

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 35873

NORFOLK SOUTHERN RAILWAY COMPANY—ACQUISITION AND OPERATION—
CERTAIN RAIL LINES OF THE DELAWARE AND HUDSON RAILWAY COMPANY,
INC.

Digest:¹ The Board denies the request of Samuel J. Nasca, on behalf of SMART/Transportation Division, New York Legislative Board, for a stay of the effective date of the Board's Decision No. 6 in this proceeding.

Decision No. 7

Decided: June 12, 2015

On November 17, 2014, Norfolk Southern Railway Company (NSR or Applicant), a Class I railroad, filed an application seeking Surface Transportation Board (Board) approval under 49 U.S.C. §§ 11323-25 of NSR's acquisition and operation of 282.55 miles of rail line owned by Delaware and Hudson Railway Company, Inc. (D&H). With that application, NSR also filed two notices of exemption to modify existing trackage rights agreements between NSR and D&H. The Board found the transaction to be in the public interest and granted NSR's application in a decision served May 15, 2015, subject to certain conditions (Decision No. 6). On June 4, 2015, Samuel J. Nasca, on behalf of SMART/Transportation Division, New York Legislative Board (SMART/TD-NY or Petitioner), filed a petition for reconsideration of Decision No. 6 and a petition requesting that the Board stay the effectiveness of Decision No. 6 pending the disposition of its petition for reconsideration and others currently before the Board.² On June 9, 2015, NSR and D&H both filed replies to SMART/TD-NY's petition for stay, arguing that the petition should be denied. SMART/TD-NY's petition for stay will be denied.

¹ 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).

² In addition to SMART/TD-NY, PPL EnergyPlus LLC, and CNJ Rail Corporation and Eric Strohmeyer filed petitions for reconsideration of Decision No. 6. All petitions for reconsideration will be addressed at a later date.

DISCUSSION AND CONCLUSIONS

Under 49 U.S.C. § 11326, the Board must impose employee protective conditions when approving certain transactions, including the acquisition and trackage rights approvals sought by NSR here. In accordance with agency precedent, the Board imposed on the acquisition transaction the employee protective conditions set out in New York Dock Railway—Control—Brooklyn Eastern District Terminal, 360 I.C.C. 60, aff'd New York Dock Railway v. United States, 609 F.2d 83 (2d Cir. 1979), as modified by Wilmington Terminal Railroad—Purchase & Lease—CSX Transportation Inc., 6 I.C.C.2d 799, 814-26 (1990), aff'd sub nom. Railway Labor Executives' Ass'n v. I.C.C., 930 F.2d 511 (6th Cir. 1991) (New York Dock as modified by Wilmington Terminal). Also in accordance with agency precedent, the Board imposed on the embraced trackage rights proceedings the employee protective conditions set forth in Norfolk & Western Railway—Trackage Rights—Burlington Northern, Inc., 354 I.C.C. 605 (1978), as modified by Mendocino Coast Railway—Lease & Operate—California Western Railroad, 360 I.C.C. 653 (1980), rather than the employee protective conditions requested by SMART/TD-NY, Oregon Short Line Railroad—Abandonment Portion Goshen Branch Between Firth & Ammon, in Bingham & Bonneville Counties, Idaho, 360 I.C.C. 91 (1979).

SMART/TD-NY asserts in its petition for reconsideration that the Board erred in the employee protective conditions that it imposed in the acquisition proceeding. It asks that the effectiveness of Decision No. 6 be stayed pending the Board's reconsideration determination. Under 49 U.S.C. § 721(b)(4), the Board may issue an appropriate order, such as a stay, when necessary to prevent irreparable harm. In ruling on a petition for a stay, the Board considers: (1) whether the party seeking the stay has made a strong showing that it is likely to prevail on the merits; (2) whether the party seeking the stay will suffer irreparable harm in the absence of a stay; (3) whether other interested parties will be substantially harmed by a stay; and (4) the public interest in granting or denying the stay. See Washington Metro. Area Transit Comm'n v. Holiday Tours, Inc., 559 F.2d 841, 843 (D.C. Cir. 1977); Va. Petroleum Jobbers Ass'n v. Fed. Power Comm'n, 259 F.2d 921, 925 (D.C. Cir. 1958). SMART/TD-NY asserts that it will succeed on the merits of its petition for reconsideration, arguing that (1) the employee impacts of the transaction were not sufficiently discussed in Decision No. 6; (2) the Board incorrectly interpreted the labor protective conditions imposed on the acquisition transaction by failing to require the negotiation of employee agreements before consummation of the transaction; (3) the Board was required to impose "'umbrella' agreements between NSR, D&H, and employees of both railroads" and failed to do so; and (4) the Board imposed the wrong labor protective conditions on the embraced trackage rights proceedings. SMART/TD-NY further asserts that the affected railroad employees will be irreparably injured in the absence of a stay because consummation of the transaction would result in D&H employees losing their jobs. SMART/TD-NY also argues that NSR and D&H would not be harmed by a stay because they have not attempted to expedite consummation of the transaction, and that the public interest supports granting a stay because the potential loss of jobs or displacement of employees would affect the employees' families and the "local business concerns in the small communities served

by D&H.” We conclude that SMART/TD-NY’s petition does not meet the standard for granting a stay.

Success on the Merits. As to the first prong of the standard, SMART/TD-NY is not likely to succeed on the merits of its petition. The Board applied the correct labor protective conditions in Decision No. 6, and the Board’s decisions in this proceeding have adequately discussed the transaction’s employee impacts and why it was appropriate to impose the New York Dock conditions, as modified by Wilmington Terminal, on the acquisition transaction and the Norfolk & Western conditions, as modified by Mendocino, on the embraced trackage rights modifications.³ Although SMART/TD-NY alludes briefly to its arguments that the Board should have imposed New York Dock conditions rather than those required by New York Dock as modified by Wilmington Terminal on the acquisition transaction, and that an umbrella agreement is required in the acquisition transaction, SMART/TD-NY’s stay petition focuses chiefly on its argument that language in Decision No. 6 appears to permit NSR and D&H to consummate the transaction prior to the negotiation of employee implementing agreements.⁴ Specifically, SMART/TD-NY argues that the sentence in Decision No. 6 stating that “. . . the negotiation of the respective employee agreements cannot delay the consummation of a line sale transaction”⁵ improperly interprets New York Dock as modified by Wilmington Terminal as not requiring the pre-consummation negotiation of required employee agreements. However, it is clear throughout Decision No. 6, including its labor protection discussion and the relevant ordering paragraph, that the Board imposed the requirements of New York Dock as modified by Wilmington Terminal without any qualification or alteration.⁶

Because Decision No. 6 did not purport to change the requirements of New York Dock as modified by Wilmington Terminal and the Board imposed the correct labor protective conditions on both the acquisition transaction and the embraced trackage rights modifications,⁷ SMART/TD-NY is unlikely to succeed on the merits of its petition.

Irreparable Harm. SMART/TD-NY also does not present evidence that employees will be imminently and irreparably harmed in the absence of a stay of the effective date of Decision

³ See Decision No. 1 at 5, 8-9; Decision No. 6 at 29, 35.

⁴ SMART/TD-NY also raises these arguments in its petition for reconsideration, which the Board will address in a separate decision.

⁵ Decision No. 6 at 29.

⁶ See Decision No. 6 at 36, ¶ 7. See also id. at 29 (stating that “the correct employee protective conditions for this case are New York Dock as modified by Wilmington Terminal.”), 35.

⁷ To the extent that parties are concerned that the Board’s meaning in Decision No. 6 is ambiguous or unclear, this decision should provide clarity.

No. 6. SMART/TD-NY states in its stay request that NSR and D&H have not attempted to expedite consummation of the transaction and have not yet served 90-day notices or negotiated the implementing agreements required under New York Dock as modified by Wilmington Terminal.⁸ While NSR and D&H both state that they have begun the requisite negotiations, neither carrier appears to have completed them.⁹ Because these agreements must be reached before the transaction can be consummated,¹⁰ SMART/TD-NY's argument that there will be an imminent loss of jobs in the absence of a stay fails.

Because SMART/TD-NY has established neither likelihood of success on the merits nor irreparable harm, the requirements for a stay have not been met and there is no need for the Board to address the remaining factors. Accordingly, SMART/TD-NY's petition for stay will be denied.

It is ordered:

1. SMART/TD-NY's petition for a stay is denied.
2. This decision is effective on its service date.

By the Board, Acting Chairman Miller and Vice Chairman Begeman.

⁸ Verified Statement of Samuel J. Nasca, SMART/TD-NY Petition for Stay 7.

⁹ NSR states in its reply that it has in fact reached implementing agreements with four unions, but that it cannot serve the 90-day notices until after Decision No. 6 is effective. NSR Reply in Opposition to Samuel J. Nasca's Petition for Stay 7-8. D&H states in its reply that it is currently in the process of negotiating implementing agreements with the unions representing affected D&H employees, and has already entered into an agreement with one union. Reply Comments of Del. & Hudson Ry. 5-6 n.2.

¹⁰ Wilmington Terminal, 6 I.C.C.2d at 814-15.