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SERVICE DATE - SEPTEMBER 16, 1999

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 33780

THE KANSAS CITY SOUTHERN RAILWAY COMPANY
— TRACKAGE RIGHTS EXEMPTION —
GATEWAY WESTERN RAILWAY COMPANY
AND
GATEWAY EASTERN RAILWAY COMPANY

Decided: September 15, 1999

We are denying the petition to reject and/or to revoke the trackage rights exemption or to impose added labor protection.

BACKGROUND

By notice filed on July 14, 1999, The Kansas City Southern Railway Company (KCS), Gateway Western Railway Company, and Gateway Eastern Railway Company (collectively, the carriers) invoked the class exemption at 49 CFR 1180.2(d)(7) to allow KCS to operate over, and to serve all shippers on, the entire systems of both Gateway Western Railway Company and Gateway Eastern Railway Company (hereafter collectively, Gateway). The Gateway system totals some 478 miles. The notice stated that the transaction would be consummated on “approximately July 21, 1999.”

By petition filed on July 19, 1999, Joseph C. Szabo, legislative director of the United Transportation Union-Illinois Legislative Board (Szabo), requested that we stay operation of the exemption pending the filing and disposition of a petition to reject or to revoke it. On July 20, 1999, the carriers jointly filed a reply in opposition to Szabo’s petition for stay.

By decision served on July 20, 1999, we granted a 60-day stay of the effective date of the exemption, until September 19, 1999, and scheduled the filing of petitions to revoke the exemption and replies thereto. As grounds for stay, we found:

The trackage rights agreement at issue is different enough from the typical trackage rights agreement to cause us to want to examine it further. In particular, section 6 of the agreement provides for a transfer of management and operation of all of the Gateway trackage under certain conditions. Such a transfer would appear to involve more than trackage rights (and thus might go beyond our trackage rights exemption), and could well require further authorization from us under section 11323.

On August 9, 1999, Szabo and W. Larry Foster, legislative director of United Transportation Union-Missouri Legislative Board (jointly, Legislative Boards), filed a petition to

reject and/or to revoke the notice of exemption or to impose added labor protection. The additional labor protection that the Legislative Boards seek appears to be akin to that afforded by New York Dock Ry. — Control — Brooklyn Eastern Dist., 360 I.C.C. 60, 84 (1979) (New York Dock), in lieu of the conditions set out in Norfolk and Western Ry. Co. — Trackage Rights — BN, 354 I.C.C. 605 (1978), modified, 360 I.C.C. 653 (1980), aff'd sub nom., RLEA v. United States, 675 F.2d 1248 (D.C. Cir. 1982) (N&W), which are usually provided for employees affected by grants of trackage rights. See note 6, below. On the same day, Union Pacific Railroad Company (UP) filed a statement that takes no position on the exemption but alleges that the trackage rights agreement purports to allow Gateway to assign rights to operate over UP lines and UP-Gateway joint facilities that cannot be assigned without UP's consent.

On August 17, 1999, the United Transportation Union filed a request that we condition the exemption by imposing the appropriate degree of labor protection required under 49 U.S.C. 11326. On August 19, 1999, the carriers filed a statement in opposition to the Legislative Boards' petition to reject and/or to revoke the exemption. The carriers also stated that they oppose additional labor protection.

DISCUSSION AND CONCLUSIONS

At issue is whether (1) the notice must be rejected and found void ab initio or (2) the exemption must be revoked or made subject to enhanced labor protection.

Rejection. The Legislative Boards argue that the notice must be rejected on the grounds that: (1) the notice does not provide a definite date when the trackage rights will be exercised; and (2) the agreement goes beyond trackage rights in that it provides for transfer of management and operation of the Gateway trackage to KCS.¹

We will not reject the notice merely because it does not provide a definite date on which the trackage rights provided under the agreement will actually be exercised. Our regulations at 49 CFR 1180.4(g) require only that the carrier notify the Board of the expected date of consummation of the "transaction." We do not view this provision as requiring that we know precisely when the operational changes under a trackage rights transaction will commence or prohibiting use of contingencies or triggering events that would delay actual operations under the trackage rights until a future date. Our view in this respect is consistent with longstanding precedent holding that authority granted by the Board is permissive, not mandatory.²

¹ The Legislative Boards also state that they do not agree with the carriers' contention that the haulage rights in the agreement are not subject to our jurisdiction but state that they will not be "pressing the matter here." (Petition, at 9 n.11.)

² See, e.g., Arkansas Central Railway Co., Inc. — Operations Exemptions — Line of
(continued...)

The Legislative Boards' reliance on Union Pacific Railroad Company — Trackage Rights Exemption — Elgin, Joliet and Eastern Railway, et al., STB Finance Docket No. 32985, et al. (STB served Dec. 12, 1996) (UP-EJ&E), is misplaced. There, we asked the parties for supplemental information because the notice gave the public only a "general idea" of the scope of the trackage rights under the notice. Although the notice in UP-EJ&E lacked a specific implementation date for the trackage rights, our problem with that notice was not the lack of an implementation date. Rather, the notice did not include the agreements to be negotiated and did not identify the actual scope of the trackage rights to be granted, but only the maximum extent of the rights.³ Here, the notice includes the agreement and identifies the rights to be granted.

With regard to their second point, the Legislative Boards argue that section 6 of the Agreement goes beyond the scope of the trackage rights exemption because that section provides for a possible transfer of management and operation to KCS of all of the Gateway trackage. We will limit the scope of the exemption in this proceeding to the trackage rights elements of the agreement (the proper scope of the notice) and reserve jurisdiction to resolve any issues involving section 6, the haulage agreement, the assignment of UP trackage rights, or any other non-trackage rights provisions in a future proceeding. This is essentially the same course of action that we took in Southern Pacific Transportation Company — Trackage Rights Exemption — The Houston Belt & Terminal Railway Company, et al., STB Finance Docket No. 33461, et al. (STB served Dec. 21, 1998) (SPT-HBT), where we refused to reject or to revoke notices of trackage rights exemption notwithstanding KCS' objection that the agreements attached to the notices contained exclusive control provisions that typify leases. Accordingly, we will not reject the notice of exemption.

Revocation. Under 49 U.S.C. 10502(d), an exemption may be revoked, in whole or in part, if we find that regulation of the transaction is necessary to carry out the Rail Transportation Policy of 49 U.S.C. 10101. The Legislative Boards argue that the notice must be revoked on the grounds that: (1) the agreement gives KCS too much discretion as to the scope and timing of the implementation of the trackage rights described in the agreement, to the detriment of members of the public, employees, and the environment; and (2) the agreement contains provisions going beyond trackage rights.⁴ The Legislative Boards also argue that additional labor protection is required of the type imposed in D&H Ry. — Lease and Trackage Rights Exemp. — Springfield Term., 4 I.C.C.2d 322 (1988), 7 I.C.C.2d 1050 (1991), and 8 I.C.C.2d 839 (1992) (D&H).

²(...continued)

Herzog Stone Products, Inc., et al., Finance Docket No. 31405, et al. (ICC served Apr. 7, 1995); and Western Fuels Service Corporation v. The Burlington Northern and Santa Fe Railway Company, et al., STB Docket No. 41987, et al. (STB served July 28, 1997).

³ In UP-EJ&E, the notice presented a master "Letter of Understanding" describing the trackage involved but stating that the actual agreements would be submitted in the future.

⁴ The latter essentially is the same argument made by the Legislative Boards for rejection, which we addressed above.

We do not agree with the Legislative Boards' argument that the agreement gives the carriers too much discretion in determining the scope of the trackage rights to be exercised. The agreement identifies the scope of the trackage rights granted, including the mileage, the operations, and the conditions. The agreement permits the grantee to exercise the full scope of these rights, as is customary in such agreements.

Nor have the Legislative Boards supported their assertion that the Rail Transportation Policy of 49 U.S.C. 10101 disfavors allowing carriers to choose when to implement grants of trackage rights. Grants of Board authority are permissive, and carriers have the discretion when to implement abandonments, mergers, or other transactions, subject to whatever time limits might be imposed by the Board.

We also disagree with the Legislative Boards' argument that revocation is required on environmental grounds. Under 49 CFR 1105.6(c)(4), no environmental documentation would normally be prepared for "common use of rail terminals and trackage rights." The Legislative Boards have not even asserted, much less demonstrated, that this regulation should not apply here.

Nor have the Legislative Boards explained why the Rail Transportation Policy requires that the exemption be revoked simply because the agreement contains provisions going beyond trackage rights. As discussed above, no exemption will be permitted for these provisions, and the Legislative Boards will be free to attempt to challenge them in another proceeding. This result is consistent with SPT-HBT, *supra*.

Labor Protection. The standard, statutory level of labor protection provided in grants of trackage rights was prescribed in N&W. We have the discretion to enhance labor protection beyond that level, but it is well established that parties seeking to do so must show that the added protection is justified.⁵

Here, the Legislative Boards argue that special circumstances justify an increase in the level of protection to the standard level required for merger, acquisition, and control transactions, i.e., the protection prescribed in New York Dock.⁶ The Legislative Boards cite D&H. There, the Delaware and Hudson Railway Company and three other railroad subsidiaries affiliated with Guilford Transportation Industries, Inc. (GTI), attempted to lease virtually all of their track to a small (Class

⁵ See, e.g., Wheeling Acquisition Corporation — Acquisition and Operation Exemption — Lines of Norfolk & Western Railway Company, et al., Finance Docket No. 31591, *et al.* (ICC served Dec. 28, 1990).

⁶ The key difference between the protection provided for trackage rights under N&W and that provided under New York Dock is that the latter requires that labor protective arrangements be worked out before the transaction can occur, whereas, under N&W, the carrier can implement the trackage rights and work out the details of labor protection afterwards.

III) subsidiary, the Springfield Terminal Railway Company (STR), subject only to the standard labor protective conditions prescribed for leases and trackage rights. GTI's lease and trackage rights scheme effectively ended the transportation operations of the larger carriers and transferred them to the STR, which was governed by a collective bargaining agreement more favorable to management. Our predecessor agency, the Interstate Commerce Commission, held that the added protection was needed because (1) the impact of the transactions was equivalent to that of a merger or consolidation, and (2) the GTI carriers were employing improper procedures to administer labor protection. 4 I.C.C.2d at 328-31.

The Legislative Boards have not shown that circumstances justify added labor protection. Unlike the situation in D&H, the impact of the instant transaction in no way resembles that of a merger. Here, a small carrier (Gateway) is granting trackage rights to a considerably larger carrier (KCS). In D&H, by contrast, the larger carriers granted trackage rights to a smaller carrier, which resulted in the smaller carrier swallowing up the operations of the larger carriers. Unlike the situation in D&H, none of the employees will be affected at all in their collective bargaining situation. And unlike the situation in D&H, there has been no allegation that the carriers are using, or will use, improper procedures to administer the standard labor protective conditions.

As discussed above, we are limiting the scope of the exemption in this proceeding to the trackage rights elements of the agreement. Employees affected by the trackage rights will be afforded protection as prescribed in N&W. If, as a result of future developments, additional Board approval is required for elements of the agreement other than the trackage rights we have authorized here, the Board will impose the appropriate level of protection for employees. All employees affected by the further approval would of course be entitled to the level of protection imposed.

It is ordered:

1. The petition to reject and/or to revoke the trackage rights exemption or to impose added labor protection is denied, subject to our reservation of jurisdiction to consider other issues in future proceedings, as discussed above.
2. This decision is effective on its date of service.

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

Vernon A. Williams
Secretary