

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 35260

WATCO COMPANIES, INC.—CONTINUANCE IN CONTROL EXEMPTION—BOISE VALLEY RAILROAD, INC.

Decided: August 26, 2010

Watco Companies, Inc. (Watco), a noncarrier, filed a notice of exemption under 49 C.F.R. § 1180.2(d)(2) from the requirements of 49 U.S.C. § 11321 *et seq.* that allowed it to remain in control of the Boise Valley Railroad, Inc. (BVR), upon BVR's becoming a Class III rail carrier. The notice was served and published in the Federal Register on October 2, 2009 (74 Fed. Reg. 50999). The notice went into effect on October 16, 2009, as did the underlying notice of exemption BVR filed under 49 C.F.R. § 1150.31, permitting BVR to acquire by assignment Idaho Northern & Pacific Railroad Company's lease and operating rights to lines owned by Union Pacific Railroad Company.¹

As the notice of exemption was about to go into effect, the Brotherhood of Maintenance of Way Employees Division (BMWE) filed a petition to revoke² it. BMWE argues that the exemption procedures are insufficient to establish a full record, given Watco's national reach of operations. In addition, according to BMWE, Watco has failed to comport with several sections of the rail transportation policy (RTP) (49 U.S.C. § 10101), particularly the sections pertaining to safety and labor practices. Watco filed a reply in opposition to the request. As discussed below, we find that BMWE has failed to show that the notice of exemption here should be revoked.

BACKGROUND

At the time it filed its notice of exemption, Watco controlled 21 Class III rail carriers: South Kansas and Oklahoma Railroad Company; Palouse River & Coulee City Railroad, Inc.; Timber Rock Railroad, Inc.; Stillwater Central Railroad, Inc. (Stillwater); Eastern Idaho Railroad, Inc.; Kansas & Oklahoma Railroad, Inc.; Pennsylvania Southwestern Railroad, Inc.; Great Northwest Railroad, Inc.; Kaw River Railroad, Inc.; Mission Mountain Railroad, Inc.;

¹ Boise Valley R.R.—Assignment of Lease Exemption—Union Pac. R.R. and Idaho N. & Pac. R.R., FD 35259 (STB served Oct. 2, 2009) (published in the Federal Register on the same date, 74 Fed. Reg. 50,998-99).

² Although BMWE at times characterizes its pleading as a petition to reject the exemption, given that BMWE's arguments are based on the standards for revocation, the pleading will be treated as a petition to revoke.

Mississippi Southern Railroad, Inc.; Yellowstone Valley Railroad, Inc.; Louisiana Southern Railroad, Inc.; Arkansas Southern Railroad, Inc.; Alabama Southern Railroad, Inc.; Vicksburg Southern Railroad, Inc.; Austin Western Railroad, Inc.; Baton Rouge Southern Railroad, LLC; Pacific Sun Railroad L.L.C.; Grand Elk Railroad; and Alabama Warrior Railway, L.L.C.

In its notice of exemption, Watco stated that: (1) the rail lines to be operated by BVR did not connect with any other railroads in the Watco corporate family; (2) the transaction was not part of a series of anticipated transactions that would connect these rail lines with any other railroad in the Watco corporate family; and (3) the transaction did not involve a Class I rail carrier. Therefore, the transaction was exempt from the prior approval requirements of 49 U.S.C. § 11323. See 49 C.F.R. § 1180.2(d)(2).

DISCUSSION AND CONCLUSIONS

Under 49 U.S.C. § 10502(d), the Board may revoke an exemption when it finds that application of a statutory provision is necessary to carry out the RTP. Only those portions of the RTP that are relevant or pertinent to the underlying statute—here, 49 U.S.C. § 11324—are considered. See Vill. of Palestine v. ICC, 936 F.2d 1335 (D.C. Cir. 1991) (Palestine). Should the Board revoke the notice of exemption, Watco would then be required to file either a petition for exemption under 49 U.S.C. § 10502 or, here, an application for control under 49 U.S.C. § 11323(a)(5). The party seeking revocation has the burden of showing that criterion is met, 49 C.F.R. § 1121.4(f), and petitions to revoke must be based on reasonable, specific concerns demonstrating that reconsideration of the exemption is warranted and more detailed scrutiny of the transaction is necessary. See Consol. Rail Corp.—Trackage Rights Exemption—Mo. Pac. R.R., FD 32662 (STB served June 18, 1998). The Board will also revoke an exemption when the transaction is shown to be a sham. See Burlington N. R.R. Co. v. United Transp. Union, 862 F.2d 1266 (7th Cir. 1988).

BMWE asserts that, prior to authorizing an exemption, the Board must determine that the exemption would satisfy the criteria of the RTP. Specifically, BMWE states that Watco has failed to comport with 49 U.S.C. § 10101(2) (minimize the need for Federal regulatory control); (8) (operate transportation facilities and equipment without detriment to public health and safety); (9) (encourage honest and efficient railroad management); and (11) (encourage fair wages and safe working conditions).

BMWE argues that Watco “should not be viewed in the light envisioned by the section 10502 power of exemption” from Board certification proceedings because of Watco’s control of approximately 4,000 miles of track in 18 states, and what BMWE characterizes as Watco’s inextricable link to Class I rail operations, namely granting Class I carriers access to Watco track to haul substantial ton-miles. BMWE also asserts that, as Watco has expanded its operations, it

has demonstrated a company-wide lack of concern for rail safety.³ BMW argues that, if Watco “is allowed to use the exemption procedures as a mere formality on its way to continued expansion it will never make any effort to improve its safety record.”⁴ Lastly, BMW asserts that, because of Watco’s “substandard” treatment of employees, including pay and working conditions, the Board should not allow Watco to oversee more employees through this transaction. Accordingly, BMW requests that the Board reject the notice, issue a procedural schedule for discovery and comments, and allow for discovery of matters relating to safety and labor practices.

The Board will deny BMW’s petition to revoke. BMW has not attempted to relate its generalized RTP claims to § 11324 or to the specifics of the transaction at issue here and thus, has not shown that application of § 11324 is necessary to carry out the RTP. Therefore, BMW has not met its burden under 49 C.F.R. § 1121.4(f) to revoke the exemption here. Neither Watco’s size nor the fact that it grants trackage rights to Class I railroads⁵ is relevant in determining whether it is eligible for an exemption in this proceeding. Nor does BMW argue that the notice contains false or misleading information, or that the transaction is a sham. Rather, BMW expresses only general concerns primarily regarding Watco’s safety and labor practices.⁶

The Board takes seriously the national policy to ensure that rail facilities are operated safely and does not condone any rail carrier flouting the goals of the RTP. However, although BMW argues that Watco’s actions fail to comport with 49 U.S.C. § 10101(2), (8), (9), and (11), BMW fails to demonstrate how additional information regarding Watco’s system-wide operations and safety practices would ultimately be relevant in determining whether an application for the authority sought by Watco under § 11321 *et seq.* would be granted. Nor has

³ For example, BMW asserts that recent congressional testimony of Watco’s CEO suggests that Watco lacks adequate capital to fund its operations in a safe manner. *See* BMW Petition 5-6. BMW also cites a 2008 derailment of a BNSF train traveling over track owned and maintained by Stillwater (a Watco company). *See id.* at 4; *see also* Watco Reply 8.

⁴ BMW Petition 5.

⁵ With regard to BMW’s claim that Watco should be treated differently in light of its control of significant trackage and link to Class I rail operations, Watco responds that “[t]he only significant Class I operations over mainline tracks owned or leased by a Watco-controlled carrier is... [BNSF’s] operations over Stillwater” and, in any event, that “there is nothing unique about Class I railroads operating over short lines.” Watco Reply 8.

⁶ Safety issues are primarily within the province of the Federal Railroad Administration, and while the Board would not normally revoke a § 11324(d) exemption (or deny a § 11324(d) application) based solely on the types of safety concerns raised here, the Board could, under appropriate circumstances, impose safety conditions or reopen an exemption proceeding to do so if shown to be warranted under the reopening standards of 49 U.S.C. § 722(c). Here, however, Watco does not suggest any safety conditions that could mitigate its expressed concerns.

BMW provided evidence to support its claim that Watco's actions contravene the RTP provision favoring minimal regulation and fair and expeditious decisions.⁷

Further, while parties may raise issues concerning the appropriate level of labor protection in a petition to revoke, BMW raises only general concerns regarding Watco's labor practices to support its claims regarding the "fair wages and safe and suitable working conditions" language in 49 U.S.C. § 10101(11).⁸ BMW has not shown that these concerns, even if valid, could provide a basis for denying an application under § 11324.⁹ Therefore, BMW's concerns about Watco's labor practices provide no basis for the Board to revoke the notice of exemption.

In short, BMW has not met its burden of proof that application of 49 U.S.C. § 11324 is necessary to carry out the RTP. Consequently, the Board will deny BMW's request to revoke the exemption. BMW's request for the issuance of a procedural schedule to allow for comments and discovery is moot.

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

⁷ To support its assertion that Watco does violate and would continue to violate the RTP unless the Board intervenes, BMW cites Watco Companies, Inc., and Watco Transportation Services, Inc.—Continuance in Control Exemption—Michigan Central Railway, LLC, FD 35064 (STB served Dec. 10, 2007) (Michigan Central Railway), to demonstrate Watco's history of "subversive tactics." In that case, the Board denied the petition of Michigan Central Railway (MCR), a noncarrier, for an exemption from 49 U.S.C. § 10901 to acquire lines from Norfolk Southern Railway Company (NS). The Board found that, because of NS's control of MCR, MCR did not qualify as a noncarrier and thus the transaction did not come within the scope of § 10901. The Board's reasoning in Michigan Central Railway is inapplicable here, where BMW has not argued that UP improperly controls BVR and has not demonstrated that Watco's control of BVR is otherwise a sham.

⁸ BMW has not asked us to impose labor protection here. We note that § 11326(c) does not provide for labor protection for § 11324 transactions, such as this one, that involve only Class III rail carriers.

⁹ See Pac. Sun R.R.—Lease and Operation Exemption—BNSF Ry., FD 35173 (STB served May 27, 2009) (finding that § 10101(11) did not provide a basis for relief to revoke the notice of exemption, which petitioner argued should have been denied because the notice lacked conditions for the protection of affected employees).

It is ordered:

1. BMWWE's request to revoke the notice of exemption is denied.
2. This decision is effective on its service date.

By the Board, Chairman Elliott, Vice Chairman Mulvey, and Commissioner Nottingham.