partial revocation, that its notice take effect retroactively to January 30, 2009, the effective date of the original class exemption in the GDLK Lease proceeding.

On September 16, 2016, CSXT filed a reply and requested that the Board reject GDLK's notice of exemption, waiver petition, and petition for partial revocation. CSXT argues that GDLK's notice does not meet the criteria in 49 C.F.R. § 1150.41, and that even if it did, the issues raised by the notice and expanded on in the petition are controversial and not routine. (CSXT Reply 11.) In the alternative, CSXT requests that the Board stay the effectiveness of the notice (id. at 21-24) and institute an investigation under 49 U.S.C. § 11701(a) as to the operations that CSXT alleges GDLK has been conducting unlawfully over CSXT's track since March 2009 (id. at 24-26). CSXT argues that this transaction is complex and not appropriate for the notice of exemption process, because it claims the original trackage rights agreements between CSXT and NSR have terminated. CSXT also claims that it has no record of providing written consent for NSR's assignment of trackage rights to GDLK, and GDLK and NSR have produced no evidence of written consent from CSXT. (id. at 4-11.)

The Board received letters from several interested parties,³ including a letter in support of GDLK from NSR on September 14, 2016. In its letter, NSR states that, although it has not been able to find record of a formal reply from CSXT, CSXT did not protest GDLK's exercise of

³ The Board received letters from United States Representatives Fred Upton and Bill Huizenga, Michigan Senators Peter MacGregor and Tonya Schuitmaker, Michigan Representative Mary Whiteford, the Michigan Department of Transportation, The Right Place: Advancing The West Michigan Economy, and RiLi Right Rail, Inc. On September 6, 2016, GDLK filed a supplement that contained letters from Padnos, King Milling Company, Universal Well Services, Inc., and the Michigan Agri-Business Association. On September 7, 2016, GDLK filed an Amended Supplement, which included a Private Memorandum of Understanding between CSXT, NSR, GDLK, and Padnos (the legal effect of which is at issue in the Michigan court case). (See, e.g., GDLK Pet. to Partially Revoke, Ex. F at 3; CSXT Reply at 13.) GDLK also filed a supplement on September 8, 2016, with letters from DRT, L.L.C. and Brink Farms, Inc.

trackage rights at any point during the seven years that GDLK operated over the CSXT Line. NSR also notes that CSXT recently entered into a Memorandum of Understanding with NSR, GDLK, and a customer affirming GDLK's trackage rights as part of a state-sponsored transportation infrastructure project.

GDLK filed a reply to CSXT's petition for stay on September 21, 2016. CSXT filed a response by letter on September 23, 2016, to which GDLK filed in opposition on September 30, 2016. In its second reply, GDLK argues that the 1980 and 1984 trackage rights agreements cannot expire absent Board-issued discontinuance authority. GDLK also claims it is possible that the Michigan court could infer the continued application of the 1980 and 1984 trackage rights agreements under a "holdover tenancy construct." (GDLK Sept. 30 Reply at 13-14.)

Notice of the exemption was served and published in the Federal Register on September 9, 2016 (81 Fed. Reg. 62,548). The notice stated that GDLK's waiver request and petition for partial revocation would be addressed in a separate decision and that the Board would establish in that decision the earliest date this transaction could be consummated. This decision will address all pending issues in this docket.

DISCUSSION AND CONCLUSIONS

We will deny CSXT's request to reject GDLK's filings and CSXT's petition for a stay, and will permit the trackage rights exemption to go into effect. CSXT does not allege that GDLK's verified notice is false or misleading, and there is no indication that GDLK has failed to comply with the requirements of the class exemption. See 49 C.F.R. § 1150.32(c). There is no dispute that there is an agreement between NSR and GDLK, and that is the agreement upon which the notice of exemption before the Board is based. Instead, CSXT's opposition centers on the proper interpretation of the underlying trackage rights agreements between CSXT and NSR, an issue which is currently being litigated in state court. (See GDLK Pet. to Partially Revoke, Ex. E.) While CSXT contends that the original trackage rights agreements between CSXT and NSR have terminated, and that CSXT never provided the required written consent for the assignment from NSR to GDLK, GDLK maintains that these arguments are more appropriate for state court adjudication.

The Board does not typically resolve contract disputes. The contractual dispute between CSXT and NSR is already in state court, and need not be resolved before the Board's permissive authority is allowed to take effect. See Wis. Cent. Ltd.—Trackage Rights Exemption—Lines of Union Pac. R.R. (Wisconsin Central), FD 35992 (STB served Mar. 4, 2016); see also BNSF Ry.—Trackage Rights Exemption—Union Pac. R.R., FD 35601, slip op. at 5-6 (STB served Sept. 11, 2013). The authorization granted through this exemption does not constitute a ruling on the parties' contractual rights. See, e.g., Ohio River Partners LLC—Acquis. & Operation Exemption—Hannibal Dev., LLC, FD 35984, slip op. at 3 (STB served Apr. 1, 2016).

CSXT contends that GDLK's position is similar to that of the party in Winamac Southern Railway—Trackage Rights Exemption—A. & R. Line, Inc. (Winamac Southern), FD35208 (STB served Jan. 9, 2009) whose notice was ultimately rejected. In Winamac Southern, the successor to the original granting party asserted that the agreement at issue was no longer in

effect and actively opposed the grant of the exemption. Here, NSR and GDLK entered into an agreement in March 2009, and NSR (the granting party) does not seek rejection of GDLK's notice of exemption. (See GDLK Pet. to Partially Revoke, Ex. E; see also NSR Support Statement.) Thus, Winamac Southern is inapposite. The closer analogue to this case is Wisconsin Central. In that case, Wisconsin Central Ltd. (WCL) filed a verified notice of exemption to acquire overhead trackage rights over two rail segments pursuant to an agreement with Illinois Central Railroad Company (IC). WCL claimed that IC had agreements with Union Pacific Railroad Company (UP) allowing IC to admit others to operate over the lines in question under certain circumstances. UP requested, among other things, a housekeeping stay, arguing that WCL did not have contractual rights to operate over the two UP tracks and that a stay would provide the parties time to negotiate regarding the trackage rights sought by WCL. The Board denied UP's request to stay the effective date of the exemption and permitted the trackage rights exemption to go into effect, noting that the proceeding involved a contractual dispute between UP and WCL, which did not need to be resolved before the Board's authority could take effect. See also BNSF Ry., FD 35601, slip op. at 4-5 (where applicant and granting party were in agreement, Winamac Southern was inapposite). Similar to Wisconsin Central, we deny CSXT's request to reject the notice of exemption.⁴

With respect to GDLK's petition for partial revocation, the Board will deny that petition and thus not permit GDLK's exemption to take effect retroactively. The Board generally disfavors retroactive grants of authority, and inadvertence alone is typically insufficient to support such relief. See, e.g., New Brunswick Ry.—Continuance in Control Exemption—Me. N. Ry., FD 35520, slip op. at 3 n.2 (STB served Sept. 26, 2011); V & S Ry.—Acquis. & Operation Exemption—Colo. Dep't of Transp., FD 35664, slip op. at 4 (STB served Nov. 13, 2012). Here, GDLK argues that, if the exemption is not allowed to take effect retroactively, the state court might decline to rule on the contractual issues before it, "since GDLK would lack appropriate regulatory authority during the time that the trackage rights agreements were effective." (GDLK Pet. to Partially Revoke 15.) However, as our precedent holds, our authority is permissive and does not constitute a ruling on the parties' contractual rights. E.g., Wisconsin Central, slip op. at 2-3. For the same reason, the Board rejects GDLK's argument that retroactive effectiveness would allow the parties to move forward with negotiations with CSXT of new terms. (GDLK Pet. to Partially Revoke 15.) GDLK also asserts that, "[w]ithout the requested retroactivity, NSR arguably could be called upon to provide service via the CSXT Line as an intermediate carrier between GDLK and its customers." (GDLK Pet. to Partially Revoke 17.) However, GDLK provides no explanation as to why it believes this concern relates to retroactivity, as opposed to whether the Board allows the exemption to take effect at all—which the Board is allowing, as discussed above. Thus, we deny GDLK's petition to partially revoke the class exemption under 49 U.S.C. § 10502(d).

Finally, GDLK's request to waive the labor notice is denied in part and granted in part. According to GDLK, it provided notice to all affected NSR employees in 2008. (GDLK Waiver

⁴ The Board will also deny CSXT's request for an investigation, as this dispute is a contractual matter already pending in Michigan state court. (See GDLK Pet. to Partially Revoke, Ex. F.)

3.) Because it appears that there has been no notice to employees since 2008, the Board will require GDLK to provide the labor notice required in 49 C.F.R. § 1150.42(e) to affected employees and to certify to the Board that it has done so 10 days before the exemption can become effective.⁵

It is ordered:

1. GDLK's exemption is effective 10 days after GDLK certifies to the Board that it has provided notice to affected employees.
2. GDLK's petition to partially revoke the class exemption is denied.
3. GDLK's petition for labor waiver is denied in part and granted in part. GDLK must provide 10 days' notice to affected employees.
4. CSXT's request to reject GDLK's filings is denied.
5. CSXT's petition for a stay is denied.
6. CSXT's request for investigation is denied.
7. This decision is effective on the date of service.

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

⁵ The labor notice must indicate that the exemption will become effective 10 days after GDLK certifies to the Board that it has provided the notice to affected employees.