28521 SERVICE DATE - DECEMBER 31, 1997
EB

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 33323

CHICAGO RAIL LINK, L.L.C.--LEASE AND OPERATION EXEMPTION--
UNION PACIFIC RAILROAD COMPANY

Decided: December 17, 1997

On December 18, 1996, Chicago Rail Link, L.L.C. (CRL), a Class III rail carrier, filed a notice of exemption under 49 CFR 1150.41 to lease and operate approximately 8.5 miles of rail lines owned by Union Pacific Railroad Company (UP). The lines are comprised of track numbers 1 through 9, 110, 500, 501, 702, 710, and 711 in UP's Irondale Yard, Chicago, IL, east of Torrence Avenue between 117th Street and 122nd Street. The exemption became effective on December 25, 1996, and the transaction was consummated on January 2, 1997. Notice of the exemption was served and published on January 9, 1997 (62 FR 1357).

On January 13, 1997, Joseph C. Szabo, on behalf of United Transportation Union-Illinois Legislative Board (UTU-IL or petitioner), filed a petition to revoke the exemption, which petitioner supplemented on February 27, 1997. By a decision served May 28, 1997, the Board instituted a proceeding under 49 U.S.C. 10502(d) to consider UTU-IL's revocation request. Subsequently, in a decision served September 2, 1997 (the September 2 decision), we denied UTU-IL's petition to revoke the exemption.

On September 22, 1997, UTU-IL filed a petition for reconsideration, and, on October 10, 1997, CRL replied. The petition for reconsideration will be denied.

BACKGROUND

This proceeding involves issues of statutory interpretation. As relevant, in the ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (ICCTA), Congress established a new statutory section, 49 U.S.C. 10902 - Short line purchases by Class II and Class III rail carriers. Under section 10902, a Class II or Class III rail carrier "may acquire or operate an extended or additional rail line" only if the Board issues a certificate authorizing such activity. In Class Exem. for Acq. or Oper. under 49 U.S.C. 10902, 1 S.T.B. 95 (1996), aff'd D.C. Cir. No. 97-1057, United Transportation Union v. STB, unpublished decision of Nov. 7, 1997, acting pursuant to our authority under 49 U.S.C. 10502 to exempt rail carrier transportation from regulation, we established a new class exemption to apply to transactions in which Class III rail carriers acquire or operate additional rail properties. The new exemption procedures are set forth at 49 CFR Part 1150, Subpart E, sections 1150.41-1150.45. The notice of exemption that is the subject of this proceeding was filed and processed under the new rules.

Also relevant to this proceeding is the statutory provision at 49 U.S.C. 10906 setting forth exceptions from Board jurisdiction.[1] Section 10906 provides:

> Notwithstanding section 10901 and subchapter II of chapter 113 of this title [regulating carrier combinations[2]], and without the approval of the Board, a rail carrier providing transportation subject to the jurisdiction of the Board under this part may enter into arrangements for the joint ownership or joint use of spur, industrial, team, switching, or side tracks. The Board does not have authority under this chapter [Chapter 109-Licensing] over construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks.

In its petition to revoke, UTU-IL had argued that section 10902, and the Board's regulations thereunder, did not apply here because the subject track was "spur, industrial, team, switching, or side tracks" covered by the second provision of section 10906 and, therefore, the transaction was outside our jurisdiction. UTU-IL had further argued that section 10902 is not applicable because it covers the acquisition and operation of rail line, and the subject tracks do not constitute a line of railroad. Petitioner had also argued that, in any event, section 10902 did not embrace lease authority and the Board's class exemption did not cover leases. Finally, UTU-IL had contended that, if the transaction were to be regulated at all, it should have been regulated under section 11323 as a lease of rail property by a rail carrier.

In our September 2 decision, we found that UTU-IL's jurisdictional arguments lacked merit. We noted that, pursuant to the decision in Nicholson v. ICC, 711 F.2d 364 (D.C. Cir. 1983), cert. denied, 464 U.S. 1056 (1984), in determining whether a particular track segment is excepted from Board jurisdiction by section 10906, the ICC and the courts have focused on the intended use of the track. We noted, further, that pursuant to the decision in Brotherhood of Locomotive Eng'rs v. STB, 101 F.3d 718 (D.C. Cir. 1996) (BLE v. STB), the proper focus must be on the tenant railroad's use of the track as the controlling factor in determining the character of the track. Finally, we acknowledged that the courts have noted an important qualification to the tenant-use test. We referred to the decision in Texas & Pacific Railway Co. v. Gulf, Colorado & Santa Fe Railway Co., 270 U.S. 266 (1926) (Texas & Pacific), in which the Supreme Court looked beyond the immediate use of the track segment in question and examined the "purpose and effect" of its use.

Applying the law to the facts of this case, we concluded that, as to the tenant, CRL, the subject track was not "yard" or "switching" track excepted from agency jurisdiction under 49 U.S.C. 10906. We indicated that, by means of the lease transaction, CRL intended to extend its

---

[1] This section is substantially the same as its predecessor, former 49 U.S.C. 10907.

[2] Under 49 U.S.C. 11323 - Consolidation, merger, and acquisition of control, specified transactions may be carried out only with the approval and authorization of the Board. Among those is a rail carrier's lease of the property of another rail carrier. 49 U.S.C. 11323(a)(2).

operations to reach new customers as discussed in Texas & Pacific and, thus, the transaction contemplated "an extended or additional rail line" within the meaning of section 10902. We rejected UTU-IL's position that the words "rail line" in section 10902 required a "through line" or a line of any particular character or minimum length. We found it sufficient that CRL would be operating over new trackage to reach new customers. Finally, we concluded that lease transactions were embraced under section 10902 and were covered by the new class exemption.

DISCUSSION AND CONCLUSIONS

UTU-IL's petition for reconsideration is grounded in contentions that our September 2 decision involves material error. 49 CFR 1115.3(b)(2). As next discussed, we reject petitioner's contentions and will deny its petition for reconsideration.

First, UTU-IL argues that our decision erred in stating that UTU-IL claimed that the subject track is switching track. Petitioner asserts that its position throughout the three pleadings it filed was that the trackage is "spur, industrial, team, switching, or side tracks."

This argument is without merit. We note that UTU-IL referred to the subject trackage as "yard" track in its petition to revoke, as "spur, industrial, team, switching, or side tracks" in its supplement to its petition to revoke, and as "industrial trackage" in its reply to CRL's motion to strike. Notwithstanding the multiple characterizations, at page 3 of the September 2 decision, we did refer to UTU-IL's argument that the subject tracks are "spur, industrial, team, switching, or side tracks." We have stated that the jurisdictional status of track must be determined by its intended use, and that CRL's contemplated use of the subject track as "an extended or additional rail line" removes it from the exclusion of section 10906. The conclusion would be the same regardless of the specific characterization of the track with reference to the second provision of that section.

UTU-IL's second argument is that the Board materially erred in concluding that the trackage is a line of railroad. UTU contends that we erroneously relied on BLE v. STB to support our conclusion in this regard. Petitioner emphasizes that BLE v. STB involved the operations of two carriers over the same track, which was conceded to be a line of railroad. Moreover, the petitioner reiterates its position that, if the transaction is not excepted under section 10906, it is covered under section 11323 as a lease of property of another rail carrier.

These arguments also lack merit. As we noted in our September 2 decision, in BLE v. STB, the court adopted the holding that the jurisdictional status of track must be determined by its intended use. The court found solid support for our intended-use test. The Texas & Pacific qualification to the intended-use test, that we must look beyond the immediate use of the track segment in question and examine the "purpose and effect" of the transaction, also guided our conclusion that CRL intends to extend its operations to reach new customers and, thus, the transaction contemplates "an extended or additional rail line" within the meaning of section 10902. Thus, our conclusion that the track at issue is a line of railroad as to CRL is fully supported by past agency and court decisions and is a correct characterization of the status of the track. Nor does the

fact that CRL is acquiring the right to operate over the "extended or additional line of railroad" by lease rather than purchase of the entire ownership interest in the line require it to proceed under section 11323 rather than section 10902 for reasons we have already explained. UTU-IL simply reiterates its position that leases should be approved under section 11323. Further discussion of that issue is not required.

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

It is ordered:

1. UTU-IL's petition for reconsideration is denied.

2. This decision will be effective on its service date.

By the Board, Chairman Morgan and Vice Chairman Owen.

Vernon A. Williams
Secretary

28521 SERVICE DATE - DECEMBER 31, 1997
EB

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 33323

CHICAGO RAIL LINK, L.L.C.--LEASE AND OPERATION EXEMPTION--
UNION PACIFIC RAILROAD COMPANY

Decided: December 17, 1997

On December 18, 1996, Chicago Rail Link, L.L.C. (CRL), a Class III rail carrier, filed a notice of exemption under 49 CFR 1150.41 to lease and operate approximately 8.5 miles of rail lines owned by Union Pacific Railroad Company (UP). The lines are comprised of track numbers 1 through 9, 110, 500, 501, 702, 710, and 711 in UP's Irondale Yard, Chicago, IL, east of Torrence Avenue between 117th Street and 122nd Street. The exemption became effective on December 25, 1996, and the transaction was consummated on January 2, 1997. Notice of the exemption was served and published on January 9, 1997 (62 FR 1357).

On January 13, 1997, Joseph C. Szabo, on behalf of United Transportation Union-Illinois Legislative Board (UTU-IL or petitioner), filed a petition to revoke the exemption, which petitioner supplemented on February 27, 1997. By a decision served May 28, 1997, the Board instituted a proceeding under 49 U.S.C. 10502(d) to consider UTU-IL's revocation request. Subsequently, in a decision served September 2, 1997 (the September 2 decision), we denied UTU-IL's petition to revoke the exemption.

On September 22, 1997, UTU-IL filed a petition for reconsideration, and, on October 10, 1997, CRL replied. The petition for reconsideration will be denied.

BACKGROUND

This proceeding involves issues of statutory interpretation. As relevant, in the ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (ICCTA), Congress established a new statutory section, 49 U.S.C. 10902 - Short line purchases by Class II and Class III rail carriers. Under section 10902, a Class II or Class III rail carrier "may acquire or operate an extended or additional rail line" only if the Board issues a certificate authorizing such activity. In Class Exem. for Acq. or Oper. under 49 U.S.C. 10902, 1 S.T.B. 95 (1996), aff'd D.C. Cir. No. 97-1057, United Transportation Union v. STB, unpublished decision of Nov. 7, 1997, acting pursuant to our authority under 49 U.S.C. 10502 to exempt rail carrier transportation from regulation, we established a new class exemption to apply to transactions in which Class III rail carriers acquire or operate additional rail properties. The new exemption procedures are set forth at 49 CFR Part 1150, Subpart E, sections 1150.41-1150.45. The notice of exemption that is the subject of this proceeding was filed and processed under the new rules.

Also relevant to this proceeding is the statutory provision at 49 U.S.C. 10906 setting forth exceptions from Board jurisdiction.[1] Section 10906 provides:

> Notwithstanding section 10901 and subchapter II of chapter 113 of this title [regulating carrier combinations[2]], and without the approval of the Board, a rail carrier providing transportation subject to the jurisdiction of the Board under this part may enter into arrangements for the joint ownership or joint use of spur, industrial, team, switching, or side tracks. The Board does not have authority under this chapter [Chapter 109-Licensing] over construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks.

In its petition to revoke, UTU-IL had argued that section 10902, and the Board's regulations thereunder, did not apply here because the subject track was "spur, industrial, team, switching, or side tracks" covered by the second provision of section 10906 and, therefore, the transaction was outside our jurisdiction. UTU-IL had further argued that section 10902 is not applicable because it covers the acquisition and operation of rail line, and the subject tracks do not constitute a line of railroad. Petitioner had also argued that, in any event, section 10902 did not embrace lease authority and the Board's class exemption did not cover leases. Finally, UTU-IL had contended that, if the transaction were to be regulated at all, it should have been regulated under section 11323 as a lease of rail property by a rail carrier.

In our September 2 decision, we found that UTU-IL's jurisdictional arguments lacked merit. We noted that, pursuant to the decision in Nicholson v. ICC, 711 F.2d 364 (D.C. Cir. 1983), cert. denied, 464 U.S. 1056 (1984), in determining whether a particular track segment is excepted from Board jurisdiction by section 10906, the ICC and the courts have focused on the intended use of the track. We noted, further, that pursuant to the decision in Brotherhood of Locomotive Eng'rs v. STB, 101 F.3d 718 (D.C. Cir. 1996) (BLE v. STB), the proper focus must be on the tenant railroad's use of the track as the controlling factor in determining the character of the track. Finally, we acknowledged that the courts have noted an important qualification to the tenant-use test. We referred to the decision in Texas & Pacific Railway Co. v. Gulf, Colorado & Santa Fe Railway Co., 270 U.S. 266 (1926) (Texas & Pacific), in which the Supreme Court looked beyond the immediate use of the track segment in question and examined the "purpose and effect" of its use.

Applying the law to the facts of this case, we concluded that, as to the tenant, CRL, the subject track was not "yard" or "switching" track excepted from agency jurisdiction under 49 U.S.C. 10906. We indicated that, by means of the lease transaction, CRL intended to extend its

---

[1] This section is substantially the same as its predecessor, former 49 U.S.C. 10907.

[2] Under 49 U.S.C. 11323 - Consolidation, merger, and acquisition of control, specified transactions may be carried out only with the approval and authorization of the Board. Among those is a rail carrier's lease of the property of another rail carrier. 49 U.S.C. 11323(a)(2).

operations to reach new customers as discussed in Texas & Pacific and, thus, the transaction contemplated "an extended or additional rail line" within the meaning of section 10902. We rejected UTU-IL's position that the words "rail line" in section 10902 required a "through line" or a line of any particular character or minimum length. We found it sufficient that CRL would be operating over new trackage to reach new customers. Finally, we concluded that lease transactions were embraced under section 10902 and were covered by the new class exemption.

DISCUSSION AND CONCLUSIONS

UTU-IL's petition for reconsideration is grounded in contentions that our September 2 decision involves material error. 49 CFR 1115.3(b)(2). As next discussed, we reject petitioner's contentions and will deny its petition for reconsideration.

First, UTU-IL argues that our decision erred in stating that UTU-IL claimed that the subject track is switching track. Petitioner asserts that its position throughout the three pleadings it filed was that the trackage is "spur, industrial, team, switching, or side tracks."

This argument is without merit. We note that UTU-IL referred to the subject trackage as "yard" track in its petition to revoke, as "spur, industrial, team, switching, or side tracks" in its supplement to its petition to revoke, and as "industrial trackage" in its reply to CRL's motion to strike. Notwithstanding the multiple characterizations, at page 3 of the September 2 decision, we did refer to UTU-IL's argument that the subject tracks are "spur, industrial, team, switching, or side tracks." We have stated that the jurisdictional status of track must be determined by its intended use, and that CRL's contemplated use of the subject track as "an extended or additional rail line" removes it from the exclusion of section 10906. The conclusion would be the same regardless of the specific characterization of the track with reference to the second provision of that section.

UTU-IL's second argument is that the Board materially erred in concluding that the trackage is a line of railroad. UTU contends that we erroneously relied on BLE v. STB to support our conclusion in this regard. Petitioner emphasizes that BLE v. STB involved the operations of two carriers over the same track, which was conceded to be a line of railroad. Moreover, the petitioner reiterates its position that, if the transaction is not excepted under section 10906, it is covered under section 11323 as a lease of property of another rail carrier.

These arguments also lack merit. As we noted in our September 2 decision, in BLE v. STB, the court adopted the holding that the jurisdictional status of track must be determined by its intended use. The court found solid support for our intended-use test. The Texas & Pacific qualification to the intended-use test, that we must look beyond the immediate use of the track segment in question and examine the "purpose and effect" of the transaction, also guided our conclusion that CRL intends to extend its operations to reach new customers and, thus, the transaction contemplates "an extended or additional rail line" within the meaning of section 10902. Thus, our conclusion that the track at issue is a line of railroad as to CRL is fully supported by past agency and court decisions and is a correct characterization of the status of the track. Nor does the

fact that CRL is acquiring the right to operate over the "extended or additional line of railroad" by lease rather than purchase of the entire ownership interest in the line require it to proceed under section 11323 rather than section 10902 for reasons we have already explained. UTU-IL simply reiterates its position that leases should be approved under section 11323. Further discussion of that issue is not required.

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

It is ordered:

1. UTU-IL's petition for reconsideration is denied.

2. This decision will be effective on its service date.

By the Board, Chairman Morgan and Vice Chairman Owen.

Vernon A. Williams
Secretary