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SERVICE DATE - LATE RELEASE APRIL 15, 1998

SURFACE TRANSPORTATION BOARD¹

DECISION

Finance Docket No. 32639

METRO NORTH COMMUTER RAILROAD COMPANY--ACQUISITION
EXEMPTION--THE MAYBROOK LINE

Finance Docket No. 32639 (Sub-No. 1)

METRO NORTH COMMUTER RAILROAD COMPANY--EXEMPTION--
FROM 49 U.S.C. SUBTITLE IV

Decided: April 9, 1998

By decision served January 13, 1995, Metro North Commuter Railroad Company (MNCR)² was granted exemptions under 49 U.S.C. 10505: (1) from the prior approval requirements of 49 U.S.C. 11343 et seq. for MNCR to acquire from Maybrook Properties, Inc. (MPI), the Maybrook Line, between milepost 71.2 on the Connecticut/New York State Line and approximately milepost

¹ The ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (ICCTA), which was enacted on December 29, 1995, and took effect on January 1, 1996, abolished the Interstate Commerce Commission (ICC) and transferred certain functions and proceedings to the Surface Transportation Board (Board). Section 204(b)(1) of the ICCTA provides, in general, that proceedings pending before the ICC on the effective date of that legislation shall be decided under the law in effect prior to January 1, 1996, insofar as they involve functions retained by the ICCTA. This decision relates to a proceeding that was pending with the ICC prior to January 1, 1996, and to functions that are subject to Board jurisdiction pursuant to 49 U.S.C. 11323-27. Therefore, this decision applies the law in effect prior to the ICCTA, and citations are to the former sections of the statute, unless otherwise indicated.

² MNCR is a public corporation and a subsidiary of the New York Metropolitan Transportation Authority (MTA). MNCR was established in 1982 to assume the common carrier commuter rail service formerly provided by Consolidated Rail Corporation on the Hudson, Harlem and New Haven lines to and from Grand Central Terminal in New York City. MNCR provides neither common carrier freight service nor intercity rail passenger service as defined by the Rail Passenger Service Act of 1970, 45 U.S.C. 561.

0.0³ at Beacon, NY, a distance of 41.1 miles; and (2) from the provisions of 49 U.S.C. Subtitle IV pertaining to its ownership of the subject line. On February 13, 1995, the United Transportation Union (UTU) filed a petition to revoke the exemptions⁴ and MNCR replied.

POSITIONS OF THE PARTIES

UTU argues that "blanket" exemptions are not authorized under 49 U.S.C. 10505 to relieve a rail carrier from all provisions of 49 U.S.C. Subtitle IV. UTU primarily relies on the language of section 10505(a), which twice refers to "a provision of this subtitle"⁵ as opposed to "Subtitle IV." UTU states that this language (i.e., a provision [emphasis added]) requires that each section of the Interstate Commerce Act (Act) must be considered separately in any exemption request. UTU argues that several decisions support this view, citing Village of Palestine v. I.C.C., 936 F.2d 1335, 1338 (D.C. Cir. 1991) (Palestine), cert. denied 116 L.Ed.2d 773 (1992).⁶ UTU states that section 10505(a) requires that a two-part test be applied for each exemption from "a provision." According

³ The connecting branches that form the Maybrook Line also retain their original milepost designations used by the former New York Central and New York, New Haven & Hartford, which are milepost 12.8 and milepost 42.9.

⁴ UTU filed its petition to revoke only in Finance Docket No. 32639. The petition, however, is primarily directed to the exemption granted in Finance Docket No. 32639 (Sub-No. 1). In the ICC's previous decision, it stated that these proceedings are not consolidated and that a single decision was being issued for administrative convenience only. Because MNCR responded to all of UTU's arguments and did not object to the procedural approach taken in the filing, we will consider petitioner's arguments as they may apply to both proceedings in this decision.

⁵ Section 10505(a) provides, as pertinent:

In a matter related to a rail carrier providing transportation . . . subject to the jurisdiction of the Interstate Commerce Commission under this subchapter, the Commission shall exempt a person, class of persons, or a transaction or service when the Commission finds that the application of a provision of this subtitle -- (1) is not necessary to carry out the transportation policy of section 10101a of this title; and (2) either (A) the transaction or service is of limited scope, or (B) the application of a provision of this subtitle is not needed to protect shippers from the abuse of market power.

⁶ UTU also cites: (1) Northwestern Pacific Acquiring Corporation and Eureka Southern Railroad Company--Exemption from 49 U.S.C. 10901 and 11301, Finance Docket No. 30555 (ICC served Jan. 8, 1988) (Northwestern Pacific); (2) Chehalis Western Railroad Company--Exemption from 49 U.S.C. Subtitle IV, Finance Docket No. 30680 (ICC served Oct. 3, 1985) (Chehalis); and (3) Metal Service Co. Inc., and the "M" Line Railroad Company--Exemption from 49 U.S.C. Subtitle IV, Finance Docket No. 30752 (ICC served Mar. 24, 1986) ("M" Line).

to UTU, under the first part of the test, a determination must be made for each provision from which an exemption is sought that regulation is unnecessary to carry out the rail transportation goals of section 10101a. UTU argues that this statutory responsibility cannot be carried out by issuing a blanket order finding that application of no provision is necessary. Accordingly, it argues that an examination must be made regarding each provision's relationship to the goals of the national transportation policy, citing Brae Corp. v. United States, 740 F.2d 1023, 1046-47 (D.C. Cir. 1984) (Brae), cert. denied 471 U.S. 1069 (1985).

UTU maintains that, once an examination of the first aspect of section 10505(a) is completed, the second part of the test set forth in section 10505(a)(2)(A) or (B) must then be undertaken. UTU argues that this second part of the test also demonstrates that an exemption can be granted only on a provision-by-provision basis, and asserts, specifically, that section 10505(a)(2)(B) provides that a determination must be made on whether "application of a provision of this subtitle is not needed to protect shippers from the abuse of market power." [emphasis added]. UTU contends that, if Congress had intended to permit the grant of blanket exemptions, it would not have referred to "a provision" for the second time in the same section.

Moreover, UTU notes that section 10505(g)(2) prohibits the use of section 10505(a) to "relieve a carrier of its obligation to protect the interests of employees as required by this subtitle." UTU notes that section 10505(e) provides that exemption authority may not be used "to relieve any rail carrier from an obligation to provide contractual terms for liability and claims which are consistent with the provisions of section 11707." UTU cites in support Quasar Co. v. Atchison, Topeka and Santa Fe Ry. Co., 632 F. Supp. 1106 (N.D. Ill. 1986). According to UTU, this proves that MNCR cannot obtain a blanket exemption from oversight. UTU also points to section 207⁷ of

⁷ Section 207 added a new provision to the Act at section 12(1)(b), which provided:

Whenever the Commission determines, upon petition by the Secretary or an interested party or upon its own initiative, in matters relating to a common carrier by railroad subject to this part, after notice and reasonable opportunity for a hearing, that the application of the provisions of this part (i) to any person or class of persons, or (ii) to any services or transactions by reason of the limited scope of such services or transactions, is not necessary to effectuate the national transportation policy declared in this Act, would be an undue burden on such person or class of persons or on interstate and foreign commerce, and would serve little or no useful public purpose, it shall, by order, exempt such persons, services, or transactions from such provisions to the extent and for such period of time as may be specified in such order. The Commission may, by order, revoke any such exemption whenever it finds, after notice and reasonable opportunity for a hearing, that the application of the provisions of this part to the exempted person, class of persons, services, or transactions, to the extent specified in such order, is necessary to effectuate the national transportation

(continued...)

the Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, 90 Stat. 31 (1976) (4-R Act), the predecessor of former section 10505 (now section 10502), for the proposition that blanket exemptions cannot be granted from the provisions of the Act. Section 207 stated that exemptions shall be granted "from such provisions [of the Act] to the extent and for such period of time as may be specified in such order" after certain requirements are met. UTU contends that the change from "such provisions" to "a provision" in section 10505(a) shows that Congress intended to ensure that exemptions were granted on a provision-by-provision basis. Similarly, UTU notes that, under the Feeder Railroad Development Program of 49 U.S.C. 10910, which was enacted at the same time as section 10505 in the Staggers Rail Act of 1980, 94 Stat. 1895 (Staggers Act), Congress specifically gave authority under section 10910(g)(2) to grant blanket exemptions.⁸ UTU compares this with the language of section 10505 referring only to "a provision" to demonstrate that Congress "obviously intended" not to allow blanket exemptions under section 10505.

UTU argues further that, even if authority to grant blanket exemptions is authorized, MNCR has not demonstrated any need for an exemption from Subtitle IV. UTU argues that MNCR's assertion that regulation of its operations is not necessary to carry out the rail transportation policy of section 10101a is insufficient justification for the exemption.⁹ UTU notes that MNCR also rests its request for an exemption on the need to preserve freight service, which UTU argues directly contradicts its assertion that regulation of its operations is not necessary to carry out the rail transportation policy. In summary, UTU argues that MNCR has not shown that regulation of its operations would be burdensome to MNCR or that regulation is unnecessary; and therefore, UTU asks that the exemption be revoked.

MNCR argues that UTU's motion should be denied for lack of standing. MNCR notes that UTU has failed to show any harm to any of its members, that mandatory labor protective conditions as set forth in New York Dock Ry.--Control--Brooklyn Eastern Dist., 366 I.C.C. 60 (1979), were imposed on the transaction, and that no employees of either MNCR or Danbury Terminal Railroad

⁷(...continued)

policy declared in this Act and to achieve effective regulation by the Commission, and would serve a useful public purpose.

⁸ Section 10910(g)(1) (now section 10907(g)(1)) provides:

Any person operating a railroad line acquired under this section may elect to be exempt from any of the provisions of this subtitle, except that such a person may not be exempt from the provisions of chapter 107 of this title with respect to transportation under a joint rate.

⁹ UTU rejects MNCR's statement that it does not intend to hold itself out to provide common carrier service because MNCR will assume responsibility for maintenance and dispatching freight service over the line. Freight operations are conducted by Danbury Terminal Railroad Company, not MNCR.

Company (Danbury) were affected in any way because the transaction did not change any operations of either carrier.¹⁰ Accordingly, MNCR maintains that UTU has no standing and that its petition must be denied, citing Simmons v. I.C.C., 900 F.2d 1018, 1021-22 (7th Cir. 1990).¹¹

MNCR avers that UTU's primary contention that blanket exemptions are not authorized under section 10505 "is contrary to the strong deregulatory philosophy embodied in the Staggers Rail Act . . . as well as longstanding precedent."¹² MNCR states that section 10505 does not require consideration of whether the exemption meets each and every one of the 15 stated rail transportation policy goals, but rather only those aspects of the policy bearing on the propriety of the exemption [citing Palestine, supra, at 1338-39 and Illinois Commerce Com'n v. I.C.C., 787 F.2d 616, 627 (D.C. Cir. 1986)]. MNCR refers to the legislative history of the Staggers Act, which directed the Commission to "pursue partial and complete exemptions from remaining regulation."¹³ MNCR argues that a policy requiring separate petitions "for each and every provision for which an exemption is sought would be contrary to [this] clearly stated Congressional policy"

None of the court cases that UTU cites, MNCR asserts, involved a request for an exemption from all provisions of the Act. For example, MNCR notes that Palestine only involved a petition to review an exemption from the requirements of 49 U.S.C. 11343-44, and that the reviewing court affirmed the Commission's decision. MNCR also notes that the court in Palestine did not address the issue of whether an exemption from Subtitle IV can be granted.¹⁴ MNCR points out that UTU does not address the ICC's longstanding policy of granting exemptions from Subtitle IV, citing its own Subtitle IV exemption granted in Metro North Commuter Railroad Company--Exemption From 49 U.S.C. Subtitle IV, Finance Docket No. 30063 (ICC served Dec. 2, 1982), and also citing Southern Pacific Trans. Co.--Abandonment, 8 I.C.C.2d 495 (1992) aff'd, 9 I.C.C.2d 385 (1993), and

¹⁰ MNCR also states that MPI has no employees, that Danbury has no labor interests that are represented by UTU, and that its UTU-represented employees work for "an unregulated private carrier."

¹¹ Because we are denying UTU's petition on its merits, we need not address this argument.

¹² MNCR argues that "contrary to UTU's characterization, it has not sought a 'blanket exemption' from the entire Act." Rather MNCR states that "it sought an exemption from the provisions of one subchapter of the Act, Subtitle IV." MNCR is incorrect in this regard because Subtitle IV contained all of the provisions of the Interstate Commerce Act.

¹³ H.R. Conf. Rep. No. 1430, 96th Cong., 2nd Sess. 105 (1980), reprinted in 1980 U.S. Code Cong. and Ad. News at 4137.

¹⁴ MNCR also discounts UTU's arguments to the extent they were based on Northwestern Pacific, Chehalis, and "M" Line. According to MNCR, the Commission denied the Subtitle IV exemption in Northwestern Pacific because the petitioner had failed to justify the exemption request, and granted the requested Subtitle IV exemptions in Chehalis and "M" Line.

Lackawanna County Railroad Authority, Inc.--Exemption from Regulation, Finance Docket No. 30628 (ICC served Mar. 22, 1985), aff'd sub nom. Pennsylvania State Legislative Board-United Transp. Union v. I.C.C., 808 F.2d 1517 (3d. Cir. Dec. 2, 1986). MNCR notes that UTU did not cite or attempt to distinguish Black v. I.C.C., 762 F.2d 106 (D.C. Cir. 1985), in which a grant of a Subtitle IV exemption was specifically challenged and was affirmed.

MNCR rejects UTU's argument that section 10505(a) requires that a petitioner demonstrate that regulation would be "burdensome" before an exemption can be granted. MNCR argues that neither the statute nor the legislative history uses the word "burdensome" or contains any indication that Congress intended for a petitioner to show that the regulation from which it seeks an exemption is "burdensome" before it could obtain the exemption. MNCR points to Palestine, which merely relied on whether the "regulation was needed." 936 F.2d at 1338.

MNCR maintains that the burden of proof is on the party seeking to revoke an exemption, and that the party must show reasonable, specific concerns demonstrating that reconsideration of the exemption is warranted, citing, e.g., Minnesota Comm. Ry., Inc.--Trackage Exempt.-BN, RR. Co., 8 I.C.C.2d 31 (1991); New England Central Railroad, Inc.--Acquisition and Operation Exemption--Lines Between East Alburgh, VT, and New London, CT, Finance Docket No. 32432 (ICC served Dec. 9, 1994); and Wheeling Acquisition Corporation--Acquisition and Operation Exemption--Lines of Norfolk & Western Railway Company, Finance Docket No. 31591 et al. (ICC served Dec. 28, 1990). MNCR avers that UTU does not allege that any aspect of its transaction is inconsistent with any of the goals of section 10101a and that otherwise UTU has submitted no evidence to justify regulatory scrutiny of the transaction or its operations. Accordingly, MNCR argues that the petition to revoke should be denied.

DISCUSSION AND CONCLUSION

We may reopen¹⁵ a proceeding based upon new evidence, changed circumstances, or material error. UTU's pleading in essence consists of additional argument claiming that the ICC committed material error in granting this exemption. Under 49 U.S.C. 10505(d), we may revoke an exemption if we find that application of the provisions of 49 U.S.C. Subtitle IV to a person, class, or transportation is necessary to carry out the rail transportation policy of 49 U.S.C. 10101a. Petitions to revoke must be based on reasonable, specific concerns demonstrating that reconsideration of the exemption is warranted. Thus, the standard for revoking an exemption is whether regulation is needed to carry out the rail transportation policy of section 10101a. Under this standard, we evaluate revocation petitions to correct demonstrated abuses. The party seeking to revoke the exemption has the burden of proving that regulation of the transaction is necessary. UTU has not shown material error, new evidence or changed circumstances; and therefore, we will deny the petition to reopen and to revoke this exemption.

¹⁵ Because this petition for reconsideration was filed more than 20 days after the January 13 decision was served, it will be treated as a petition to reopen rather than as an administrative appeal.

UTU does not cite or address any problems that it expects to arise specifically from the grant of the exemptions to MNCR. Instead, UTU focuses on whether 49 U.S.C. 10505(a) provides sufficient jurisdiction to grant "blanket" exemptions. UTU argues that section 10505(a)'s use of the term "a provision" limits each exemption granted to only one provision of the Act. We find that it does not. From the early days of the Staggers Act, the ICC granted blanket exemptions that extended to numerous provisions of the Act.

We note that, while use of the indefinite article "a" always precedes and modifies a singular noun, it does not necessarily connote a numerical limitation of one. Lewis v. Spies, 350 N.Y.S.2d 14, 17 (1973) and Black's Law Dictionary 1 (5th ed. 1979). It also may mean "any" rather than "one." Id. "Any," in turn, may mean "all" or "every," as well as "some" or "one." Donohue v. Zoning Bd. of App. of Town of Norwalk, 235 A.2d 643, 646 (1967) and Black's Law Dictionary 86 (5th ed. 1979). Accordingly, we find that the use of the word "a" does not compel us to limit the number of provisions that may be subject to an exemption under 49 U.S.C. 10505(a).¹⁶

UTU has presented no evidence regarding the legislative history of section 10505 to indicate that Congress chose the word "a" to limit exemption powers in the manner that UTU advances here. Rather, the legislative history indicates that Congress expected these exemption powers to be used liberally to remove all unnecessary regulation. As was stated in Exemption from Regulation--Boxcar Traffic, 367 I.C.C. 425, 428 (1983),¹⁷ reversed in part on other grounds Brae, 740 F.2d 1069:

The . . . exemption provision, now codified at 49 U.S.C. 10505(a), . . . eliminates the test of burdensomeness,^[18] and instead requires that exemptions be granted whenever continued regulation is unnecessary. The Conference Committee's report on the

¹⁶ The Act contained many provisions incorporating the use of "a." For example, 49 U.S.C. 10922(b) authorized the issuance of "a certificate" to "a person" for motor carrier operations. Clearly, Congress did not intend for the issuance of only one certificate to one person to conduct these operations. Compare Crown Coach Co. v. Public Service Commission, 179 S.W.2d 123, 127 (1944).

¹⁷ In that proceeding, the ICC also rejected the contention that application of section 10505(a) to "a . . . class of persons, or a . . . service" required an examination of each individual shipper or movement. 367 I.C.C. at 436.

¹⁸ This refers to section 207 of the 4-R Act, as noted, which required the Commission to make findings that regulation was burdensome and served no useful purpose before granting an exemption. See footnote 7, supra. UTU argues that MNCR has not shown that regulation of its operations would be burdensome or would not serve a useful purpose. We need not address those issues here because those standards were specifically repealed by Congress in enacting section 10505.

[Staggers Act] places an affirmative duty on the Commission to 'pursue partial and complete exemptions from remaining regulation'¹⁹

As MNCR points out, none of the cases that UTU cites provides support for its position. For example, in Palestine, the court upheld the Commission's use of section 10505(a) to grant an exemption embracing more than one provision of the Act. Moreover, as MNCR points out, UTU completely ignores Black v. I.C.C., supra, which specifically affirmed the ICC's grant of a blanket exemption from Subtitle IV. While UTU correctly points out that the authority to exempt from Subtitle IV is limited by subsections 10505(e) and (g), those restrictions are not an issue here, and the grant of any exemption from Subtitle IV is necessarily restricted so as to comply with those statutory proscriptions.

Based on the considerations discussed above, the petition will be denied.

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

It is ordered:

1. UTU's petition to reopen and to revoke the exemptions granted in these proceedings is denied.
2. This decision is effective on May 15, 1998.

By the Board, Chairman Morgan and Vice Chairman Owen.

Vernon A. Williams
Secretary

¹⁹ The quoted material is from the Conference Committee report that appears at H.R. Conf. Rep. No. 1430, 96th Cong., 2d Sess. 105 (1980).