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SERVICE DATE - NOVEMBER 10, 1999

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 33609¹

NORFOLK SOUTHERN RAILWAY COMPANY—PURCHASE
EXEMPTION—UNION PACIFIC RAILROAD COMPANY

STB Finance Docket No. 33610

NORFOLK SOUTHERN RAILWAY COMPANY—LEASE AND OPERATION
EXEMPTION—UNION PACIFIC RAILROAD COMPANY

Decided: November 4, 1999

Central Illinois Public Service Company, doing business as AmerenCIPS (AmerenCIPS), has filed timely petitions to reopen two separate proceedings in which we authorized line transactions between the Norfolk Southern Railway Company (NS) and the Union Pacific Railroad Company (UP). In STB Finance Docket No. 33609, we authorized NS to purchase from UP approximately 15.3 miles of rail line located between milepost 104.8 at Monterey Junction, IL, and milepost 119.8 at DeCamp, IL (the purchased line). In STB Finance Docket No. 33610, we authorized NS to lease and operate approximately 4.7 miles of UP's line between Monterey lead milepost 4.4 at Exxon Corporation's Monterey Mine No. 1 (Exxon Mine), near Carlinville, IL, and milepost 0.0 at Monterey Junction, IL (the leased line).² We authorized the transactions in STB Finance Docket Nos. 33609 and 33610 in decisions served (and published in the Federal Register) on October 29, 1998 (63 FR 58903) and November 20, 1998 (63 FR 64538), respectively, by granting exemptions under 49 U.S.C. 10502 from the prior approval requirements of 49 U.S.C. 11323-25.

¹ These proceedings are not consolidated. A single decision is being issued for administrative convenience.

² The two transactions embraced a leg of wye track and related trackage between mileposts 104.5 and 104.8 at Monterey Junction. Both UP and NS have the non-exclusive right to use the entire wye track area at Monterey Junction, along with sufficient tail room to turn trains. The purchase transaction also included certain yard tracks known as the Wiggins Track, the New Pass Track, and the CNW (AGE) Main Track, at Madison, IL. The purchase agreement also contained certain exclusions whereby UP retained an interest in certain yard trackage and in land more than 50 feet from the centerline of each side of the line between Monterey Junction and DeCamp. The lease agreement is non-exclusive and allows both UP and NS to move traffic over the line.

AmerenCIPS filed timely petitions to reopen on November 19, 1998, and December 3, 1998, respectively. NS filed timely replies on December 8, 1998, and December 21, 1998, respectively. We deny both petitions.

BACKGROUND

AmerenCIPS owns and operates an electric power generating plant in Coffeen, IL, that receives rail shipments of approximately two million tons of coal annually from the Exxon Mine³ pursuant to a long-term shipping contract with NS.⁴ In addition, AmerenCIPS' coal purchase agreement allows it to ship coal to at least five other affiliated generating plants not served by NS, and to market coal to other buyers. According to the parties, coal can travel from the Exxon Mine to the generating plant over two different routes, with NS being a necessary party to movements on either route.

Until February 1998, coal moved from the Exxon Mine to the Coffeen generating plant over a joint UP-NS northern route approximately 88 miles in length. UP moved the shipments from the Exxon Mine to Monterey Junction (over what is now the leased line) and from there to Edwardsville, IL, where UP interchanged with NS, which then moved the shipments over an NS line from Edwardsville to the Coffeen generating plant. This joint UP-NS route remains available.⁵

From February 1998 to December 1998, coal moved from the Exxon Mine to the Coffeen generating plant over a single-line southern route approximately 60 miles in length, with NS operating by trackage rights⁶ from the Exxon Mine to Monterey Junction (over what is now the leased line), then turning south and continuing by trackage rights from Monterey Junction to DeCamp (over what is now the purchased line), then continuing over NS' line through Litchfield and Sorento, using NS trackage rights over a line of The Burlington Northern and Santa Fe Railway Company (BNSF) for part of the movement, and finally over an NS-owned line from Sorento to the

³ The Exxon Mine is the only shipper located on the leased line and no shippers are located on the purchased line.

⁴ There are several years remaining on AmerenCIPS' rail transportation contract with NS.

⁵ There was previously another northerly UP-NS route of approximately 72.6 miles, over which UP could move traffic from the Exxon Mine through DeCamp to Edwardsville, where UP would interchange with NS, which would then move the traffic to the Coffeen generating plant. This route, however, is no longer available because UP has discontinued service over the DeCamp to Edwardsville segment. Union Pacific Corp., et al.- Control and Merger - Southern Pacific Rail Corporation, et al., STB Finance Docket No. 32760 (Decision No. 44) (STB served Aug. 12, 1996), slip op. at 230, 234.

⁶ The trackage rights over the purchased and leased lines were authorized in Norfolk and Western Railway Company--Trackage Rights Exemption--Union Pacific Railroad Company, STB Finance Docket No. 33488 (STB served Oct. 21, 1997).

Coffeen generating plant. This single-line southern route is 28 miles shorter than the joint UP-NS northern route.

Coal continues to move from the Exxon Mine to the Coffeen generating plant over the single-line southern route of NS. However, as a result of the purchase and lease that AmerenCIPS here challenges, NS now has a greater property interest in the lines over which it formerly only had trackage rights. The purchase and lease also shifted the responsibilities for maintenance, dispatching and signaling from UP (which does not currently use the lines) to NS (which does).

POSITIONS OF THE PARTIES

In its petitions to reopen, AmerenCIPS raises both procedural and substantive objections to the exemptions granted in these proceedings. On the procedural front, AmerenCIPS complains that NS failed to serve it with a copy of our decision in STB Finance Docket No. 33610, even though our decision specifically ordered NS to do so, and that NS did not contact AmerenCIPS to explain the transaction or to discuss the impact on AmerenCIPS' interests. (AmerenCIPS concedes, however, that it had obtained copies of both petitions for exemption.) AmerenCIPS also complains that it was not afforded more time to analyze the transactions.⁷

On the substantive issues, AmerenCIPS argues that the efficiency gains and cost savings that NS claims here in support of the purchase and lease are the same as those that NS has been enjoying since February 1998 as a result of the trackage rights that it obtained from UP in STB Finance Docket No. 33488 (see supra note 6).⁸ AmerenCIPS argues that NS cannot claim the same efficiency gains more than once. AmerenCIPS further complains that NS has not promised to share the cost savings with AmerenCIPS.

AmerenCIPS also argues that, because UP will have to use either a circuitous northbound routing or a joint UP-NS routing to reach southern destinations, this arrangement will result in increased shipping costs via UP and limit AmerenCIPS' ability to market coal elsewhere. AmerenCIPS further suggests that the limitations on UP routings could hamper emergency responses to service delays.

NS acknowledges that it inadvertently failed to serve a copy of our decision in STB Finance Docket No. 33610 on AmerenCIPS, as ordered. NS argues, however, that no one was prejudiced because AmerenCIPS learned of the decision in time to file a petition to reopen this proceeding and

⁷ AmerenCIPS notes that, under section 10502(b), the Board has 90 days to decide whether to begin a proceeding. AmerenCIPS evidently assumed that the Board would use the full 90-day period to decide whether to invite public comments on NS' two exemption petitions. Instead, we issued our decisions 50 days after NS submitted its petition in STB Finance Docket No. 33609, and 72 days after NS submitted its petition in STB Finance Docket No. 33610.

⁸ NS originally obtained these trackage rights through its predecessor in interest, the Norfolk and Western Railway Company.

be heard. NS states that AmerenCIPS had actual knowledge of the decision and had already filed a petition to reopen in STB Finance Docket No. 33609 by the time that the Board ordered NS to serve AmerenCIPS with a copy of the decision in STB Finance Docket No. 33610.

NS disputes AmerenCIPS' suggestion that a shipper must directly and immediately benefit from the transfer or lease of a rail line in order for us to authorize such transactions. In any event, NS asserts that AmerenCIPS will benefit indirectly through more efficient service and may ultimately receive other benefits. NS states that its operation of these lines permits it to provide more efficient direct, single-line service from the Exxon Mine to the Coffeen generating plant entirely via NS. Not only are the costs and delays of interchange avoided, but also the southern routing is approximately 28 miles shorter than the joint UP-NS northern route. According to NS, the resulting economies and increased efficiencies for NS and UP (which can now direct its resources elsewhere) will improve overall service to shippers.

NS disputes AmerenCIPS' claim that these efficiency gains were already fully achieved through the trackage rights authorized in STB Finance Docket No. 33488. NS states that the purchase and lease will enable it to realize additional efficiencies through the transfer of maintenance, dispatching, and signaling responsibilities to NS, the main user of the line.⁹ NS further explains that obtaining the trackage rights was only a first step in taking over a route that UP no longer needed. While trackage rights enabled NS to provide single-line service over the lines while it was negotiating the terms of the purchase and lease,¹⁰ UP had little incentive to diligently conduct maintenance, dispatching, and signaling on lines that it no longer used.

NS asserts that AmerenCIPS is not adversely affected by the transactions because there is no reduction in competition or change in rates, and service will likely improve. NS states that the purchase and lease do not reduce competition because the nonexclusive terms of the lease agreement allow both NS and UP to use the line from the Exxon Mine to Monterey Junction (where UP connects to its main rail system and NS connects to the purchased line). Thus, both NS and UP can continue to handle AmerenCIPS' potential overhead traffic to any destinations that the carriers serve.

DISCUSSION AND CONCLUSIONS

Petitions to reopen must meet the standards of 49 CFR 1115.4, which provides that a petition to reopen "must state in detail the respects in which the proceedings involve material error, new evidence, or substantially changed circumstances" AmerenCIPS asserts that the Board committed material error in granting the exemption. In deciding AmerenCIPS' petition, we will

⁹ NS asserts that union contract considerations made it impossible to gain such efficiencies through trackage rights alone.

¹⁰ NS' predecessor in interest, NW, stated in its petition for exemption of those trackage rights that the parties ultimately intended to proceed with the current purchase and lease of the same lines.

review the exemption in the light of the statutory criteria for exempting transactions or services from the application of the ICC Termination Act.

The use of regulatory exemptions are favored under Congressional policy. When Congress enacted the Staggers Rail Act of 1980, it found that “many of the Government regulations affecting railroads ha[d] become unnecessary and inefficient.” Staggers Rail Act of 1980, Pub. L. No. 96-448, § 2(4), 94 Stat. 1895, 1896 (1980). Accordingly, Congress directed us to grant exemptions under 49 U.S.C. 10502 to remove “as many as possible of [our] restrictions on changes in prices and services by rail carriers.” H.R. Conf. Rep. 96-1430, at 105 (1980) (emphasis added), reprinted in 1980 U.S.C.C.A.A.N. 4137. Section 10502 commands that we “shall exempt . . . a transaction” from regulatory requirements if we find that such requirements are not necessary to carry out the rail transportation policy goals of 49 U.S.C. 10101, and either (1) the transaction is of limited scope or (2) regulation is not needed to protect shippers from the abuse of market power. 49 U.S.C. 10502(a).

Congress instructed us to use this exemption authority liberally and to “adopt the policy of reviewing carrier transactions after the fact to correct abuses of market power.” H.R. Conf. Rep. 96-1430, at 105 (1980) (emphasis added), reprinted in 1980 U.S.C.C.A.A.N. 4137. Accordingly, we have fashioned procedures that are swift and simple, and rely on our own initial examination of the proposal. See, e.g., 49 CFR 1121.4(a) (exemption proceedings are informal, and we do not usually seek public comment prior to our initial determination to grant an exemption). The public is fully protected, however, because our procedures include notice to the public and ample opportunity to raise objections through petitions to reopen and revoke exemptions. See 49 CFR 1121.4. Through a timely petition, a protestant can present any evidence and arguments that it would otherwise have presented before the exemption decision was issued, as well as any evidence and arguments that have arisen since.

Thus, we reject AmerenCIPS’ procedural claim that it was treated unfairly by not being given the opportunity to analyze the exemption proposal and file its comments with us prior to our issuance of the decision initially granting the exemption in STB Finance Docket No. 33609. Moreover, there is no reason why we should have used the full 90-day period allowed by statute to determine whether to pursue an exemption proposal.¹¹ Such delay would defeat the purpose of an exemption in a case such as this, because the exemption proceeding could take as long as the approval process from which the carrier seeks to be exempted.

AmerenCIPS was not prejudiced by NS’ failure to serve it with a copy of our decision in STB Finance Docket No. 33610. We specifically ordered NS to serve AmerenCIPS and Exxon with a copy of that decision in order to alert these two potentially affected shippers of our decision in the event that either or both wished to object. While we do not condone NS’ failure to serve

¹¹ The 90-day period provided in the statute serves as an outer limit for deliberations on whether to proceed with consideration of exemption proposals, including those for major class exemptions of industry-wide significance.

AmerenCIPS, we are satisfied that AmerenCIPS was not harmed, as it had actual knowledge of the decision in time to file a petition to reopen within 20 days of the decision.

Turning to AmerenCIPS' substantive arguments, AmerenCIPS has failed to show that the purchase and lease should be disallowed. The purchase and lease enable greater efficiency for NS, because NS obtains direct control over the operations on the lines, including dispatching of traffic, signaling, and maintenance of the lines. Thus, these functions are now in the hands of the party with the most interest in performing them well. While UP continues to have access to the leased line, it can transfer its resources from the purchased and leased lines, over which it does not currently provide service, to other lines within its system that it does use. AmerenCIPS will likely also benefit from the service efficiencies that are achieved, through improved service and possibly lower costs in the future.

AmerenCIPS' ability to ship coal to the Coffeen generating plant and other locations is not impaired.¹² While UP cannot directly move traffic south of these lines, it could not do so even prior to the purchase and lease, because UP had already abandoned other line segments needed for it to move traffic over a southern route. (See supra note 5.) Rail service from the Exxon Mine to the Coffeen generating plant will continue to be available over the same two routes that existed prior to our issuance of these exemptions: NS' single-line southern route and the joint UP-NS northern route. Both UP and NS also have non-exclusive access over the leased line to allow each to move coal from the Exxon Mine to its main rail system for service to other destinations. NS has merely been substituted for UP as the carrier responsible for the upkeep and operations of these lines. Thus, we find no lessening of competition resulting from the purchase and lease.

In short, AmerenCIPS has failed to show that regulation of these transactions is necessary to protect shippers from an abuse of market power. Both NS and UP can continue to provide service over the leased line, and there is no change in service on the purchased line, only a change in owners. Likewise, there is no loss of rail competition or adverse change in the competitive balance in the relevant geographical market.

Finally, AmerenCIPS has failed to persuade us that further regulation of these subject transactions is necessary to carry out the rail transportation policy of 49 U.S.C. 10101. On the contrary, these exemptions promote that policy by minimizing administrative expenses; fostering an economically sound rail system through the integration of operations, efficient use of resources, improved transit times, and better routing options; and ensuring that the national rail system meets the public needs. Other aspects of the policy are not adversely affected.

Accordingly, the petitions to reopen will be denied.

¹² NS continues to provide service to AmerenCIPS' Coffeen plant under the rates and services defined in its rail transportation contract.

STB Finance Docket No. 33609, et al.

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

It is ordered:

1. The petitions to reopen filed by AmerenCIPS in STB Finance Docket No. 33609 and STB Finance Docket No. 33610 are denied.
2. NS is ordered to serve a copy of this decision on the Exxon Corporation.
3. This decision is effective 30 days from the service date.

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

Vernon A. Williams
Secretary