

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 33843

ARKANSAS AND MISSOURI RAILROAD COMPANY—
LEASE AND OPERATION EXEMPTION—
UNION PACIFIC RAILROAD COMPANY

[REQUEST FOR WAIVER OF 49 CFR 1150.42(e)]

Decided: June 28, 2000

By motion filed June 15, 2000, Arkansas and Missouri Railroad Company (A&M) seeks waiver of the requirements of 49 CFR 1150.42(e), to permit the exemption it is seeking in this proceeding to become effective without awaiting the expiration of the 60-day notice period measured from the date of certification to the Board as established in section 1150.42(e).¹ The motion will be granted.

On June 8, 2000, A&M, a Class III rail carrier, filed a verified notice of exemption under 49 CFR 1150.41 to lease and operate approximately 3.2 +/- miles of rail line from Union Pacific Railroad Company (UP) at several locations near UP's Van Buren, Arkansas yard, in Sebastian County, AR. As part of the verified notice of exemption, A&M provided, at Exhibit C, a certificate of compliance with 49 CFR 1150.42(e) (certificate), in which it certified that, on April 6, 2000, it had posted a notice of intent at the workplace of the employees of the affected lines and served the national offices of the labor unions representing the employees on the line with a copy of a notice of intent. A&M stated in its notice that it expected to consummate the transaction on or about June 14, 2000.

In its motion for waiver, A&M states that, on or about February 1, 2000, it posted a notice of intent concerning the transaction at the workplace of the employees located on the

¹ Under 49 CFR 1150.42(e), "If the projected annual revenue of the rail lines to be acquired or operated, together with the acquiring carrier's projected annual revenue, exceeds \$5 million, the applicant must, at least 60 days before the exemption becomes effective, post a notice of applicant's intent to undertake the proposed transaction at the workplace of the employees on the affected line(s) and serve a copy of the notice on the national offices of the labor unions with employees on the affected line(s), setting forth the types and numbers of jobs expected to be available, the terms of employment and principles of employee selection, and the lines that are to be transferred, and certify to the Board that it has done so."

affected lines and notified local officials of the labor unions representing the affected employees. A&M further asserts that, on or about April 1, 2000, A&M's counsel called the Surface Transportation Board's Office of Proceedings and asked whether a certificate relating to the notice to employees should be filed 60 days in advance of the filing of a verified notice of exemption or whether such certificate should be filed with the verified notice of exemption. According to A&M, the staff person, with whom its counsel allegedly spoke, but whom counsel does not identify, indicated that the certificate should be filed with the verified notice of exemption. A&M states that, on April 6, 2000, new notices of intent were posted at the workplace of the employees on the affected lines and mailed to the national offices of the labor unions representing such employees when A&M discovered that it was unclear whether the national offices had actually received the February 1, 2000 notification. A&M further notes that, relying on the advice it allegedly received from Board staff on April 1, 2000, it did not submit the required certificate to the Board at that time. Although the notice was apparently posted on February 1, 2000, and again on April 6, 2000, A&M did not certify that fact to the Board until June 8, 2000. A&M states that, on June 13, 2000, a Board staff member notified its counsel that the certificate should have been filed at the Board 60 days prior to the proposed effective date of the exemption. As a result of that notification, A&M filed its waiver request. Absent Board action granting the waiver, the transaction may not be consummated until 60 days after June 8, 2000 (or August 7, 2000).

A&M seeks waiver of the 60-day Board notice period and seeks to have the exemption made effective as of June 14, 2000, so that consummation of the transaction can go forward on that date. A&M contends that the regulations of the Board at 49 CFR 1150.42(e) are ambiguous as to whether the certificate should be filed 60 days prior to the effective date or whether the certificate must simply certify that notice was given 60 days prior to the effective date. A&M points out that the affected employees and their unions will have had more than 60 days' actual notice by June 14, 2000. A&M states that continued delay of the implementation of the transaction will constitute a hardship on it and UP.

While A&M claims that the Board's regulation at 49 CFR 1150.42(e) is ambiguous, we note that the Board has addressed the issue of the 60-day certification to the Board in various decisions. See *Portland & Western Railroad, Inc.—Lease and Operation Exemption—Port of Tillamook Bay Railroad* [Request for Waiver of 49 CFR 1150.42(e)], STB Finance Docket No. 33734 (STB served May 10, 1999); *Belt Line Division of Tacoma Public Utilities—Operation Exemption—in Pierce, Thurston and Lewis Counties, WA* [Request for Waiver of 49 CFR 1150.42(e)], STB Finance Docket No. 33666 (STB served Oct. 30, 1998); *Minnesota Commercial Railway Company—Lease and Operation Exemption—Canadian Pacific Railway Company (Soo Line District) et al.* [Request for Waiver of 49 CFR 1150.42(e)], STB Finance Docket No. 33675 (STB served Oct. 30, 1998); *Wisconsin & Southern Railroad Co.—Lease and Operation Exemption—Soo Line Railroad Company d/b/a Canadian Pacific Railway* [Request for Waiver of 49 CFR 1150.42(e)], STB Finance Docket No. 33571 (STB served May 27, 1998). The Board, through these decisions, has made it clear that the posting of a notice of applicant's intent to undertake the proposed transaction at the workplace of the employees on the affected

line(s) and the service of a copy of the notice on the national offices of the labor unions setting forth the types and numbers of jobs expected to be available, the terms of employment and principles of employee selection, and the lines that are to be transferred, and the filing of a certification to the Board that it has done so are to be done at least 60 days before the exemption becomes effective. We therefore reject A&M's claim that an ambiguous regulation justifies its failure to file a timely certification. Moreover, in light of these past Board decisions, we are similarly unpersuaded that relief for A&M is in order as a result of the alleged receipt of bad advice from an unidentified Board staff person.

In its waiver request, however, A&M asserts that no interested party, including employees and their unions, would be adversely affected by implementation of the transaction sooner than 60 days after June 8, 2000. The purpose of 49 CFR 1150.42(e) is to ensure that rail labor unions and employees who would be affected by the transfer of a line are given sufficient notice of the transaction before consummation.² Because it appears that A&M has already provided much more than 60 days' actual notice to affected employees and their unions, we will accept A&M's June 8 certification to the Board, grant the waiver request, and waive the remainder of the 60-day requirement, as measured from the certification date to the Board, under 49 CFR 1150.42(e) with respect to this transaction. Granting the waiver request will have the effect of making the exemption for the lease and operation transaction in this proceeding effective on the service date of this decision.

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

It is ordered:

1. A&M's motion is granted to the extent described above.
2. This decision is effective on its service date.

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

Vernon A. Williams
Secretary

² See Acquisition of Rail Lines Under 49 U.S.C. 10901 and 10902--Advance Notice of Proposed Transactions, STB Ex Parte No. 562 (STB served Sept. 9, 1997).