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SERVICE DATE - DECEMBER 3, 2002

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 34209

NORFOLK SOUTHERN RAILWAY COMPANY–TRackage RIGHTS
EXEMPTION–DELAWARE AND HUDSON RAILWAY COMPANY, INC.

STB Finance Docket No. 34225¹

NORFOLK SOUTHERN RAILWAY COMPANY–TRackage RIGHTS
EXEMPTION–READING BLUE MOUNTAIN AND NORTHERN RAILROAD
COMPANY

Decided: November 25, 2002

On July 5, 2002, Norfolk Southern Railway Company (NS) filed two notices of exemption to acquire trackage rights over two lines of railroad located in Pennsylvania and New York. On July 23, 2002, Samuel J. Nasca, the legislative director of the United Transportation Union–New York State Legislative Board (UTU-NY), filed a petition to reject or revoke the notices.² On August 12, 2002, NS filed a response to UTU-NY's petition. For the reasons discussed below, the petition will be denied.

BACKGROUND

By separate notices filed in these two proceedings pursuant to 49 CFR 1180.2(d)(7), NS invoked our class exemption to acquire overhead trackage rights. In STB Finance Docket No. 34209, NS acquired rights over 284.6 miles of the freight main line of the Delaware and Hudson Railway Company, Inc., d/b/a Canadian Pacific Railway Company (CP), between NS's connection with CP at milepost 752.0 near Sunbury, PA, and CP's connection with Guilford Rail System at milepost 467.40

¹ The cases are not consolidated but are being handled together for administrative convenience.

² In a decision served on July 25, 2002, the Chairman denied an embraced petition to stay the effectiveness of the exemptions.

at Mechanicville, NY. In STB Finance Docket No. 34225, NS obtained rights to operate over 56.7 miles of the Lehigh Line of the Reading Blue Mountain and Northern Railroad Company (RBMN), between milepost 119.3 in Lehighon Yard and milepost 175.5 in Dupont, PA.³

The exemptions became effective on July 12, 2002, 7 days after the notices were filed. NS informed us, however, that it did not intend to implement the transactions covered by the notices until August 24, 2002.

UTU-NY filed its petition on July 23, 2002. On July 25, 2002, the petitioner filed a letter indicating that NS employees represented by UTU-NY had reached an implementing agreement, covering both transactions, with that carrier.⁴ However, the letter also stated that RBMN and CP employees represented by UTU-NY had not resolved their differences with those two carriers.

On August 6, 2002, NS filed with us an unredacted version of its trackage rights agreement with RBMN, along with a motion for a protective order. Also on that date, NS filed an unredacted version of its Restructuring Agreement with CP, along with a motion for a protective order. On August 16, 2002, separate decisions granting both of the requested protective orders were served.

PRELIMINARY MATTERS

On August 12, 2002, UTU-NY filed a motion to compel discovery from NS. The railroad replied on August 26, 2002. In its motion, UTU-NY requests that we compel NS to produce an unredacted version of its Restructuring Agreement with CP, as well as three haulage agreements with CP dated May 5, 1998, April 11, 1999, and June 16, 1999.⁵ The union argues that these materials are relevant to its dispute with NS because, under the proposed transactions, CP and RBMN will lose

³ By letter submitted on July 11, 2002, NS states that, due to the history of the line's ownership, there is a discrepancy of approximately one-half mile between the apparent and the actual mileage between these mileposts. Nevertheless, NS maintains that the distance between them is approximately 56.7 miles.

⁴ According to NS, this agreement was entered into pursuant to the employee protective conditions set forth in Norfolk and Western Railway Company—Trackage Rights—Burlington Northern, Inc., 354 I.C.C. 605 (1978), as modified in Mendocino Coast Railway, Inc.—Lease and Operate—California Western Railroad, 360 I.C.C. 653 (1980) (Norfolk and Western).

⁵ On August 26, 2002, UTU-NY indicated by letter that NS had agreed to supply an unredacted version of the Restructuring Agreement, but had not produced the three haulage agreements.

some of their current business of hauling cargo for NS. In response, NS argues that the haulage agreements should not be subject to a motion to compel because they are irrelevant to the current dispute over the appropriate level of employee protection for these transactions. The railroad also argues that the text of the haulage agreements would not shed any light on the effect of the transactions on railroad employees.

The motion to compel will be denied. UTU-NY now has access to the Restructuring Agreement in unredacted form, and the petitioner has offered no support for its assertion that the haulage agreements are relevant to the dispute over employee protection.

Along with the motion to compel, UTU-NY requested an extension of the time to file a supplemental petition to revoke. But the basis for the request for the supplemental petition was to incorporate material from the discovery we have denied. Moreover, an extension of the time to file a petition to revoke is unnecessary because, under 49 U.S.C. 10502(d), a petition to revoke may be filed at any time. For these reasons, the relief sought will be denied.

DISCUSSION AND CONCLUSIONS

In its petition, UTU-NY asks us to reject or revoke the notices of exemption. As grounds for rejection, UTU-NY argues that NS has contravened 49 CFR 1180.6(a)(7)(ii) by failing to provide, or redacting information from, certain relevant agreements. As grounds for revocation, UTU-NY claims that the notices provide inadequate labor protection.

Rejection. Under 49 CFR 1180.6(a)(7)(ii), NS was required to provide, along with each notice of exemption, a copy of any contract or other written instrument entered into, or proposed to be entered into, pertaining to the proposed transaction. Petitioner asserts that NS violated this rule by failing to file its Restructuring Agreement in STB Finance Docket No. 34209 and by failing to file three ancillary haulage agreements and an unredacted trackage rights agreement in STB Finance Docket No. 34225. As noted, however, on August 6, 2002, NS submitted to the Board unredacted versions of its trackage rights agreement with RBMN and its Restructuring Agreement with CP. UTU-NY has access to these materials as long as it satisfies the undertakings attached to our decisions granting the protective orders. As discussed above, the haulage agreements are irrelevant here. Therefore, any defects have been cured, and the petition to reject will be denied.

Revocation. UTU-NY seeks partial revocation of the two trackage rights exemptions in order to obtain greater labor protection. Under 49 U.S.C. 10502(d), we may revoke an exemption, in whole or in part, if we find that regulation of a transaction is necessary to carry out the rail transportation policy (RTP) of 49 U.S.C. 10101. To justify revocation, a petitioner must demonstrate reasonable,

specific concerns addressing the revocation criteria.⁶ Because UTU-NY has not carried its burden under section 10502(d), its petition will be denied.

UTU-NY argues that the exempted transactions require the standard level of labor protection for railroad consolidations developed in New York Dock Ry.–Control–Brooklyn Eastern Dist., 360 I.C.C. 60 (1979) (New York Dock), rather than the standard level of labor protection for trackage rights transactions developed in Norfolk and Western.⁷ UTU-NY makes three arguments to support its case. First, petitioner argues that NS plans to eliminate 21 positions at Renovo, PA, and possibly to discontinue all service at that point. This, claims petitioner, would amount to a “de facto” abandonment. In its response NS states that it does not intend to discontinue all services to the Renovo area and, therefore, it has not sought discontinuance or abandonment authority. We agree that there is no basis for UTU-NY’s de facto abandonment claim. As to the concerns about layoffs, as noted, NS employees represented by UTU-NY have concluded an implementing agreement with NS—an action indicating that petitioner’s concerns vis-a-vis NS employees are unfounded.⁸ For these reasons, we reject this first argument as a basis for revocation.

Second, UTU-NY asserts that the exempted transactions require New York Dock employee protection rather than Norfolk and Western protection because the Restructuring Agreement is related to CSX Corp. Et Al.–Control–Conrail Inc. Et Al., 3 S.T.B. 196 (1998) (Conrail), in which the assets of Consolidated Rail Corporation were divided between NS and CSX Transportation, Inc. (CSXT). That transaction was made subject to New York Dock employee protection for affected employees. NS counters that neither trackage rights transaction is related to or arises out of Conrail, which did not mandate, permit, necessitate, or in any way trigger the trackage rights from CP or RBMN. NS Opposition to Motion to Compel, p. 10. In any event, in Conrail, we imposed, as respects employees

⁶ Labor interests may raise issues concerning the appropriate level of labor protection. See, e.g., The New York, Susquehanna and Western Railway Corp.–Trackage Rights Exemption–Onondaga County Industrial Development Agency, Finance Docket No. 32772 (STB served Aug. 7, 2001).

⁷ The substantive benefits are the same under the employee protective conditions of both New York Dock and Norfolk and Western. Under the New York Dock conditions, however, applicants must provide employees with 90 days’ notice, rather than the 20 days required under Norfolk and Western. Also, under New York Dock, an agreement to implement the details and specific application of the protection must be reached before the transaction is executed, whereas, under Norfolk and Western, the transaction may be executed subject to a later implementing agreement.

⁸ Petitioner, a representative (or employee) of the labor union at issue, is not a dissident NS employee seeking to enforce his individual rights.

of carriers other than the applicants and their affiliates, Norfolk and Western conditions, not New York Dock conditions, on any related trackage rights granted there. Conrail, 3 S.T.B. at 216 n.35, 371-72, and 394-95. Therefore, even if these exempted trackage rights transactions were related to Conrail, we would typically impose the Norfolk and Western conditions to protect affected employees of CP and RBMN.

Third, UTU-NY asserts that the Restructuring Agreement itself comes within 49 U.S.C. 11323 and is subject to New York Dock. Although petitioner is correct about the applicability of section 11323 to the Restructuring Agreement because it deals with trackage rights, UTU-NY has failed to provide any support for its argument that New York Dock protections are applicable to that agreement. In any event, the Restructuring Agreement covers matters solely related to trackage rights, for which only the Norfolk and Western conditions are imposed.⁹ For this reason, we reject this argument as a basis for revocation.

In sum, we conclude that UTU-NY has not shown that the imposition of New York Dock employee protection in lieu of Norfolk and Western protection is warranted in these circumstances. Accordingly, UTU-NY's petition to revoke will be 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-NY's motion to compel and motion to extend the time for filing a supplemental petition to revoke are denied.
2. UTU-NY's petition to reject the notices of exemption is denied.
3. UTU-NY's petition to revoke the notices of exemption is denied.

⁹ Specifically, it provides for the revision of compensation under the existing trackage rights agreement, provides for the allocation of the cost of funding for capacity improvements, creates an option for CP to obtain trackage rights over a line owned by NS, and creates a plan for operating trains over certain routes.

4. This decision is effective on its date of service.

By the Board, Chairman Morgan and Vice Chairman Burkes.

Vernon A. Williams
Secretary