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SERVICE DATE - AUGUST 7, 2001

SURFACE TRANSPORTATION BOARD<sup>1</sup>

DECISION

Finance Docket No. 32772

THE NEW YORK, SUSQUEHANNA AND WESTERN RAILWAY  
CORPORATION--TRackage RIGHTS EXEMPTION--ONONDAGA COUNTY  
INDUSTRIAL DEVELOPMENT AGENCY AND CONSOLIDATED RAIL CORPORATION

Finance Docket No. 32288<sup>2</sup>

CONSOLIDATED RAIL CORPORATION--TRackage RIGHTS EXEMPTION--  
ONONDAGA COUNTY INDUSTRIAL DEVELOPMENT AGENCY

Decided: August 2, 2001

On August 31, 1995, in Finance Docket No. 32772, The New York, Susquehanna and Western Railway Corporation (NYS&W) filed a notice of exemption under 49 CFR 1180.2(d)(7) to acquire by assignment from Consolidated Rail Corporation (Conrail) trackage rights over approximately 10 miles of the Onondaga County Industrial Development Agency (OCIDA) rail line, known as the Jamesville Cluster,<sup>3</sup> in Onondaga County, NY. Conrail was authorized to

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<sup>1</sup> The ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (ICCTA), abolished the Interstate Commerce Commission (ICC) and transferred certain functions and proceedings to the Surface Transportation Board (Board) effective January 1, 1996. Section 204(b)(1) of the ICCTA provides, in general, that proceedings pending with the ICC on the effective date of that legislation shall be decided under the law in effect prior to January 1, 1996, insofar as they involve functions retained by the ICCTA. This decision relates to a proceeding that was pending with the ICC prior to January 1, 1996, and to functions that are subject to the Board's jurisdiction pursuant to 49 U.S.C. 11323. Therefore, this decision applies the law in effect prior to the ICCTA, and citations are to the former sections of the statute and the Code of Federal Regulations, unless otherwise indicated.

<sup>2</sup> These proceedings are not consolidated but are being considered in a single decision for administrative convenience.

<sup>3</sup> The Jamesville Cluster includes: (1) the Jamesville Industrial Track from approximately milepost 264.3 to approximately milepost 272.0; (2) the Lake Industrial Track from approximately milepost 272.0 to approximately milepost 273.5 (including the Saltland Spur); and (3) Track 7 of the Chicago Line from approximately milepost 292.0 to approximately milepost 292.8.

acquire the trackage rights in Finance Docket No. 32288,<sup>4</sup> when it sold the line to OCIDA in 1993.<sup>5</sup> The NYS&W notice in Finance Docket No. 32772 was served and published in the Federal Register on September 20, 1995 (60 FR 48725). The NYS&W exemption authority became effective on September 7, 1995,<sup>6</sup> and the transaction was consummated on September 8, 1995.

On September 6, 1995, Samuel J. Nasca, New York State Legislative Director for the United Transportation Union-New York State Legislative Board (UTU-NY), filed a petition to reject the NYS&W notice of exemption, or, in the alternative, to stay that exemption, and to revoke both the NYS&W exemption (in Finance Docket No. 32772) and the Conrail exemption (in Finance Docket No. 32288). On September 15, 1995, the United Transportation Union (UTU), the national union, also filed a petition to revoke the NYS&W exemption. After agency publication of the NYS&W notice, UTU-NY filed an appeal on September 27, 1995, to that action and renewed its request to reject or stay the NYS&W notice of exemption. On October 13, 1995, Conrail and NYS&W (collectively, respondents) jointly filed a reply to the petitions to revoke.<sup>7</sup> We will deny the petitions.

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<sup>4</sup> See Consolidated Rail Corporation--Trackage Rights Exemption--Onondaga County Industrial Development Agency, Finance Docket No. 32288 (ICC served May 10, 1993). Labor protective conditions were imposed on this transaction as provided 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).

<sup>5</sup> See Onondaga County Industrial Development Agency--Acquisition and Operation Exemption--Lines of Consolidated Rail Corporation, Finance Docket No. 32287 (ICC served May 19, 1993), petition to revoke denied (ICC served July 7, 1994) (Onondaga).

<sup>6</sup> See 49 CFR 1180.4(g).

<sup>7</sup> The time for filing a reply was extended to October 16, 1995, by a decision served on September 29, 1995.

## PRELIMINARY MATTER

On November 3, 1995, UTU-NY filed a motion to strike a portion of respondents' reply statement<sup>8</sup> on the grounds that it is "self-serving" and "misleading." According to UTU-NY, OCIDA was never responsible for, and did not arrange for, passenger operations over the line and the plan always was for NYS&W to perform the service. Except for occasional excursions, UTU-NY submits that all of the passenger service on the line is performed within the City of Syracuse by NYS&W through a subsidiary.

On November 24, 1995, respondents replied to the motion to strike, arguing that it is groundless and nothing more than a reply to a reply in violation of 49 CFR 1104.13(c). Moreover, respondents submit that UTU-NY's version of the facts is not inconsistent with the challenged text. We agree. In any event, the motion to strike goes more to the weight to be accorded respondents' statement rather than its admissibility. Accordingly, the motion will be denied.

## DISCUSSION AND CONCLUSIONS

Appeal of acceptance of the NYS&W notice. UTU-NY argues that the NYS&W notice of exemption should have been stayed or rejected. According to UTU-NY, the Director of the Office of Proceedings (Director), in the September 20, 1995 decision, erred in finding that the petition for stay was received too late to be considered, and that the notice satisfied the class exemption provisions of 49 CFR 1180.2(d).<sup>9</sup> UTU-NY also argues that the Director was without authority to rule on whether the notice should have been rejected because this determination was a substantive matter that required action by the Commissioners of the ICC.

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<sup>8</sup> The text UTU-NY seeks to have stricken appears on page 2 of respondents' reply as follows:

The purpose of these transactions was to provide for rail passenger operations on the Cluster and to preserve rail freight service and jobs. By acquiring the Cluster and granting trackage rights to Conrail for freight service, OCIDA was able to arrange for rail passenger operations, and by relieving the freight carrier of the burdens of ownership, including local real estate tax obligations, to enhance the preservation of freight service.

<sup>9</sup> UTU-NY submits that the transaction was not scheduled to be consummated until September 8, 1995, and therefore, it could have been stayed anytime before it was consummated. In the alternative, UTU-NY submits that the notice should have been rejected because OCIDA is not a carrier.

Although the petition for stay was received at the ICC on September 6, 1995, it was not docketed until after the exemption became effective on September 7, 1995. Thus, it was too late to stay the effective date of the exemption. And while the ICC may have had the authority, in appropriate circumstances, to stay the consummation of a transaction, no showing was made in the petition that a stay was warranted under the applicable criteria. See Washington Metropolitan Area Transit Comm. v. Holiday Tours, Inc., 559 F.2d 841 (D.C. Cir. 1977). Therefore, even if the petition were timely, it did not warrant a stay of this transaction.

Moreover, the Director acted properly in publishing the notice, after finding that it appeared to meet all of the requirements of the trackage rights class exemption at 49 CFR 1180.2(d). We will address UTU-NY's argument that OCIDA is not a rail carrier and, therefore, is disqualified from using the trackage rights class exemption, in the section on petitions to revoke, infra.

Petitions to revoke. Under 49 U.S.C. 10505(d) [now 49 U.S.C. 10502(d)], we may revoke an exemption if we find that regulation is necessary to carry out the rail transportation policy (RTP) of 49 U.S.C. 10101a [now 49 U.S.C. 10101].<sup>10</sup> Labor interests may raise issues concerning the appropriate level of labor protection in a petition for revocation. See 49 U.S.C. 10505(g)(2) [now 49 U.S.C. 10502(g)]; Simmons v. I.C.C., 900 F.2d 1023 (7th Cir. 1990). To the extent that a petitioner wishes to challenge the bona fides of a transaction, we retain the right to review the transaction to protect the integrity of our processes. Minnesota Comm. Ry., Inc.--Trackage Exempt.--BN R.R. Co., 8 I.C.C.2d 31 (1991) (Minnesota). However, the petitioner seeking to revoke an exemption must meet its burden of proof by articulating reasonable, specific concerns to satisfy the revocation criteria. Wisconsin Central Ltd.--Exemption Acquisition and Operation--Certain Lines of Soo Line Railroad Company, Finance Docket No. 31102 (ICC served July 28, 1988); Minnesota, 8 I.C.C.2d at 35.

In its petition to revoke, UTU-NY characterizes the assignment of trackage rights in Finance Docket No. 32772 as a transfer of operation of the line from Conrail to NYS&W that is not included within the class exemption for trackage rights adopted in Railroad Consolidation Procedures, 1 I.C.C.2d 270 (1985). According to UTU-NY, in order for there to be valid trackage rights, both parties to the arrangement must be carriers. UTU-NY argues that OCIDA is not a carrier because it has never operated the line.<sup>11</sup> Therefore, according to UTU-NY, OCIDA

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<sup>10</sup> Also, if a notice invoking an exemption contains false or misleading information, we may summarily revoke the exemption. 49 CFR 1180.4(g)(1)(ii).

<sup>11</sup> UTU-NY cites two statutory provisions to support its argument: (1) 49 U.S.C. 11343(a)(6) [now 49 U.S.C. 11323(a)(6)], which provides for "trackage rights over . . . a railroad line . . . owned or operated by another rail carrier;" and (2) 49 U.S.C. 10102(22) [now 49 U.S.C.

(continued...)

could not grant trackage rights to Conrail in Finance Docket No. 32288, and it seeks to have those rights revoked here. UTU-NY appears to be arguing alternatively that, if Conrail acquired valid trackage rights, it will cease to be a carrier as to this line after the assignment and, therefore, the trackage rights to NYS&W must fail as well because one of the two parties to the arrangement is not a carrier, citing Railroad Consolidation Procedures, 1 I.C.C.2d at 270, n.1.

UTU-NY's argument that OCIDA is not a carrier (and, therefore, could not grant trackage rights to Conrail) was already addressed by the ICC in Onondaga, see supra note 5, in response to a petition to revoke filed by the Brotherhood of Locomotive Engineers (BLE). BLE had challenged the acquisition and operation exemption because OCIDA would not be operating the line and, at a future date, intended to assign the operating rights to a third party noncarrier thereby, according to BLE, avoiding labor protection for Conrail employees. The ICC, however, specifically found that OCIDA had assumed the common carrier obligation, thus providing the people who rely on this service another entity—in this case a local government—on which they might depend. The ICC also noted the related proceeding, Finance Docket No. 32288, wherein OCIDA granted trackage rights to Conrail to conduct exclusive freight operations and held that any subsequent change in this trackage rights arrangement, including any future Conrail discontinuance of service over the lines, would require ICC action through the exemption or application procedures, where labor protective conditions would be imposed. As Conrail notes in its reply, appropriate labor protection was imposed in Finance Docket No. 32772 to protect its employees. We note that we have also addressed the same arguments that UTU-NY raises here and have denied revocation. See, e.g., Soo Line Railroad Company--Trackage Rights Exemption--CMC Heartland Partners, Finance Docket No. 32847 (STB served Mar. 11, 1997).

Turning to UTU's petition to revoke the NYS&W transaction in Finance Docket No. 32772, UTU argues that the sole purpose of the trackage rights assignment was to avoid collective bargaining obligations under the Railway Labor Act regarding the transfer of work from Conrail employees to NYS&W employees.

According to UTU, Conrail had assured its employees that they would continue to perform the work on the line when it sold the line to OCIDA, and, in support, submits two 1992 letters addressing the 1993 sale of the line to OCIDA. In these letters, Conrail stated that it would have "perpetual freight operating rights for all present and future customers" and that "no

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<sup>11</sup>(...continued)

10102(5)], which defines a rail carrier as "a person providing railroad transportation for compensation." It also cites Alabama Southern R. Co. Inc., Et Al—Exemption, 1 I.C.C.2d 298, 299 (1984), wherein the ICC overruled prior decisions holding that "a new company acquiring a line but which has not yet commenced operations is a carrier for the purposes of section 11343 jurisdiction because it will 'become a carrier. . . .'"

other carrier will be permitted to provide rail freight service on these tracks,”<sup>12</sup> and NYS&W stated that Conrail will “retain permanent rights to provide freight service on the line to all current and potential customers.”<sup>13</sup> UTU alleges that, notwithstanding these assurances, NYS&W workers began operating trains over this track without ICC authorization. UTU requested an explanation from Conrail<sup>14</sup> and was told that the operations were for the purpose of interchange only.<sup>15</sup> UTU asserts that it was only after Conrail received complaints from its UTU-represented employees about the loss of work to NYS&W workers that respondents sought ICC authorization for the assignment of trackage rights. UTU contends that the carriers must prove that the purpose of the transaction is to secure to the public some transportation benefit originating from the transaction itself and not from a modification of a collective bargaining agreement before the ICC could permit such a modification and that the carriers have not done so here.

Respondents deny UTU’s allegation that the assignment of trackage rights was motivated by a desire to avoid Conrail’s labor obligations. Rather, according to respondents, Conrail’s assignment of trackage rights to NYS&W was prompted by changing circumstances. The purpose of the assignment, as stated in the verified notice of exemption in Finance Docket No. 32772, was to improve operating economies and service to local shippers.

Because UTU has not shown that the assignment of trackage rights is not in the public interest, and because the standard labor protective conditions for trackage rights already have been imposed, UTU has failed to demonstrate that the exemption should be revoked. And, to the

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<sup>12</sup> See Letter dated April 15, 1992, from R.E. Swert, Conrail’s Vice President for Labor Relations, to C.D. Winebrenner, General Chairperson, UTU (C&T), attached as Exhibit A to UTU’s petition.

<sup>13</sup> See Letter dated April 29, 1992, from Walter Rich, President and Chief Executive Officer of NYS&W, to the Honorable Michael Bragman, New York State Assembly, attached as Exhibit B to UTU’s petition.

<sup>14</sup> See Letter from UTU’s General Committee of Adjustment to Conrail, dated August 15, 1995, attached to UTU’s petition as Exhibit C.

<sup>15</sup> Conrail responded to UTU in a letter written by Mr. J. F. Glass, Conrail’s Senior Director—Labor Relations, dated September 8, 1995, which was attached to UTU’s petition as Exhibit D. In addition to stating that NYS&W operations over the Jamesville Industrial Track were for purposes of interchange only and that Conrail continued to be the only provider of freight service over the line, Conrail stated that it was in the process of transferring its exclusive right to operate freight service over the line, and its obligation to repurchase the track, to NYS&W.

extent that the matter has been raised in these proceedings, we find that the respondents' showing of transportation benefits is adequate and that there has been no demonstration of any harm to employees.

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

It is ordered:

1. UTU-NY's motion to strike is denied.
2. UTU-NY's appeal of the Director's denial of its petition to reject or stay the notice of exemption in Finance Docket No. 32772 is denied and its petition to revoke the exemptions in Finance Docket No. 32772 and Finance Docket No. 32288 is denied.
3. UTU's petition to revoke the exemption in Finance Docket No. 32772 is denied.
4. This decision is effective on the date of service.

By the Board, Chairman Morgan, Vice Chairman Clyburn, and Commissioner Burkes.

Vernon A. Williams  
Secretary