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SERVICE DATE – SEPTEMBER 26, 2011

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 35520

THE NEW BRUNSWICK RAILWAY COMPANY—CONTINUANCE IN CONTROL  
EXEMPTION—MAINE NORTHERN RAILWAY COMPANY

Docket No. FD 35518

MAINE NORTHERN RAILWAY COMPANY—TRACKAGE RIGHTS EXEMPTION—  
MONTREAL, MAINE & ATLANTIC RAILWAY, LTD.

Docket No. FD 35519

MAINE NORTHERN RAILWAY COMPANY—TRACKAGE RIGHTS EXEMPTION—  
MONTREAL, MAINE & ATLANTIC RAILWAY, LTD.

Docket No. FD 35521

MAINE NORTHERN RAILWAY COMPANY—MODIFIED RAIL CERTIFICATE—IN  
AROOSTOOK AND PENOBSCOT COUNTIES, ME.

Digest:<sup>1</sup> These proceedings stem from the transfer of 233 miles of rail line from Montreal, Maine & Atlantic, Ltd. to the State of Maine, and the State's choice of a new operator for the line, Maine Northern Railway Company (MNRC). MNRC is owned by Eastern Maine Railway (EMR), a subsidiary of The New Brunswick Railway Company. In this decision, the Board grants authority to EMR to continue in control of MNRC.

Decided: September 20, 2011

BACKGROUND

These proceedings stem from the transfer of 233 miles of rail line in Northern Maine from Montreal, Maine & Atlantic Railway, Ltd. (MMA) to the State of Maine. Also involved is

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<sup>1</sup> 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).

the State's choice of Maine Northern Railway Company (MNRC), a noncarrier, to operate in the place of the MMA.

To prepare for MNRC's operations on the line, MNRC's parent company, The New Brunswick Railway Company (NBRC), a noncarrier, filed a petition on May 20, 2011, in Docket No. FD 35520. That petition sought an exemption under 49 U.S.C. § 10502 from our prior approval requirements to continue in control of its existing Class III rail carrier subsidiary, Eastern Maine Railway (EMR), and MNRC, once MNRC became a Class III carrier. In a decision served on June 3, 2011, the Board granted NBRC the requested control authority. In its June 3 decision, the Board also expedited the effective date of trackage rights filed under notices of exemption in Docket Nos. FD 35518 and 35519, in order to promote efficient operations by eliminating extra interchanges for MNRC traffic and to enhance MNRC coordination of its operations over MMA lines. On June 6, 2011, MNRC filed a modified rail certificate to become a Class III carrier in Docket No. FD 35521, pursuant to 49 C.F.R. §§ 1150.21-.24. MNRC began the authorized operations on June 15, 2011.

On July 14, 2011, MNRC, EMR, and NBRC filed a petition asking that the Board accept a correction to the record in Docket Nos. FD 35518, FD 35519, FD 35520, and FD 35521. The petitioners state that they erred in describing the control transaction in the filings on which the Board issued its June 3 decision. The parties explain that NBRC and MNRC had previously stated that NBRC would wholly own MNRC in the same manner that NBRC wholly owns EMR. However, under the actual corporate structure created by the control transaction, NBRC wholly owns EMR, which in turn wholly owns MNRC. The parties assert that the description initially provided to the Board was made in good faith, and that the mistake resulted from internal miscommunications and inadvertence, and that all other facts remain as originally described. Petitioners assert that no prejudice to any party will result from the inaccurate description of corporate structure because the relevant parties and purpose of these transactions, as well as the underlying operations, have not changed. Accordingly, the parties ask that the Board accept the correction related to corporate structure and grant any necessary retroactive approval or other appropriate relief.

## DISCUSSION AND CONCLUSIONS

The petition is accepted. We authorized the transaction put before us in the June 3 decision, and we will treat the new filing as a petition for supplemental authority. As discussed below, we will exempt EMR from the prior approval requirements of 49 U.S.C. §§ 11323-25 pursuant to our authority at 49 U.S.C. § 10502(a), so that EMR may continue in control of MNRC.

The acquisition of control of a rail carrier by any number of rail carriers requires prior approval by the Board under 49 U.S.C. § 11323(a)(3). Under 49 U.S.C. § 10502(a), however, the Board must exempt a transaction or a service from regulation if it finds that: (1) regulation is not necessary to carry out the rail transportation policy (RTP) of 49 U.S.C. § 10101; and (2) either (a) the transaction or service is limited in scope, or (b) regulation is not needed to protect shippers from the abuse of market power. For most of the reasons we articulated in the

June 3 decision approving the exemption for NBRC, we find that granting EMR an exemption under § 10502 is appropriate. We review these below.

An exemption for EMR from the prior approval requirements of 49 U.S.C. §§ 11323-25 is consistent with the standards of 49 U.S.C. § 10502. We already have enough information in the record to know that granting EMR control authority will allow MNRC to continue to provide service to the shippers on the line, and that detailed scrutiny through an application for review is therefore not necessary to carry out the RTP. Because we can conclude on this record that continued service will be in the public interest, an exemption also promotes the RTP by minimizing the need for Federal regulatory control over the transaction, ensuring that a sound rail transportation system will continue to meet the needs of the shipping public, and reducing regulatory barriers to entry, in furtherance of 49 U.S.C. §§ 10101(2), (4), and (7). In addition, other aspects of the RTP will not be adversely affected.

Regulation of this transaction is not needed to protect shippers from an abuse of market power. As noted in the June 3 decision, the State and all of the commenting shippers support the new operations of MNRC, and granting EMR control authority will ensure that the new operations continue. Moreover, the revised ownership structure should not lessen competition in Northern Maine. In our prior decision, we found that having MNRC, EMR, and NBRC in the same corporate family would not raise competitive concerns because MNRC's entry would result in continuation of service that would otherwise be lost. Although the corporate structure is not exactly what we had envisioned, MNRC will continue to remain in the same corporate family, although it will now be indirectly, rather than directly, controlled by NBRC. In either arrangement, MNRC will continue to preserve rail service over a line previously approved for abandonment, supporting our conclusion that regulation under 49 U.S.C. §§ 11323-25 is not necessary. Shippers will have virtually the same operational access to transportation services under either structure. Given our finding regarding the probable effect of the transaction on market power, we need not determine whether the transaction is limited in scope under § 10502(a).

While EMR has possessed corporate control over MNRC since June, it is nevertheless appropriate to issue the requested exemption here.<sup>2</sup> The petition is unopposed, and it appears that petitioners' inaccurate description of the proposed control transaction was inadvertent. The record shows an absence of any intent to flout the law, or of a deliberate or planned violation. See Kenosha Auto Transport Corp.—Control—U.S.A.C. Transport, Inc., 85 M.C.C. 731, 736 (1960). Moreover, there is no evidence of prejudice to any party as a result of the incorrect corporate structure description. The relevant parties, NBRC, MNRC, and EMR, have not changed. Similarly, the purpose of the transactions at issue in these dockets was properly

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<sup>2</sup> Petitioners seek retroactive or nunc pro tunc approval of EMR's control of MNRC. The Board generally disfavors retroactive grants of authority. It is not necessary here because, given the circumstances presented, the Board does not intend to pursue an enforcement action against the petitioners for previously unauthorized control. See David W. Wulfson—Control Exemption—Clarendon & Pittsford R.R., FD 33607 (STB served Aug. 20, 1998).

disclosed and remains unchanged, and approved operations thereunder remain virtually unchanged.

Under 49 U.S.C. § 10502(g), the Board may not use its exemption authority to relieve a rail carrier of its statutory obligation to protect the interests of its employees. Section 11326(c), however, does not provide for labor protection for transactions under §§ 11324 and 11325 that involve only Class III rail carriers. Accordingly, the Board may not impose labor protective conditions here, because all the carriers involved are Class III rail carriers.

The acquisition of control is exempt from environmental reporting requirements under 49 C.F.R. § 1105.6(c)(2)(i) because it will not result in any significant change in carrier operations. Similarly, the transaction is exempt from the historic reporting requirements under 49 C.F.R. § 1105.8(b)(3) because it will not substantially change the level of maintenance of railroad properties.

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 is accepted.
2. Under 49 U.S.C. § 10502, the Board exempts from the prior approval requirements of 49 U.S.C. §§ 11323-25 EMR's continuance in control of MNRC.
3. Notice in the above dockets will be published in the Federal Register on September 26, 2011.
4. EMR's exemption will be effective on October 26, 2011. Petitions for stay must be filed by October 6, 2011, and petitions for reconsideration must be filed by October 17, 2011.

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