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SERVICE DATE - FEBRUARY 13, 2008

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 35092¹

PROGRESSIVE RAIL INC.–CONTINUANCE IN CONTROL EXEMPTION–
MONTGOMERY SHORT LINE LLC

STB Finance Docket No. 35093

MONTGOMERY SHORT LINE LLC–LEASE AND OPERATION EXEMPTION–
UNION PACIFIC RAILROAD COMPANY

Decided: February 12, 2008

BACKGROUND

In STB Finance Docket No. 35093, Montgomery Short Line LLC (MSL), a noncarrier, filed, on October 25, 2007, a notice of exemption under 49 CFR 1150.31 to lease 23.5 miles of rail line owned by Union Pacific Railroad Company (UP) and to operate the line as a rail common carrier. The line, known as the Montgomery, Minnesota Subdivision, runs from milepost 38.7 near Merriam in Scott County to milepost 62.2 (end of track) near Montgomery in Le Sueur County, MN. In a notice of exemption concurrently filed in STB Finance Docket No. 35092, Progressive Rail Inc. (PRI), which wholly owns MSL, seeks authority to continue in control of MSL when that entity becomes a Class III rail carrier.²

On November 23, 2007, Phillip James Qualy, on behalf of the United Transportation Union-Minnesota Legislative Board (UTU-MN), filed a petition asking the Board to stay the effectiveness of the exemptions. PRI and MSL (jointly, applicants) filed a joint reply to UTU-MN's petition for stay on November 27, 2007. On December 4, 2007, the United Transportation Union (UTU) filed a petition to revoke the exemptions, or, alternatively, to have the Board hold a hearing to further investigate this matter. Applicants jointly replied to UTU's petition to revoke on December 20, 2007. On January 14, 2008, Minnesota Attorney General Lori Swanson

¹ These proceedings are not consolidated. A single decision is being issued for administrative convenience.

² Notices of exemption in both proceedings were published in the Federal Register on November 9, 2007 (72 FR 63657).

filed in support of UTU's request for a hearing.³ On January 17, 2008, the applicants filed their own letter protesting the timeliness of the Attorney General's letter-filing and arguing that the Board should disregard it.

In this decision we will deny UTU's petition and will dismiss UTU-MN's stay request as moot.

DISCUSSION AND CONCLUSIONS

Under 49 U.S.C. 10502(d), we may revoke an exemption, in whole or in part, if regulation is necessary to carry out the rail transportation policy set forth in 49 U.S.C. 10101. We may exercise that revocation authority to protect the integrity of our processes. Minnesota Comm. Ry., Inc.—Trackage Exemp.—BN RR. Co., 8 I.C.C.2d 31, 37 (1991). The party seeking revocation has the burden of proof, and petitions to revoke must be based on reasonable, specific concerns demonstrating that reconsideration of the exemption is warranted and that regulation of the proposal is necessary. I&M Rail Link LLC—Acquisitions and Operation Exemption—Certain Lines of Soo Line Railroad Company d/b/a Canadian Pacific Railway, STB Finance Docket No. 33326 et al. (STB served Apr. 2, 1997), aff'd sub nom. City of Ottumwa v. STB, 153 F.3d 879 (8th Cir. 1998). Here, UTU seeks revocation on the grounds that the notices allegedly contain false and misleading information, but, as discussed below, UTU has failed to substantiate its claims. Accordingly, UTU has not shown that revocation is warranted.

Projected Revenues. UTU initially contends that MSL's notice contains false and misleading information about the annual projected operating revenues for the line MSL proposes to lease from UP. In the notice, MSL has certified that projected revenues would not exceed \$5 million annually. But UTU contends that, based on its "information and belief" about UP's present shippers, annual revenues should exceed \$5 million, thus obligating MSL to comply with the 60-day advance labor notice requirement at 49 CFR 1150.32(e).

Applicants dispute this contention, pointing out that MSL's freight business on the line will consist of moving approximately 4,000 freight cars annually between the interchange with UP at Merriam and customers located on the line. For this service, MSL will receive a set per-car charge from UP. To reach \$5 million annually in revenues, MSL points out that it would have to charge some \$1,250 per car, which it characterizes as "an unconscionable figure." Rather, MSL states that, while the actual per-car charge it will receive from UP is confidential, it will be substantially less than \$1,250 per car.

UTU has not submitted any support for its contention that MSL's projected annual revenues should exceed \$5 million or that MSL otherwise improperly certified that its annual

³ Minnesota Attorney General Swanson's letter was dated December 24, 2007, but was not received until January 14, 2008.

revenues would not exceed \$5 million. Conversely, MSL has offered a reasonable explanation in support of its certification. Thus, we find nothing false or misleading about MSL's certification, and we find no basis for requiring MSL to comply with the 60-day notice requirement at 49 CFR 1150.32(e).

Environmental issues. UTU asserts, again upon "information and belief" without offering any evidence, that at certain locations that were not disclosed by MSL the proposed transaction may raise environmental contamination issues. UTU alleges that three locations along the line have experienced large diesel fuel dumps or spills, with one involving more than 2,000 gallons. UTU argues that MSL should equip its locomotives operating in the areas of the fuel dump/spills with exhaust stack spark arresters, fire extinguishers suitable for flammable liquid fires, and low spark brake shoes as precautionary measures to eliminate the possibility of fire-related incidents. Because of these alleged environmental concerns, UTU contends that MSL should be required to submit an environmental report and that an Environmental Assessment (EA) or Environmental Impact Statement (EIS) should be prepared.

Applicants respond that no environmental documentation should be required. They point out that MSL's operations on the line will not have a significant environmental impact, noting that the lease transaction will not change rail operations on the line. MSL expects to operate the line in the same manner as UP, moving cars between customers on the line and the junction at Merriam, where the cars are added or subtracted from UP trains. Regarding the prior diesel fuel spills alleged to have occurred on the property, applicants point out that UP as owner and MSL as lessee must comply with federal and state law, if any remedial action is necessary.

The Board's regulations exempt MSL from the environmental reporting requirements for this transaction.⁴ UTU has not demonstrated that environmental documentation is required here or that an EA or an EIS should be issued. MSL will continue to provide the same level of service as presently provided by UP, and there will be no significant change to the environmental status or condition of the line. And, as noted, MSL, as the lessee of the line, and UP, as the owner of the line, will comply with federal and state law, if remedial action is necessary. Additionally, both must comply with Federal Railroad Administration (FRA) safety regulations in instituting and conducting rail operations. Accordingly, UTU has not shown that its environmental concerns require revocation.

New Prague Depot. UTU states that UP's New Prague depot is over 50 years old, raising concerns about whether there are any plans to alter or dispose of it as a result of the transaction. UTU contends that an historic report should be required. In its response, MSL states that it will lease the depot as part of the transaction described in STB Finance Docket No. 35093 but has no plans to alter or dispose of it.

⁴ See 49 CFR 1105.6(c)(2) and 1105.7(e) (4) or (5).

Under the Board's environmental regulations, MSL ordinarily would be exempt from the historic preservation reporting requirements for this transaction.⁵ And UTU has not presented sufficient evidence here to warrant requiring MSL to submit an historic report pursuant to 49 CFR 1105.8 regarding the New Prague depot. While MSL will lease the depot as part of the transaction, UP will continue to own it. Moreover, MSL has no plans to alter or dispose of the depot. Accordingly, UTU has failed to show that MSL's failure to submit an historic report warrants revocation here.

Delays. UTU next argues that MSL's new operations may cause unnecessary delays in interstate commerce. It notes that MSL will interchange and operate on UP's main line near Merriam (at milepost 34) on the Mankato Subdivision of the Twin Cities Service Unit. According to UTU, UP's main line operations include meeting and staging of through train movements and switching for blocking and set-outs of main line movements at milepost 34. Also, UP trains have occupied the trackage for train meets over which MSL will operate. UTU contends that MSL's operations could interfere with UP's operations at this junction, thus causing a delay in interstate commerce.

We find no merit in UTU's concern that MSL's operations could interfere with UP's operations at Merriam. The record shows that MSL will be doing nothing different in its train operations than what UP previously has done on the subject line. MSL will have an engine perform the same service that UP has been performing with its engine on the line. That service consists of moving cars between Merriam and customers on the line. Moreover, MSL's owner, PRI, is a short line rail carrier that operates several lines in Minnesota and Wisconsin that connect with Class I rail carriers. PRI also controls another Class III rail carrier that leases a line from UP.⁶ PRI's experience in interchanging traffic with Class I carriers should allay any concerns about the interchange of traffic at Merriam.

Notice. UTU-MN and UTU assert that MSL has not properly fulfilled its legal duties of notice pursuant to Minnesota State law by failing to notify the Minnesota Attorney General and Commissioner of Transportation 14 days before filing a notice of exemption with the Board pursuant to Minn. Stat. §§ 222.85 et seq. (2006). Whether that assertion is correct or not, compliance with Minnesota's notice statute is neither a prerequisite to qualify for exemption under any federal statute or Board regulation, nor grounds to revoke an exemption under any federal statute or Board regulation.

⁵ See 49 CFR 1105.8(b)(1).

⁶ See Progressive Rail Inc.–Acquisition of Control Exemption–Central Midland Railway Company, STB Finance Docket No. 35051 (STB served July 5, 2007).

Safety Information. Finally, we find no merit in UTU-MN's criticism that applicants have failed to include evidence in their notices of exemption that they are in compliance with FRA safety regulations. Our rules⁷ applicable to these proposed transactions do not require an advance affirmative showing of compliance with FRA safety regulations. Applicants, of course, must fully comply with all applicable FRA regulations in instituting and conducting rail operations. Moreover, PRI, as an operating carrier, should already be familiar with FRA requirements.

In sum, we find that UTU and UTU-MN have failed to show that applicants have not provided proper information under the Board's rules⁸ to qualify for the exemptions that they have invoked. We conclude that UTU has not shown that the exemptions in these proceedings should be revoked and that these transactions should be regulated. Accordingly, we will deny UTU's petition to revoke.⁹ We will also dismiss UTU-MN's petition to stay as moot, as we have addressed here the merits of the issues raised in the stay petition.

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

It is ordered:

1. UTU's petition to revoke the exemptions is denied.
2. UTU-MN's petition for stay is dismissed as moot.
3. This decision is effective on its date of service.

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

Anne K. Quinlan
Acting Secretary

⁷ See 49 CFR 1150.31-34, 49 CFR 1180.2(d)(2) and 1180.4(g), and 49 CFR part 1105.

⁸ Id.

⁹ Although UTU has also requested in the alternative that the Board hold a hearing to further investigate this matter, UTU has not presented evidence or argument that would warrant granting this request.

VICE CHAIRMAN MULVEY, commenting:

While I vote to permit these transactions to be implemented as proposed, I am troubled by the thin record required by our regulations and provided by the petitioners, despite several challenges to the transactions. I would have preferred that petitioners produce, under seal, the actual per car charge that MSL will receive from UP, in rebuttal of the allegation that MSL's revenues will exceed \$5 million annually. I would also have preferred the disclosure of any interchange commitments to which MSL agreed as a condition of its lease. This information may have assisted the State of Minnesota with its inquiry as well.