

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 35412

MIDDLETOWN & NEW JERSEY RAILROAD, LLC–LEASE AND OPERATION
EXEMPTION–NORFOLK SOUTHERN RAILWAY COMPANY

Digest:¹ This decision permits a lease between Middletown & New Jersey Railroad, LLC, and Norfolk Southern Railway Company to go into effect, even though objections have been raised by a labor union representative.

Decided: October 6, 2010

BACKGROUND

On August 31, 2010, Middletown & New Jersey Railroad, LLC (M&NJ), a Class III rail carrier, filed a notice invoking the class exemption at 49 C.F.R. § 1150.41 to lease and operate certain lines from Norfolk Southern Railway Company (NSR). In conjunction with the lease of the NSR rail lines, M&NJ will also sublease connecting track owned by New York, Susquehanna & Western Railway (NYS&W) and receive incidental trackage rights.

By decision and notice, served on September 16, 2010, and published in the Federal Register at 75 Fed. Reg. 56,653-54, the Board, under 49 C.F.R. § 1011.2(a)(6), revoked the delegation of authority under 49 C.F.R. § 1011.7(b)(10) for the Director of the Office of Proceedings (Director) to determine whether to issue the notice of exemption and issued the notice of exemption itself. The exemption was scheduled to become effective on September 30, 2010. On September 23, 2010, United Transportation Union–New York State Legislative Board (UTU-NY) filed a petition for stay of the effective date of the exemption pending disposition of a petition to revoke.² On September 28, 2010, M&NJ filed a reply in opposition to the petition for stay. By decision served on September 29, 2010, the Board imposed a housekeeping stay of the effective date of the notice of exemption until October 7, 2010, in order to provide the Board sufficient time to fully consider the issues presented by the petition for stay.

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 UTU-NY filed its petition to revoke the notice of exemption on September 27, 2010.

As required at 49 C.F.R. § 1150.43(h), M&NJ has disclosed that the Lease Agreement contains a provision that would provide for a “Lease Credit” whereby M&NJ may reduce its annual lease payments by receiving a credit for each car interchanged with NSR; it has also provided access to unredacted copies of the agreements pursuant to a protective order. M&NJ states that NSR initially proposed a fixed rental payment with no option to reduce the rent, but that M&NJ insisted on a lease credit option to provide an opportunity for M&NJ to earn a lower rental payment so that it would be able to invest in improvements on the leased lines to increase traffic levels. According to M&NJ, the affected interchange point is Campbell Hall, N.Y.

DISCUSSION AND CONCLUSIONS

The request for a stay will be denied because UTU-NY has not met the stay criteria. In deciding a petition for stay, the Board follows the traditional stay criteria by requiring a party seeking a stay to establish that: (1) there is a likelihood that it will prevail on the merits of any challenge to the action sought to be stayed; (2) it will suffer irreparable harm in the absence of a stay; (3) other interested parties will not be substantially harmed by a stay; and (4) the public interest supports the granting of the stay. 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). The party seeking a stay carries the burden of persuasion on all of the elements required for such extraordinary relief. Canal Auth. of Fla. v. Callaway, 489 F.2d 567, 573 (5th Cir. 1974).

UTU-NY argues that it has satisfied the criteria for a stay. However, as discussed below, it has failed to meet its burden on each of the required elements.

Likelihood of Prevailing on the Merits

UTU-NY argues that it is likely to prevail on the merits because it can show that: (1) the interchange commitment contained in the Lease Agreement between M&NJ and NSR presents many undisclosed and anticompetitive features; (2) the transaction goes beyond the scope of the usual § 10902 class exemption because it involves 6 separate agreements and 4 carriers; (3) the lease would degrade safety where important commuter trackage is involved; and (4) the lease would negatively impact the rail transportation policy (RTP) provisions at 49 U.S.C. § 10101. Here, as discussed below, in its stay petition UTU-NY has failed to make the requisite showing that it would likely prevail in seeking revocation of the exemption.

Interchange Commitment. UTU-NY’s first argument on the merits – that the exemption needs to be revoked to allow increased scrutiny of the transaction to determine whether the interchange commitment contained in the Lease Agreement between M&NJ and NSR is anticompetitive – is unlikely to succeed based on the arguments presented by UTU-NY.

The Board's regulations expressly provide for the filing of transactions involving an interchange commitment under 49 C.F.R. pt. 1150 subpart E—Exempt Transactions under 49 U.S.C. § 10902 for Class III Rail Carriers, as long as the interchange commitment is disclosed and a copy of the agreement is made available to those requesting it. M&NJ has complied with those requirements here. A bare allegation that an interchange commitment will have anticompetitive effects is not sufficient to carry the burden of proof to show that it is likely that an exemption that the Board has permitted to be processed under 49 C.F.R. pt 1150 will be set aside.³

In its decision soliciting public comment on proposed regulations for disclosure of interchange commitment agreements in acquisition and operation exemption proceedings, the Board stated that the propriety of an interchange commitment is best considered on an individual, case-by-case basis.⁴ After reviewing the comments, the Board declined to adopt rules of general applicability regarding the use of interchange commitments that would have created a rebuttable presumption that such agreements were unreasonable and contrary to the public interest. The Board further stated that it would apply a higher level of scrutiny to interchange agreements that would totally ban an interchange or would continue in perpetuity.⁵ Here, the interchange commitment is neither a total ban on interchange with another carrier, nor is it structured as a “penalty” payment if interchange with a third party occurs. M&NJ is contractually able to route traffic over NYS&W, the other carrier with which it connects, and states that it will do so upon reasonable request of the shipper.

UTU-NY has not provided evidence in this proceeding sufficient to establish likelihood of success on the merits to support the grant of a stay pending further review of its petition to revoke. UTU-NY merely makes a conclusory statement in its stay request that the interchange commitment contains anticompetitive features that negatively impact several aspects of the RTP at 49 U.S.C. § 10101. UTU-NY does no more, however, than cite to the RTP; it does not explain how the interchange commitment would negatively impact development of a sound rail transportation system with effective competition,⁶ sound economic conditions,⁷ public health and

³ Vice Chairman Mulvey dissented from the Board's decision allowing the transaction to be processed under the notice of exemption procedures.

⁴ See Review of Rail Access and Competition Issues—Renewed Pet. of the W. Coal Traffic League, Docket No. EP 575, et. al (STB served Oct. 30, 2007)

⁵ See Disclosure of Rail Interchange Agreements, Docket No. EP 575 (Sub-No. 1) (STB served May 29, 2008).

⁶ See 49 U.S.C. § 10101(4).

⁷ See 49 U.S.C. § 10101(5).

safety,⁸ honest and efficient management railroads,⁹ or fair wages and safe and suitable working conditions in the railroad industry.¹⁰ Thus, UTU-NY has not presented adequate evidence to demonstrate that any of the aspects of the RTP highlighted by UTU-NY will be negatively impacted as a result of the interchange commitment involved in the proposed transaction, and thus its argument is insufficient to support a stay while the Board considers the petition to revoke.

Scope of the Transaction. UTU-NY argues that the proposed transaction is beyond the scope of the typical carrier acquisition and operation exemption, both because of the number of carriers involved and the number of agreements involved in the transaction. According to UTU-NY, the Lease Agreement and 5 other related agreements submitted by M&NJ involve M&NJ, NSR, NYS&W, and the lines of a fourth carrier, Metro North Commuter Railroad Company (MNCR). UTU-NY states that, under § 10902 and the Board's accompanying regulations at 49 C.F.R. § 1150.41, there should be no more than 3 carriers involved in the transaction in order to qualify for the Board's class exemption.

The Board's regulations cited by UTU-NY do not limit the class exemption to transactions involving 3 carriers. Nonetheless, there is no evidence in the record that more than 3 carriers are involved in the transaction relevant to this proceeding: M&NJ (the lessee), NSR (the lessor), and NYS&W (the grantor of incidental trackage rights). Although the Lease Agreement submitted by M&NJ mentions MNCR, because it operates passenger service over one of the affected lines, MNCR is not a party to the transaction and did not sign any of the agreements. Nor has UTU-NY shown why the number of transaction agreements filed by M&NJ is relevant.

Passenger Service. UTU-NY argues that the substantial involvement of MNCR's passenger operations raises important safety considerations. UTU-NY states that M&NJ, "a small carrier with unknown personnel, would be operating on important commuter trackage."¹¹ UTU-NY argues that the class exemption is inappropriate and that M&NJ should be required to demonstrate, through a petition for exemption or application, its operating personnel and capabilities. UTU-NY states that the safety risk to MNCR's passenger operations cannot be determined in a class exemption proceeding.

⁸ See 49 U.S.C. § 10101(8).

⁹ See 49 U.S.C. § 10101(9).

¹⁰ See 49 U.S.C. § 10101(11).

¹¹ See Petition for Stay at 6.

UTU-NY has not submitted evidence that persuades us that it is likely to prevail in seeking revocation of the exemption because of the safety concerns it alleges. For example, UTU-NY has not shown that M&NJ has a history of unsafe operations or a history of negative impacts on commuter operations. Nor has MCNR, which has incidental trackage rights over 4.36 miles of the involved track, raised any concerns with the Board regarding safety and its passenger operations.

For all of these reasons, UTU-NY has not sufficiently shown a likelihood of prevailing on the merits to support a stay pending review of its petition to revoke.

Irreparable Harm

UTU-NY alleges that its members would suffer irreparable harm absent a stay because its employees would be displaced and that, under the terms of their collective bargaining agreement, these employees might: (1) lose their seniority; (2) not be returned to the same position; and (3) not be compensated for claims involving loss of employment, should the Board grant the petition to revoke. UTU-NY has not submitted evidence of actual or imminent irreparable harm to the employees involved here, but only provided generalized suggestions about what could occur in any transaction of this nature. UTU-NY has not substantiated with sufficient detail its claim in the Verified Statement of Samuel J. Nasca that 15 NSR employee positions will be lost as a result of this transaction. M&NJ, in its reply, states that, according to NSR, NSR will eliminate 1 signal maintainer position, 1 engineer position, and 1 conductor position as a result of the proposed transaction.¹² M&NJ states that the seniority of the 3 individuals in those positions affords them work opportunities near Campbell Hall such that NSR does not anticipate furloughing any such employees. In short, when balanced against the other factors necessary to compel the grant of a stay, UTU-NY has not adequately demonstrated that its members would suffer irreparable harm.

Harm to Other Interested Parties

UTU-NY offers no substantive argument regarding the absence of harm to other interested parties. UTU-NY states that “there will be no harm to M&NJ if the exemption is stayed pending determination of the petition to revoke.”¹³ In contrast, M&NJ states that it intends to upgrade the tracks and improve service to the shippers located on the leased lines as a result of the entirety of the transactions contemplated in the instant filing. M&NJ argues that any delay resulting from a stay of implementation of those transactions will have a material, adverse

¹² See M&NJ Reply at 9.

¹³ See Petition for Stay at 7.

effect on the shippers because it will delay the benefits they will realize once M&NJ commences operations.

Public Interest

UTU-NY has also failed to show how a stay would be in the public interest and makes only vague references to “commuter operations” and “railroad employees.” This is not sufficient to support the public interest grounds for a stay.

For all the reasons set forth above, UTU-NY has not met the stay criteria and the request for stay will be denied. The Board will consider UTU-NY’s petition to revoke the exemption in a separate decision.

It is ordered:

1. The request for stay is denied.
2. The exemption will become effective on October 7, 2010.
3. This decision is effective on its date of service.

By the Board, Chairman Elliott, Vice Chairman Mulvey, and Commissioner Nottingham. Vice Chairman Mulvey commented with a separate expression.

VICE CHAIRMAN MULVEY, commenting:

A stay of any Board action is an extraordinary remedy. Accordingly, the criteria the Board uses to consider stays is necessarily stringent. However, the burden placed on a petitioner for a stay in a rail transaction processed under the Board’s notice of exemption rules, including those involving an interchange commitment, should not be insurmountable or require the petitioner to meet an evidentiary burden that cannot realistically be achieved prior to an exemption becoming effective. Here, however, UTU-NY’s stay petition consists of little more than conclusory statements regarding the transaction’s impact, particularly with regard to the possibility of irreparable harm. Although I disagreed with the Board’s decision to allow this transaction to be processed as a notice of exemption because I believe that more information should have been required from the parties, I concur with the denial of the stay because UTU-NY has submitted insufficient evidence and argument to satisfy the Board’s stay criteria in this case.