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SERVICE DATE - JUNE 5, 2000

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 33780

THE KANSAS CITY SOUTHERN RAILWAY COMPANY
— TRACKAGE RIGHTS EXEMPTION —
GATEWAY WESTERN RAILWAY COMPANY
AND
GATEWAY EASTERN RAILWAY COMPANY

Decided: May 31, 2000

We are denying the joint petition to reconsider our prior decision in this case and to reject or revoke the trackage rights exemption previously granted.

BACKGROUND

By notice filed on July 14, 1999, The Kansas City Southern Railway Company (KCS), Gateway Western Railway Company, and Gateway Eastern Railway Company invoked the class exemption at 49 CFR 1180.2(d)(7) to allow KCS to operate over, and to serve all shippers on, the entire systems of both Gateway Western Railway Company and Gateway Eastern Railway Company (collectively, Gateway).

On July 19, 1999, Joseph C. Szabo, for the United Transportation Union-Illinois Legislative board (UTU-IL), asked us to stay the July 21, 1999 effective date of this exemption. Petitioners replied in opposition on July 20, 1999. That same day, we stayed the effect of the exemption for 60 days “to permit us to examine the issues in greater detail.”

On August 9, 1999, UTU-IL and W. Larry Foster, for the United Transportation Union-Missouri Legislative Board (jointly, Legislative Boards), filed a petition to reject and/or to revoke the notice of exemption or to impose added employee protection. The Legislative Boards argued that the notice does not provide a definitive date when the trackage rights will be exercised and goes beyond trackage rights in that it provides for transfer of management and operation of Gateway trackage to KCS. The Legislative Boards also asked us to impose the standard protective conditions developed for mergers and consolidations in New York Dock Ry. — Control — Brooklyn Eastern Dist., 360 I.C.C. 60, 84 (1979) (New York Dock), in lieu of similar standard protective conditions developed for trackage rights transactions in Norfolk and Western Ry. Co. — Trackage Rights — BN, 354 I.C.C. 605 (1978), modified, 360 I.C.C. 653 (1980), aff'd sub nom. RLEA v. United States, 675 F.2d 1248 (D.C. Cir. 1982) (N&W). The key difference between the two sets of conditions is that New York Dock requires that implementing arrangements be worked out before the changes affecting employees can occur, whereas N&W

permits the carrier to implement the trackage rights and work out the details of employee protection afterwards.

By decision served on September 16, 1999, we denied the Legislative Boards' petition to reject and/or to revoke the trackage rights exemption or to impose added employee protection. We noted that we were authorizing only trackage rights and nothing more, but that, if the carriers later seek to take action requiring further authorization from us under 49 U.S.C. 11323, we would then impose whatever labor protection is appropriate.

On September 29, 1999, we published notice of the exemption in the Federal Register at 64 FR 52574. On October 6, 1999, the Legislative Boards jointly filed a petition for reconsideration of our prior decision, renewing their prior request that we reject or revoke the trackage rights exemption. The Brotherhood of Locomotive Engineers (BLE) joined in the petition and also requested that the notice of exemption be rejected or revoked.¹ BLE raises the same issues as had been raised by the Legislative Boards. The carriers replied on October 26, 1999.

DISCUSSION AND CONCLUSIONS

We will not reconsider our September 16, 1999 decision denying rejection or revocation of the exemption. To obtain reconsideration, petitioners must show that our decision would be materially affected by new evidence or changed circumstances or that it involved material error. Petitioners have not met that burden; they offer no new evidence or evidence of changed circumstances, and for the most part merely repeat arguments addressed in the prior decision.² The new arguments raised by petitioners are addressed below.

Interpretation of our Regulations. Petitioners assert (Petition, at 6-7) that we misinterpreted our own regulations, which they claim require the carriers to reveal the "date for exercise of the trackage rights, in addition to any different date for consummation of the 'transaction.'" But the carriers did provide the date (July 21, 1999) when the agreement would take effect, even if KCS' obligations and operations under it would not begin immediately after July 21, 1999. We affirm our decision that this satisfies our regulations. Carriers need not specify when the operational changes under a binding trackage rights agreement will commence.

¹ BLE did not participate in the earlier stage of this proceeding, but our regulations allow first-time participants like BLE to request rejection or revocation in their own right after a notice is published.

² Although BLE was not a party when we issued our September 16, 1999 decision, arguments it has raised for rejection and/or revocation are the same as those we fully considered and rejected in that decision.

Reservation of Jurisdiction. Petitioners criticize (Petition, at 7) our refusal to rule immediately on the non-trackage rights aspects of the transaction.³ Petitioners imply that our only alternative was to reject the exemption. We disagree. The carriers filed a notice of trackage rights exemption in standard form, and did not ask us to approve other actions beyond the scope of the trackage rights exemption. The petitioners fail to state any reason why the carriers must do so. Petitioners offer no support for their statement that the trackage rights are inseparably bound to a larger transaction.

In conclusion, we find no basis for reconsidering our September 16, 1999 decision. Nor do we find any basis for rejecting or revoking the exemption.

It is ordered:

1. The Legislative Boards' request to reconsider our decision served on September 16, 1999, is denied.
2. BLE's request that the exemption be rejected and/or revoked is denied.
3. This decision is effective on its date of service.

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

Vernon A. Williams
Secretary

³ We cited Southern Pacific Transportation Company — Trackage Rights Exemption — The Houston Belt & Terminal Railway Company, et al., STB Finance Docket No. 33461, et al. (STB served Dec. 21, 1998), only to show that we have previously allowed class exemptions to take effect even though the agreements defining the class exemptions contained other provisions going beyond the scope of the exemptions. We did not cite that case to justify our authority to retain jurisdiction to evaluate the non-trackage rights aspects of the agreement as petitioners argue (Petition, at 7 n.3).