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SERVICE DATE - NOVEMBER 6, 1998

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 33562

SOUTH CENTRAL FLORIDA EXPRESS, INC.--TRACKAGE RIGHTS EXEMPTION--  
FLORIDA EAST COAST RAILWAY COMPANY

Decided: November 3, 1998

On February 24, 1998, South Central Florida Express, Inc. (SCFE), a Class III rail carrier, filed a verified notice of exemption in this proceeding under 49 CFR 1180.2(d)(7) to acquire overhead trackage rights between milepost K-0.0, near Ft. Pierce, FL, and milepost K-1.50, and local trackage rights between milepost K-15.0 and milepost K-70.4, at or near Lake Harbor, FL, from Florida East Coast Railway (FEC or petitioner), a Class II rail carrier. The notice was served and published in the Federal Register (64 FR 11950) on March 11, 1998. The trackage rights became effective on March 2, 1998, subject to employee protective conditions imposed in Norfolk and Western Ry. Co.—Trackage Rights—BN, 354 I.C.C. 605 (1978), as modified in Mendocino Coast Ry., Inc. - Lease and Operate, 360 I.C.C. 653 (1980) (Norfolk & Western).

On September 21, 1998, FEC filed a petition to reopen the exemption. FEC asserts that there was a misunderstanding between SCFE's counsel and FEC's labor relations officers responsible for handling the labor relations aspects of the trackage rights arrangement. According to FEC, its labor relations officers were aware that the ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803, had limited the labor protection for employees adversely affected by Class II and Class III transactions to one year of protection, but their inexperience led them to assume that this meant one year of protection under Norfolk & Western, supra. As a result, the FEC officials evidently advised SCFE's counsel that FEC understood that Norfolk & Western would apply to the trackage rights. FEC states that SCFE's counsel understood erroneously that FEC was telling him that FEC had reached an agreement with the unions to apply Norfolk & Western to the trackage rights. FEC states that there was, in fact, no agreement with FEC's unions that Norfolk & Western would apply to the transaction.

FEC states that it gave the unions more than 20 days' advance notice of the trackage rights arrangement concerning potentially affected employees and that it did not state that the employee protection conditions imposed in Norfolk & Western, supra, would apply.<sup>1</sup> FEC states that one employee was displaced due to the trackage rights arrangement. FEC says that this employee had ample seniority entitling her to take another position but that she elected not to do so, thus forfeiting any labor protection. FEC adds that this employee remains in furloughed status.

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<sup>1</sup> Exhibit A of petition.

FEC states that the labor protection error was detected after consultation with labor relations officials of another carrier, which prompted FEC to file its petition to reopen. FEC further states that it should not be required to pay labor protection that Congress determined a carrier in its situation cannot reasonably afford. FEC argues that employees should not receive a windfall because of a factual misunderstanding that has not harmed and will not harm any employees.

On October 2, 1998, the United Transportation Union (UTU) filed a reply in opposition to FEC's petition to reopen. UTU maintains that FEC's request for relief is improper because the material error referenced in 49 CFR 1115.4 pertains to errors by the Board and not to errors by an applicant railroad. UTU also has stated that, because FEC did not elect a one year severance pay arrangement, the labor protection arrangements under 49 U.S.C. 11326(a) would apply.<sup>2</sup> Finally, UTU attacks FEC's claim that the alleged error is material by questioning FEC's assertion that it will have to pay substantially more money to affected employees than Congress determined that a Class II carrier should pay in a transaction with a Class III carrier, when it also asserts that no protected employees have been harmed by the erroneous statement in the verified notice of exemption.

On October 13, 1998, FEC filed a verified emergency motion for stay of arbitration. Action on this filing is moot because the labor protection conditions as modified by this decision do not require an implementing agreement.

Also on October 13, 1998, FEC filed a reply to UTU's reply in opposition to its verified petition to reopen; a motion for leave to file a reply to UTU's reply in opposition; and a certificate of service. On October 15, 1998, UTU filed in opposition to FEC's verified emergency motion for stay of arbitration.

#### DISCUSSION AND CONCLUSIONS

We may, on our own initiative, or on a party's petition, reopen a proceeding because of material error, new evidence, or substantially changed circumstances. See 49 CFR 1115.4. FEC states that its petition to reopen meets all of the legal requirements for material error. Because FEC does not allege new evidence or changed circumstances, we need not and will not address those criteria.

FEC has shown that the Board's notice of exemption that relied on erroneous information in the verified notice of exemption in imposing labor protection contained material error. Under 49 U.S.C. 11326(b), labor protection for this transaction is limited to one year of severance pay unless the parties agree to other terms. Based on the record now before us, there seems to have been no

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<sup>2</sup> UTU initially relied here on a misprint of the labor protection conditions described in the 1996 version of the United States Code Annotated under 49 U.S.C. 11326(b), which included an election provision that was never enacted.

agreement on terms other than those established by the statute. Under these circumstances, we have no authority to impose terms beyond those in the statute and we erred in doing so. We will grant the petition to reopen.

This action 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 granted.
2. The verified emergency motion for stay of arbitration is moot.
3. Upon reconsideration, the notice served and published on March 11, 1998, exempting SCFE's trackage rights over FEC's rail line is modified to the extent necessary to impose the appropriate labor protective condition as follows:

As a condition to this exemption, any employees affected by the trackage rights will be protected by the labor protection arrangements provided by 49 U.S.C. 11326(b), as explained in Wisconsin Central Ltd.—Acquisition Exemption—Lines of Union Pacific Railroad Company, STB Finance Docket No. 33116 (STB served Nov. 27, 1996), appeal pending in Association of American Railroads et al. v. STB, D.C. Cir. No. 97-1384, argued Oct. 1, 1998.

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

By the Board, Chairman Morgan and Vice Chairman Owen.

Vernon A. Williams  
Secretary