

SERVICE DATE - MARCH 11, 1997

SURFACE TRANSPORTATION BOARD¹

DECISION

Finance Docket No. 32847

SOO LINE RAILROAD COMPANY--TRackage RIGHTS EXEMPTION--
CMC HEARTLAND PARTNERS

Decided: March 7, 1997

On December 28, 1995, Soo Line Railroad Company (Soo) filed a notice of exemption under 49 CFR 1180.2(d)(7) to acquire local and overhead trackage rights over approximately 1.04 miles of CMC Heartland Partners' (CMC) rail line between milepost 3.50, near Diversey Parkway, and milepost 2.57, near Clybourn Avenue, in Cook County, IL. The notice of exemption was served and published in the Federal Register on February 12, 1996 (61 FR 5439).

On January 3, 1996, the Illinois Legislative Director for the United Transportation Union (UTU)² filed a petition to reject the notice of exemption, alleging, among other things, that CMC is a noncarrier and, therefore, the transaction does not qualify for the class exemption under 49 CFR 1180.2(d)(7). Soo replied. In the February 12 notice of exemption, the Director of the Office of Proceedings denied UTU's petition to reject the notice of exemption stating that the trackage rights were properly filed under the class exemption procedures of 49 CFR 1180.2(d)(7).

On February 22, 1996, the UTU Illinois Legislative Director³ filed an appeal seeking review and reversal of the February 12 decision by the Director of the Office of Proceedings, and requesting that the notice of exemption be rejected without prejudice to consideration of the notice as a petition for exemption for a lease. Soo did not reply to the appeal.

¹ The ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (ICCTA), which was enacted on December 29, 1995, and took effect on January 1, 1996, abolished the Interstate Commerce Commission (ICC) and transferred certain functions and proceedings to the Surface Transportation Board (Board). Section 204(b)(1) of the ICCTA provides, in general, that proceedings pending before 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 Board 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, unless otherwise indicated.

² In the petition, the UTU Illinois Legislative Director is identified as Mr. Thomas M. Berry.

³ In this pleading, the UTU Illinois Legislative Director is identified as Mr. Joseph C. Szabo.

We have considered the entire record, including UTU's petition to reject the notice, Soo's reply, and the appeal. For the reasons stated below, we will affirm the February 12 decision of the Director of the Office of Proceedings and deny the requests to reject the notice of exemption.

BACKGROUND

CMC is the corporate successor of the reorganized debtor railroad, Chicago, Milwaukee, St. Paul and Pacific Railroad Company (the Milwaukee). By the Asset Purchase Agreement (APA) of April 6, 1984, Soo acquired from CMC most of the operating property and core assets of the Milwaukee. The assets excluded from the conveyance to Soo were parcels of property -- the Beer Line, the C&E Line,⁴ and the Rockford Line -- which were the subject of pending abandonment proceedings initiated by the Trustee in the United States District Court for the Northern District of Illinois, Eastern Division. Subsequent to acquiring the rail assets of the Milwaukee, Soo provided rail service over these lines in accordance with a letter amendment to the APA dated February 19, 1985, and pursuant to a service order in The Milwaukee Road, Inc. Authorized to Use Tracks And/Or Facilities of Chicago, Milwaukee, St. Paul and Pacific Railroad Company, Debtor (Richard B. Ogilive, Trustee), Service Order No. 1500 (ICC served Jan. 17, 1986). The amendment to the APA provided that, if the abandonment proceedings were denied, Soo would either purchase the property or acquire the trackage rights necessary to provide continuing rail service over the lines. On October 15, 1986, the reorganization court denied authority to abandon the C&E Line, ordered Soo to continue to provide service on the C&E Line, and further ordered CMC and Soo to negotiate and agree to either a purchase of the C&E Line property by Soo or "a grant of trackage rights" to Soo. Negotiations over appropriate trackage rights agreements continued intermittently between Soo and CMC. Because of the parties' inability to agree upon terms and conditions of a trackage rights agreement, a valuation proceeding resulted before the reorganization court. On July 20, 1995, the court ordered Soo and CMC to enter into a contractual relationship to resolve the dispute and established the values for compensation and billing. Subsequently, Soo and CMC negotiated and entered into a trackage rights agreement dated November 20, 1995, incorporating the compensation terms decreed by the reorganization court and providing for the acquisition of trackage rights.

DISCUSSION AND CONCLUSIONS

We will treat UTU's appeal as a petition to revoke the exemption that was the subject of the notice served and published on February 12, 1996. Under 49 U.S.C. 10505(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.⁵ Labor

⁴ The C&E Line is the line segment that is the subject of the notice of exemption issued in this proceeding.

⁵ We also note that, if the notice invoking an exemption contains false or misleading information, we may summarily revoke the exemption and require divestiture. 49 CFR 1180.4(g)(1)(ii). UTU has not made a showing that the notice contains false or

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interests may raise issues concerning the appropriate level of labor protection in a petition for revocation. See 49 U.S.C. 10505(g)(2); Simmons v. ICC, 900 F.2d 1023 (7th Cir. 1990). To the extent a party 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 RR. Co., 8 I.C.C.2d 31, 37 (1991). The party seeking revocation has the burden of proof, and a petition to revoke must be based on reasonable, specific concerns demonstrating that reconsideration of the exemption is warranted and regulation of the transaction is necessary. Id. at 35.

UTU argues that the transaction does not fall within the class exemption at 49 CFR 1180.2(d)(7) and that the notice of exemption is prima facie invalid because CMC is a noncarrier and therefore cannot grant trackage rights.⁶ UTU argues that only a carrier can grant trackage rights to another carrier, citing Railroad Consolidation Procedures, 1 I.C.C.2d 270 (1985).⁷ Moreover, UTU argues that the express language of the statute requires that both parties to a trackage rights agreement be carriers because the statute requires approval of the "[a]cquisition by a rail carrier of trackage rights over, or joint ownership in or joint use of, a railroad line (and terminals incidental to it) owned or operated by another rail carrier." 49 U.S.C. 11343(a)(6). UTU states that, by statutory definition, a rail carrier is a person providing common carrier railroad transportation for compensation.

Although Soo assumes that CMC has a residual common carrier obligation to perform service on the line, UTU contends that CMC may not agree. In any event, according to UTU, a residual common carrier obligation does not make a person a carrier under the statute. UTU also argues that what is involved here is not trackage rights because the agreement grants Soo an exclusive right on the property.

Generally, an entity acquiring an active rail line under 49 U.S.C. 10901 or 11343 assumes the common carrier obligation to provide continued rail service. Southern Pacific Transportation Company--Abandonment Exemption--In Fresno County, CA, Docket No. AB-12 (Sub-No. 179X), et al. (ICC served May 8, 1995), slip op. at 4, and cases cited therein. Although it did not acquire the line at issue here under either statutory provision, CMC is the corporate successor to the Milwaukee and retained certain railroad operating property, including this rail line. In CMC Real Estate Corporation -- Abandonment Exemption -- Chicago, IL, Docket No. AB-7 (Sub-No. 114X) (ICC served Oct. 13, 1988), the ICC considered a claim by Patrick Simmons, Legislative Director

⁵(...continued)
misleading information or otherwise fails to comply with applicable requirements.

⁶ UTU cites the first paragraph of the agreement between CMC and Soo in which CMC identifies itself as a "non-carrier."

⁷ In that decision the ICC stated: "Trackage rights agreements are arrangements among rail carriers to permit local service or bridge operations by one carrier over the tracks owned by another carrier, while the owning carrier continues to provide service." 1 I.C.C.2d at 270 n.1.

of the United Transportation Union (Simmons) that CMC was not a rail carrier for purposes of invoking the class exemption for abandonment of out-of-service rail lines to permit CMC to abandon a railroad line with status similar to that of the C&E Line in the present proceeding. The ICC rejected Simmons' claim, concluding, at p. 3 of that decision, that "CMC is a rail carrier for the limited purposes of this proceeding, and it may properly use the notice of exemption procedures to terminate its common carrier obligation" ⁸ Thus, CMC's filing of abandonment applications with respect to lines of railroad that were not conveyed to Soo under the APA, and the ICC's actions in those proceedings, demonstrate recognition that, regardless of CMC's status following reorganization, CMC's rail property was subject to the oversight of the ICC and is now subject to the oversight of the Board. CMC, as an owner of rail property, and a rail carrier proposing to operate over the rail property, have entered into a trackage rights arrangement with respect to the property as a means of compliance with the court's order. Consequently, while trackage rights normally are transactions between rail carriers and CMC's status as an owner of carrier property is not altogether clear, to facilitate the efforts of Soo and CMC to carry out the court's mandate expeditiously, we will continue to follow the approach taken by the ICC in Docket No. AB-7 (Sub-No. 114X) and treat CMC as a carrier for purposes of its eligibility to use, in conjunction with Soo, the class exemption for trackage rights transactions.

UTU's allegation that the trackage rights agreement grants Soo an exclusive right on the property is not supported by the language of the agreement, which does not give exclusive rights to Soo. Rather, it merely guarantees that CMC will not interfere with Soo's rail operations on the line. ⁹

While objecting to the trackage rights, UTU is not opposed to consideration of the notice as a petition for exemption for a lease. It states that it desires the strongest commitment by Soo to continue operations on the C&E Line, and under a lease agreement, CMC would be required to perform rail service in the event that Soo does not, citing Smith v. Hoboken R. Co., 328 U.S. 123 (1946). We do not see how CMC's residual common carrier obligation to provide service, which UTU denies exists, would be

⁸ In a decision served June 6, 1989, in the same proceeding, the ICC observed that Simmons had reasserted the argument that CMC was not a carrier and thus was not eligible to use the class exemption, noted that the argument had been rejected in the decision served October 13, 1988, and stated that Simmons had presented no new grounds for further consideration of the issue.

⁹ The agreement provides, at 4, paragraph 2.8:

CMC shall enter into no agreement and shall take no action with respect to or affecting the Subject Trackage that materially impedes [Soo's] ability to conduct rail operations and to serve shippers on the Subject Trackage.

greater under a lease agreement than under the trackage rights agreement.¹⁰

We note that, were we to be persuaded by UTU's argument that the notice of exemption for trackage rights should be rejected without prejudice to filing of a petition for exemption for a lease, UTU's interests would not be enhanced in any discernible way. Similar labor protection would attach regardless.

For the above stated reasons, we agree with the Director of the Office of Proceedings that Soo's trackage rights, which will permit Soo's operations over CMC's property in conformity with the orders of the reorganization court, were properly accepted as filed under the class exemption procedures of 49 CFR 1180.2(d)(7). Therefore, UTU's appeal of that decision will be denied.

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

It is ordered:

1. UTU's appeal is denied.
2. This decision is effective on its service date.

By the Board, Chairman Morgan and Vice Chairman Owen.

Vernon A. Williams
Secretary

¹⁰ UTU does not elaborate on how Smith v. Hoboken R. Co. has a bearing on the facts of this case. In that decision, which involved the forfeiture provision in a lease, the Supreme Court held that a lessee could not be forced to cease operations over track owned by a bankrupt lessor without a determination by the ICC permitting the discontinuance.