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SERVICE DATE - NOVEMBER 10, 2003

SURFACE TRANSPORTATION BOARD

DECISION

STB Docket No. 42076

ALBANY & EASTERN RAILROAD COMPANY

v.

THE BURLINGTON NORTHERN AND SANTA FE RAILROAD COMPANY

Decided: November 5, 2003

As explained in the Board's July 22, 2003 decision in this matter, the Albany & Eastern Railroad Company (AERC) has filed a complaint against The Burlington Northern and Santa Fe Railway Company (BNSF) under the Board's procedures in 49 CFR part 1108,¹ seeking arbitration of a dispute under the Railroad Industry Agreement (RIA).² AERC's complaint seeks waiver of a paper barrier that is allegedly contained in an agreement by which AERC purchased 17.4 miles of BNSF's line between Lebanon and Foster, OR.³ AERC claims that the paper barrier precludes it from interchanging certain rail traffic with the Union Pacific Railroad Company (UP) at Albany, OR. The complaint alleges that the traffic at issue is new traffic, originating on AERC's line at Bauman and Sweet

¹ The procedures were adopted in Arbitration of Disputes Subject to Stat. Juris. of the STB, 2 S.T.B. 564 (1997) (Ex Parte No. 560).

² The RIA is an agreement between the Association of American Railroads (AAR) and the American Short Line and Regional Railroad Association (ASLRRRA) that is intended to provide a framework for improving the ability of smaller (Class II and Class III) railroads and Class I railroads to work together to serve the public in the most efficient manner possible. AERC's complaint invokes the provision of the RIA that prescribes the procedures in 49 CFR part 1108 for resolving disputes over so-called "paper barriers." In general, a paper barrier is a contractual restriction on interchange that is imposed on short-line carriers at the time of their creation. See Assn. of American Railroads et al.—Agreement—49 U.S.C. 10706, 3 S.T.B. 910, 911 (1998) (Agreement). As also pertinent to this matter, the RIA provides for waiver of paper barriers under certain circumstances for new traffic as defined by the RIA. AERC has attached a copy of the RIA to its complaint.

³ Albany & Eastern Railroad Company—Acquisition and Operation Exemption—The Burlington Northern and Santa Fe Railway Company, STB Finance Docket No. 33567 (STB served May 21, 1998) (AERC Acquisition).

Home, OR, and terminating at locations served only by UP. In its answer to the complaint, BNSF denies that the traffic at issue is new traffic. BNSF has agreed to arbitrate the dispute under the Board's procedures.

On February 13, 2003, the Director of the Office of Proceedings issued a notice providing that AERC and BNSF may proceed to arbitration. The notice also rejected a request by John D. Fitzgerald, United Transportation Union-General Committee of Adjustment (UTU/GO-386) to intervene in the determination of whether arbitration should proceed. The Board subsequently denied the union's appeal of the notice in the July 22, 2003 decision.

UTU/GO-386 has now filed a petition for reconsideration, claiming material error in the Board's July 22nd decision and citing 49 CFR 1115.3. AERC and BNSF have replied. Upon consideration of this petition, the Board finds no material error and the petition will be denied.

DISCUSSION AND CONCLUSIONS

UTU/GO-386 again claims that it should be permitted to intervene in the determination of whether arbitration should proceed between the two carriers. UTU/GO-386's request to intervene was rejected by the Director's notice and the previous Board decision because the procedures in 49 CFR 1108 do not provide for public participation when an arbitration proceeding is initiated or for intervention by an uninvited third party at any time. The union's current petition presents no reasons for the Board to reconsider this matter and does not demonstrate that the Board materially erred.

UTU/GO-386 asserts that, in seeking to refer its complaint to arbitration, AERC actually is seeking to revoke, in part, the exemption granted in AERC Acquisition, so that the Board could impose a condition on the line acquisition to permit AERC to carry the alleged new traffic. The union contends that the relief sought by AERC is not available under the Board's rules in 49 CFR 1108.2, which provide that the arbitration procedures may not be used to revoke an exemption.⁴ In its reply, AERC points out that it is not seeking to revoke the exemption in AERC Acquisition by which it acquired the rail line, but rather, is seeking arbitration involving a provision of the RIA, as provided by the RIA.

⁴ As part of its argument, UTU/GO-386 claims that the Board erred in its prior decision by not citing the specific statutory authority to support its conclusion that the transportation at issue is sufficiently connected to the Board's jurisdiction to warrant the use of the Board's arbitration procedures. The transportation at issue – for-hire rail transportation provided by common carriers – clearly falls within the Board's general jurisdiction under 49 U.S.C. 10501 and is sufficiently connected to the Board's licensing authority at 49 U.S.C. 10901 and its authority over the interchange of traffic at 49 U.S.C. 10742 so as to warrant the use of the Board's arbitration procedures pursuant to the RIA.

There is no merit to the union's assertion. Where the dispute is one that can be resolved by the parties themselves, the arbitration procedures are available to consenting parties as an alternative to the revocation procedures. See Ex Parte No. 560, 2 S.T.B. at 567-68. The exemption granted in AERC Acquisition authorizes AERC to handle traffic moving on the line pursuant to its agreement with BNSF, the specific terms of which properly were not before the Board for approval. The paper-barrier term, however, is also subject to the RIA. Because arbitration pursuant to the RIA is consensual between AERC and BNSF, neither specific Board approval nor revocation of AERC Acquisition is required.

The union and BNSF also ask the Board to clarify whether the Board in its July 22, 2003 decision intended to make a finding that the traffic at issue is new traffic. AERC's complaint asserts that the subject traffic is new traffic as defined by the RIA. BNSF denies this assertion. In the July 22, 2003 decision, the Board described the dispute as involving interchange rights for new traffic, and discussed rail labor's allegation of harm should AERC be successful in its efforts to have the paper barrier removed. However, as both AERC and BNSF recognize in their replies, the Board certainly did not intend to make, nor did it make, a determination of whether the traffic at issue was new traffic as defined by the RIA. Rather, the Board recognized that this dispute is one that the parties have agreed to resolve by arbitration.

Finally, UTU/GO-386 again asserts that the Board did not properly consider whether BNSF employees would be harmed if AERC could interchange the traffic at issue with UP. But this issue has already been addressed. The union's current petition does not show that reconsideration of this matter is warranted.

Accordingly, the petition for reconsideration is denied.

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

It is ordered:

1. UTU/GO-386's petition for reconsideration is denied.

2. This decision is effective on its service date.

By the Board, Chairman Nober.

Vernon A. Williams
Secretary