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SERVICE DATE - AUGUST 1, 2001

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 34048

READING BLUE MOUNTAIN AND NORTHERN RAILROAD COMPANY—
LEASE AND OPERATION EXEMPTION—NORFOLK SOUTHERN RAILWAY COMPANY
AND PENNSYLVANIA LINES LLC

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

Decided: July 31, 2001

By request filed July 20, 2001, Reading Blue Mountain and Northern Railroad Company (RBMN or petitioner) seeks a partial waiver (waiver request) of the requirements of section 1150.42(e) to permit the exemption it is seeking in this proceeding to become effective without awaiting the expiration of the full 60-day notice period measured from the date of certification to the Board as established in 49 CFR 1150.42(e).¹ On July 23, 2001, the United Transportation Union (UTU) filed a reply in opposition (reply) to RBMN's waiver request. On July 25, 2001, RBMN filed a rebuttal (rebuttal) to UTU's reply.² The waiver request will be granted.

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 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."

² Pursuant to 49 CFR 1104.13(a), a party may file a reply or a motion addressed to any pleading within 20 days after the pleading is filed with the Board. A reply to a reply is prohibited under 49 CFR 1104.13(c). RBMN characterizes its pleading as a rebuttal to UTU's reply rather than as a reply to a reply. In appropriate circumstances, we construe our rules liberally to allow pleadings where they will contribute to a complete record without prejudicing any party or delaying the proceeding. Petitioner maintains that UTU's reply adds facts that are not in the record and that RBMN's pleading is a rebuttal to address the factual issues raised so that the Board will have a complete record. UTU has not objected to the pleading, and in the

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BACKGROUND

On July 17, 2001, RBMN, a Class III rail carrier, filed a verified notice of exemption (verified notice) under 49 CFR 1150.41, in this proceeding, to sublease and operate approximately 1.3 miles of rail line currently owned by Pennsylvania Lines LLC and currently operated by Norfolk Southern Railway Company (NSR). The rail line extends between milepost 212.2 and a point 150 feet west of the western control point for Robinson's Crossing (milepost 213.5±) near Mehoopany, in Wyoming County, PA.³

As part of its verified notice, RBMN certified, pursuant to 49 CFR 1150.42(e), that, on May 25, 2001, it had posted a notice of intent to undertake the proposed transaction (notice of intent) at the workplace of the employees on the affected rail line and had served a copy of the notice of intent on the national offices of the labor unions representing the employees on the line. RBMN stated in its verified notice that it expected to consummate the transaction on or after July 25, 2001.

According to the waiver request, at the time RBMN filed its verified notice, it had interpreted the regulations at 49 CFR 1150.42(e) to mean that the 60-day advance notice applied only to the posting of the notice of intent at the workplace of the employees of NSR. Following the filing of its verified notice, RBMN notes that it was contacted by a Board staff member who alerted petitioner to the fact that it should have filed at the Board, 60 days in advance of the proposed transaction's effective date, its certification that the posting and service of the notice of intent had been made.

Petitioner states that consummation of the lease arrangement will enable it to serve an additional customer on the line. Petitioner further states that RBMN, NSR and the customer have been planning for the transfer of operations and that RBMN has made arrangements for the additional power and personnel to be available by what it had mistakenly assumed to be the proposed effective date of July 25, 2001. Petitioner submits that failure by the Board to grant the waiver will result in delays in service changes requested by the customer and adversely affect RBMN with respect to the power and personnel commitments it has made. RBMN further submits that it gave the required notice and that affected employees and their labor unions have had the full 60 days notice required by the regulations and that no interested party, including employees and their unions, would be adversely affected by implementation of the transaction now.

²(...continued)
interests of developing a complete record, we will accept it.

³ RBMN will replace NSR as the operator on the line. Counsel for RBMN notes that it has been authorized by counsel for NSR to state that NSR joins in this waiver request.

In its reply to the waiver request, UTU contends that RBMN failed to comply with the notice requirements of 49 CFR 1150.42(e). Counsel for UTU acknowledges that, on May 31, 2001, he received RBMN's letter dated May 25, 2001, regarding this proceeding and the requirements of 49 CFR 1150.42(e). However, he notes that, while the May 25, 2001 letter attached NS's certificate, it failed to include the notice of intent. UTU refutes RBMN's statements that RBMN gave the required notice and that no interested party would be adversely affected by early implementation.

In its rebuttal, RBMN states that it believed that it had enclosed a copy of the notice of intent with its May 25 letter. RBMN further states that it had no knowledge that the notice of intent had been omitted from the May 25 letter until petitioner received a copy of UTU's reply by facsimile on the afternoon of July 23, 2001.⁴ Petitioner adds that, even though the notice of intent was inadvertently not provided to UTU, UTU had notice that a proposed transaction was going to occur, who the parties to the transaction were and who the counsel for RBMN was. Petitioner suggests that UTU had an opportunity to learn the details relating to the transaction and RBMN's intentions that UTU claims were not previously provided by contacting counsel for RBMN. Petitioner argues that delaying this transaction under these circumstances would raise form over substance.

DISCUSSIONS AND CONCLUSIONS

RBMN's waiver request is reasonable and will be granted. The purpose of 49 CFR 1150.42(e) is to ensure that rail labor unions and employees who would be affected (especially through job loss) by the transfer of a line are given sufficient notice of the transaction before consummation.⁵ The responsibility to provide the general notice rested on RBMN.

It appears from the copy of RBMN's May 25 letter that petitioner had every intention of providing UTU with a copy of the notice of intent and assumed that it had done so. While RBMN apparently omitted the notice of intent enclosure when it mailed its May 25, 2001 letter to UTU, UTU had the information that there was a proposed transaction in STB Finance Docket No. 34048 and that a notice of intent existed and had been posted at the workplace of the employees at Mehoopany. Once UTU became aware of the omission, it could have contacted RBMN to correct the deficiency. The fault of course lies with RBMN, which bears the burden of compliance with the notice requirements, but in these circumstances, it appears that RBMN's oversight has not adversely affected the employees or their unions.

⁴ RBMN states that, upon learning of its omission, it immediately sent UTU, by facsimile, a copy of its verified notice, which included the notice of intent, the NSR certification, the cover letter and RBMN's certification.

⁵ See Acq. of R. Lines Under 49 U.S.C. 10901 & 10902—Advance Notice, 2 S.T.B. 592 (1997).

Here, the record reflects that notice has been provided to employees working on the rail line as of May 25, 2001. The Board takes seriously the requirements of the rule and admonishes petitioner and others to comply fully with those requirements in the future. We point out that the Board has consistently interpreted its regulations at 49 CFR 1150.42(e) to mean that the posting of the notice of intent at the workplace of the employees on the affected line, the service of the notice of intent on the labor unions with employees on the affected line, and the certification to the Board are all to be given at least 60 days in advance of the proposed transaction's effective date. See Arkansas and Missouri Railroad Company—Lease and Operation Exemption—Union Pacific Railroad Company, STB Finance Docket No. 33843 (STB served June 29, 2000). But, given the circumstances presented here, granting the requested waiver would not, in our view, be inconsistent with the Board's objectives in adopting the 60-day notice requirement. Accordingly, we will waive the remainder of the 60-day requirement under 49 CFR 1150.42(e) with respect to this transaction. Granting the waiver request has the effect of making the exemption for the 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. RBMN's rebuttal is accepted.
2. RBMN's waiver request is granted to the extent described above.
3. This decision is effective on its service date.

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

Vernon A. Williams
Secretary