

20411  
EB

SERVICE DATE - NOVEMBER 20,1996

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 32896

KANSAS CITY TERMINAL RAILWAY COMPANY AND  
THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY--  
CONTRACT TO OPERATE EXEMPTION--IN KANSAS CITY, MO

Decided: November 6, 1996

On April 5, 1996, the Kansas City Terminal Railway Company (KCT) and The Atchison, Topeka and Santa Fe Railway Company (Santa Fe) filed a joint petition pursuant to 49 U.S.C. 10502(a) for an exemption from the requirements of 49 U.S.C. 11323 to enter into a joint contract for Santa Fe to operate KCT's facilities for the benefit of the owners of KCT. Petitioners also seek an exemption from the Surface Transportation Board's (Board) environmental and historic reporting requirements. KCT is a Class III terminal railroad and Santa Fe is a Class I railroad. The United Transportation Union requests the imposition of labor protective conditions.

On June 10, 1996, Kansas City Southern Railway Company (KCS) filed a motion to hold the petition for exemption in abeyance pending resolution of a contract dispute between it and petitioners in the Circuit Court of Clay County, MO. On June 27, 1996, KCT and Santa Fe filed an unopposed motion for an extension of time until July 24, 1996, in which to answer the motion by KCS. The extension of time was granted by decision served July 8, 1996, and KCT and Santa Fe filed a timely response to the motion on July 24, 1996. We will grant the motion to hold this proceeding in abeyance.

BACKGROUND

KCT was formed in 1906 by a group of railroads serving Kansas City, MO, to construct the Kansas City, Missouri, Union Station and railroad tracks connecting the various railroads that serve Kansas City. Because of changes in the railroads' ownership interests over the years, the stock in KCT is now owned by Santa Fe, KCS, Burlington Northern, Inc., Union Pacific Railroad Company, Gateway Western Railway Company (GWR), Norfolk Southern Railway Company, Chicago and North Western Transportation Company, Southern Pacific Transportation Company, and Soo Line Railroad Company.

In 1909, the founding railroads entered into an operating agreement which, with amendments, controls the operations of KCT. KCS was not one of the original railroads, but became a party to the operating agreement by an amendment to the agreement in 1910.

Initially, KCT performed train operations over its tracks pursuant to the agreement, including the transfer of freight cars between the railroads and the service of local shippers located on KCT tracks. These operations ceased in 1992 when KCT leased

its joint tracks to Santa Fe and its switch tracks<sup>1</sup> to GWR. Those carriers assumed responsibility for the operation and maintenance of those tracks.<sup>2</sup> As a result, KCT no longer operates trains or maintains its track.

KCT states that it has continued to dispatch trains over its joint tracks, and to perform accounting and clerical functions relating to the operating agreement between its owners and the leases and agreements to which KCT is party with other carriers. KCT has now determined, however, that it does not make economic sense for it to continue to perform its limited rail-related functions. It believes that, under this proposal, it will realize significant cost savings and provide more reliable operations to its owners. For this reason, KCT has decided to contract with Santa Fe to operate KCT.

Under the proposed contract, Santa Fe would perform all remaining functions now being performed by KCT, including dispatching services and general and administrative functions (including accounting and clerical functions). KCT does not, however, propose to discontinue its common carrier obligation or cease to exist as a corporate entity. KCT will continue to supervise and monitor Santa Fe's performance and hold title to KCT assets for its owners.

#### THE MOTION TO HOLD IN ABEYANCE

KCS contends that the original intent of the KCT operating agreement was to place responsibility for the dispatching of trains within the terminal facilities with a neutral third party. According to KCS, responsibility for dispatching is not a duty that is assignable or delegable by KCT to Santa Fe or any of the other owner railroads without the consent of KCS and the other owners. It notes that such consent has not been obtained here.

KCS is concerned about the potential for discrimination against it at Sheffield Junction, where the KCS-Santa Fe main lines cross, if Santa Fe is allowed to handle the dispatching of trains. KCS notes that, notwithstanding its opposition to the contract and to the KCT and Santa Fe petition for exemption, KCT and Santa Fe have proceeded. KCS avers that the rights and obligations of KCT, Santa Fe and KCS are governed by the operating agreement and are a matter of private contract interpretation under Missouri law. As such, KCS indicates that it filed a Petition for Declaratory Judgment and Injunction to resolve the contract dispute in the Missouri State Court on June 6, 1996.

KCS argues that the Board should hold the petition for exemption in abeyance pending the ruling of the court on matters of contract interpretation to avoid "piecemeal" litigation and

---

<sup>1</sup> Joint tracks connect the owning railroads to each other and are used jointly to move their trains through the Kansas City area. Switch tracks are KCT tracks used to serve those industries in the area located on KCT.

<sup>2</sup> The ICC exempted these lease transactions in The Atchison, Topeka and Santa Fe Ry. Co. and Gateway Western Ry. Co.--Lease Exemption--Kansas City Terminal Ry. Co., Finance Docket No. 32238 (ICC served Feb 24, 1994).

inconsistent rulings. According to KCS, even if the Board were to issue the exemption authority, the contract could not be consummated until the state court ruled on the declaratory judgment. If the Board denies this motion, KCS asks that the Board: (1) request additional information from KCT and Santa Fe regarding the operational impacts of the proposed transaction; or (2) refrain from issuing a decision until KCS conducts discovery and submits a pleading addressing the merits of the petition for exemption.

KCT and Santa Fe respond that Board action on their petition is not premature as the Board has exclusive and plenary jurisdiction over the joint petition, the proposed contract to operate and the operating agreement. Petitioners further argue that the contract issues raised here are, in fact, within the jurisdiction of the Board. Contrary to KCS' arguments, petitioners contend that the proposed contract does not violate the operating agreement. Specifically, KCT and Santa Fe argue that nothing in the operating agreement requires that KCT actually perform the dispatching function, nor does any provision of the agreement forbid KCT from delegating a function to another firm, including one of its owners. Petitioners acknowledge that the agreement does specify that KCT "shall have the exclusive management and control of the operation, maintenance, repair and renewal of the terminal facilities . . . ." Petitioners point out, however, that under the proposed contract, KCT retains exclusive control over dispatching through its oversight of Santa Fe.

Petitioners add that, even if the court were to interpret the operating agreement to require KCS' consent to the proposed contract, the Board has authority to override such an impediment. Notwithstanding this authority, KCT and Santa Fe recognize that the Board's preference in the past has been to defer consideration of contract issues to a court in the first instance. For this reason, petitioners have decided to initially litigate the contract issues before the state court and to have regulatory issues resolved by the Board.

Finally, KCT and Santa Fe also argue that postponing consideration of the joint petition will delay unnecessarily the implementation of the proposed contract. According to petitioners, even if they prevail in the court action, they could not implement the proposed contract without Board action. KCT and Santa Fe do not believe that they should be forced to wait until after the conclusion of the state court litigation to start the regulatory approval process.

#### DISCUSSION AND CONCLUSIONS

The KCS motion will be granted. Petitioners note that this agency has primary jurisdiction over this transaction. But a factor in determining whether the proposed lease is in the public interest is the question of whether the lease would abrogate an existing contractual agreement. The Board has the authority to override such an impediment at 49 U.S.C. 11321(a). But a predicate to the exercise of such authority is a determination that such an impediment exists. The petitioners in fact argue that no such impediment exists and that the operating agreement does not bar the proposed contract between KCT and Santa Fe.

KCS asserts, and the petitioners do not dispute, that the operating agreement is to be interpreted under Missouri law. A court that applies Missouri law is better able than this agency to interpret the terms of the operating agreement. After the court interprets the agreement, we will be better able to apply our statutory standard to evaluate the proposed transaction.

Should the court find that there is no contractual impediment to Santa Fe's and KCT's proposed transaction, we can proceed to address the merits of the proposed exemption. Should the court find that there is a contractual impediment, if the petitioners wish to argue that the transaction should be exempted notwithstanding the contract, we can address those arguments at that time.

Holding the petition in abeyance would maintain the status quo without harming employees or the affected railroads, as KCT will continue to provide dispatching services as in the past. Under the circumstances it appears that the best course of action is to hold up action on the matter before the Board for now, pending action by the court. The parties shall immediately inform the Board of all developments related to the state court action.

It is ordered:

1. The motion by KCS to hold the petition for exemption in abeyance is granted.
2. The parties must inform the Board immediately of any and all developments in the state court case.
3. This decision is effective on its service date.

By the Board, Chairman Morgan, Vice Chairman Simmons, and Commissioner Owen.

Vernon A. Williams  
Secretary