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SERVICE DATE – JULY 13, 2009

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 35187

GRAND ELK RAILROAD, L.L.C.  
– LEASE AND OPERATION EXEMPTION –  
NORFOLK SOUTHERN RAILWAY COMPANY

STB Finance Docket No. 35188

WATCO COMPANIES, INC. – CONTINUANCE IN CONTROL EXEMPTION – GRAND  
ELK RAILROAD, L.L.C.

Decided: July 10, 2009

The Board is denying the petition of the United Transportation Union (UTU) to revoke the exemptions in these dockets.

BACKGROUND

On November 3, 2008, a notice invoking the class exemption for lease and operation at 49 CFR 1150.31 was filed in STB Finance Docket No. 35187 by the Grand Elk Railroad, L.L.C. (GER), a noncarrier subsidiary of Watco Companies, Inc. (Watco). By this notice, GER sought to lease from the Norfolk Southern Railway Company (NS) and to operate approximately 123 miles of rail lines in Michigan and Indiana and also to obtain incidental trackage rights over 0.43 miles of track in NS's Botsford Yard. The leased lines run generally between Grand Rapids, MI, and Elkhart, IN.<sup>1</sup> The notice was served on November 17, 2008, and published on the same date in the Federal Register at 73 FR 67927.

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<sup>1</sup> Specifically, the leased lines are located between: (1) milepost KH 1.4 at Elkhart, IN, and milepost KH 27.4 at Three Rivers, MI; (2) milepost FB 27.3 at Three Rivers, MI, and milepost FB 102.3 at Grand Rapids, MI; (3) milepost KZ 94.25 and milepost KZ 95.0 (Kalamazoo Industrial Track); (4) milepost OW 66.6 and milepost OW 70.24 (Plainwell Industrial Track); (5) milepost XH 88.10 and milepost XH 92.40 (Hastings Running Track); (6) milepost CQ 42.8 and milepost CQ 43.9 (CK&S Industrial Track); (7) milepost KY 0.0 and milepost 3.2 ( B O Secondary); (8) milepost UP 0.0 and milepost UP 6.7 (Upjohn Secondary); (9) milepost QY 421.2 and milepost QY 421.3 (Quincy Secondary); (10) milepost VW 106.0 and milepost VW 106.9 (Comstock Industrial Track); (11) milepost AZ 69.6 and milepost AZ 70.4 (Airline Extension); and (12) milepost IJ 44.3 and milepost IJ 44.7 (CK&S Industrial Track), along with the yard tracks in Botsford Yard located between milepost MH 141.8 and milepost

(continued . . . )

Also on November 3, 2008, Watco filed a related notice in STB Finance Docket No. 35188 invoking the class exemption at 49 CFR 1180.2(d)(2) to allow it to continue in control of GER upon GER's becoming a Class III rail carrier.<sup>2</sup> That notice was served on November 17, 2008, and published on the same date in the Federal Register at 73 FR 67927-28, and it became effective on December 3, 2008. Under the 60-day labor notification provision in 49 CFR 1150.32(e), the lease-and-operation exemption could not become effective until January 30, 2009.

In STB Finance Docket No. 35187, several parties sought stays. By decision served on December 22, 2008, the Board denied a petition for stay filed by the Michigan Economic Development Corporation. By decision served on January 29, 2009, the Board denied petitions for stay filed by UTU and the Brotherhood of Locomotive Engineers and Trainmen/Michigan Legislative Board (BLET), thereby allowing the lease-and-operation exemption to become effective on January 30, 2009. That decision also addressed comments filed by Michigan State Senator Raymond E. Basham.

On April 14, 2009, UTU filed a petition to revoke the exemptions (Petition). UTU argues that the exemptions must be revoked because GER provided false and misleading information in its notice and subsequent filings. On May 1, 2009, GER and Watco jointly filed a reply in opposition to UTU's petition to revoke the exemptions.

#### 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 rail transportation policy of 49 U.S.C. 10101. The party seeking revocation has the burden of showing that criterion is met, 49 CFR 1121.4(f), and petitions to revoke must be based on reasonable, specific concerns demonstrating that reconsideration of the exemption is warranted and that more detailed scrutiny of the transaction is necessary. See Consolidated Rail Corporation – Trackage Rights Exemption – Missouri Pacific Railroad Company, Finance Docket No. 32662 (STB served June 18, 1998). When the Board considers whether to revoke an exemption, it analyzes whether the underlying provision of the statute – here, 49 U.S.C. 10901 for the lease-and-operation exemption and 49 U.S.C. 11324-26 for the control exemption – would require review of a particular issue. See Pacific Sun Railroad, L.L.C. – Lease and Operation Exemption – BNSF Railway Company, STB Finance Docket No. 35173 (STB served May 27, 2009). UTU argues that the exemptions should be revoked and that the notices of exemption should be declared void ab initio because GER's

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MH 142.7. The incidental trackage rights are to be conducted over an NS rail line located between milepost 143.03 and milepost 142.6 at Botsford Yard.

<sup>2</sup> Watco, which owns 100% of the issued and outstanding stock of GER, controlled 19 Class III rail carriers at the time it filed the notice of exemption.

notice and subsequent filings contained false or misleading information. See 49 CFR 1150.32(c) and 1180.4(g)(1)(ii). We find, on the record before us, that UTU has not shown that GER's notice or subsequent filings contain false or misleading information so as to render the notices void ab initio.

Condition of Line. In support of its argument that the notice and subsequent filings provided false and misleading information, UTU first contends that GER, in opposing the requests for stay, incorrectly stated that the line was maintained at less than Federal Railroad Administration (FRA) Class 3 level. Based on the Declaration of NS employee and UTU member Ken Bolender, UTU argues (Petition at 8) that NS operated the line at the Class 3 level (maximum 40 mph) in most places, at 50 mph on one part, and that those places where it was operated at 10 mph were simply due to slow orders.<sup>3</sup> UTU states that GER currently operates the track at 25 mph and claims that GER intends to abandon the signal system on the line. According to UTU, GER's plan to operate the line at the Class 2 level will degrade the current level of service, rather than preserve service and attract traffic as represented in the notice.

GER's representations regarding the physical condition of the line do not constitute false or misleading information that would warrant revocation. Each of the statements that UTU challenges concerns matters extraneous to whether the transaction fits within the class exemption. Under Board precedent, whether a party invoking a class exemption has provided false and misleading information turns on whether the party has, in its notice, claimed that it may lawfully invoke the class exemption when, in fact, it cannot.<sup>4</sup> The fact that a party has provided incorrect information in a notice does not justify rejection unless the information is material to whether the transaction qualifies for the class exemption.<sup>5</sup> While we expect applicants to provide accurate information, the speed limits on the line acquired here are not relevant to the issue of whether the acquisition of the line qualifies for the class exemption.

In any event, the record does not support UTU's claim that GER's statements are factually incorrect. Indeed, UTU and GER say essentially the same thing in describing the prior speed limits on the track. GER focuses on the thirteen track segments that are operated pursuant to 10-mph speed restrictions, while noting that the remainder of the line may be operated at higher speeds. UTU stresses that the line could be operated at speeds of up to 25, 40 or 50 mph,

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<sup>3</sup> In support, Mr. Bolender has submitted an undated NS timetable page showing that, at one time, one section of the line had a maximum speed of 50 mph, with exceptions, and that the other had a maximum speed of 40 mph, with exceptions.

<sup>4</sup> See R.J. Corman Railroad Company/Pennsylvania Lines, Inc. – Abandonment Exemption – in Clearfield, Jefferson, and Indiana Counties, PA, STB Docket No. AB-491 (Sub-No. 2X) at 2-3 (STB served Dec. 11, 2008) (Corman); Buffalo & Pittsburgh Railroad, Inc. – Abandonment Exemption – in Erie and Cattaraugus Counties, NY, STB Docket No. AB-369 (Sub-No. 7X) at 2 (STB served Nov. 4, 2008) (B&P).

<sup>5</sup> See Corman, supra; B&P, supra.

while conceding that the line is subject to “some” slow orders. These factual recitations are not necessarily inconsistent, but are different characterizations of the restrictions.

UTU notes that GER says that it intends to operate on the line at speeds that do not exceed 25 mph (FRA Class 2), and that GER intends to eliminate the signal system on the line. UTU offers these statements as reasons for revoking the exemption. But nothing on the record demonstrates that service at that speed would be inadequate. No shipper has complained about it. As for abandoning the signal system, GER responds that the signal system remains operational and that it has not sought the necessary prior approval of FRA to abandon any of the signal system.

Botsford Yard Congestion. UTU maintains that GER, in opposing the requests for stay, incorrectly argued that the Botsford Yard will not see a large increase in traffic. Based on the Declaration of UTU member and NS employee Grant Lapp, UTU argues that Botsford Yard will see an increase in traffic, for the following reasons: (1) GER has told its new employees that its crews will operate out of Kalamazoo (location of Botsford Yard); (2) contrary to what GER stated in opposing a stay, there will be no offsetting post-transaction decrease in eastbound traffic out of Botsford Yard because such eastbound traffic has not been staged or switched there since the 1970’s; and (3) GER will handle traffic at Botsford Yard that was previously handled by the Canadian National Railway Company (CN) due to the expiration of a CN lease.

The record before us does not support UTU’s claim that GER filed misleading information about the likelihood of traffic increases at Botsford Yard. GER credibly responds that: (1) its potential assumption of CN’s operations near Botsford Yard is uncertain; (2) even if GER later were to assume CN’s operations, the new traffic would not be handled at Botsford Yard; (3) the fact that most GER employees will be working out of Kalamazoo – because it is the geographic mid-point of the line – does not show that the yard will see an increase in traffic; and (4) due to the economy, actual traffic at the yard has declined from 340 cars/day to 100 cars/day since GER took over operations.

Failing Line. Finally, based on the Declaration of Jerry Gibson, Director of the UTU Michigan State Legislative Board, UTU characterizes as misleading GER’s claim that the financial condition of the line had been declining under NS control and that GER intended to reverse the trend.<sup>6</sup> UTU maintains that NS has not attempted to increase business on the line but has allowed the line to die, as evidenced by a recent admission that NS failed to pursue over 30 customer leads, and that, therefore, GER was deceptive in claiming that it was coming to the rescue of a failing line.

Even if we were to assume that UTU is correct in its characterization of NS’s operation of the line, it would not show that GER submitted false or misleading information to the Board warranting revocation. GER’s statement does not relate to whether the transaction qualifies for

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<sup>6</sup> On June 29, 2009, Dennis Baca, State Director of UTU’s New Mexico State Legislative Board, filed a statement in support of the statement of Mr. Gibson. On July 8, 2009, GER and Watco filed a reply to Mr. Baca’s statement.

the class exemption, and a lessee seeking to invoke the class exemption is not required to identify the cause of a decline in traffic over the line that it is attempting to lease. More importantly, the failure of NS to pursue certain customer leads would not render false or misleading GER's statement that, as a short line, it would be better able to reverse the lines' declining traffic patterns.<sup>7</sup>

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

It is ordered:

1. UTU's petition is denied.
2. This decision is effective on its date of service.

By the Board, Acting Chairman Mulvey, and Vice Chairman Nottingham.

Anne K. Quinlan  
Acting Secretary

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<sup>7</sup> GER claims that the customer leads came from NS union employees at town hall meetings before GER commenced operations and that GER has no knowledge of whether those leads were ever provided to NS. Reply at 10.