

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 35873

NORFOLK SOUTHERN RAILWAY COMPANY—ACQUISITION AND OPERATION—
CERTAIN RAIL LINES OF THE DELAWARE AND HUDSON RAILWAY COMPANY,
INC.

Digest:¹ The Board denies the petition of the American Train Dispatchers Association (ATDA) for a declaratory order and to postpone the implementation of the transaction approved in the Board's Decision No. 6 in this proceeding because the issues raised in ATDA's petition must be resolved in arbitration before being addressed by the Board.

Decision No. 8

Decided: September 18, 2015

BACKGROUND

On November 17, 2014, Norfolk Southern Railway Company (NSR) filed an application seeking Board approval under 49 U.S.C. §§ 11323-25 of NSR's acquisition and operation of 282.55 miles of rail line owned by Delaware and Hudson Railway Company, Inc. (D&H) (the D&H South Lines). In a decision served May 15, 2015 (Decision No. 6), the Board approved NSR's application, subject to the employee protective conditions in New York Dock Railway—Control—Brooklyn Eastern District Terminal (New York Dock), 360 I.C.C. 60, aff'd New York Dock Railway v. United States, 609 F.2d 83 (2d Cir. 1979), as modified by Wilmington Terminal Railroad—Purchase & Lease—CSX Transportation, Inc. (Wilmington Terminal), 6 I.C.C. 2d 799, 814-26 (1990), aff'd sub nom. Railway Labor Executives' Ass'n v. ICC, 930 F.2d 511 (6th Cir. 1991).² New York Dock, as modified by Wilmington Terminal, specifically requires that, in a line sale transaction, implementing agreements must be reached with each set of adversely affected employees prior to consummation of the transaction. Wilmington Terminal, 6 I.C.C. 2d at 814-15. Decision No. 6 became effective on June 15, 2015, after the Board denied a request to stay the effective date.

¹ The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. Policy Statement on Plain Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

² See Decision No. 6 at 28-29, 36 ¶ 7.

The American Train Dispatchers Association (ATDA) has filed a petition for declaratory order, dated September 10, 2015, seeking an order (1) holding that the implementing agreement requirement of Article I, Section 4 of New York Dock applies to both the train dispatching employees of NSR and the train dispatching employees of Soo Line Railroad Company (Soo); and (2) preventing consummation of the line sale transaction until implementing agreements are reached.³ Soo, like D&H, is a wholly-owned independent subsidiary of Canadian Pacific Railway Company. ATDA states that, since 1992, Soo dispatchers have performed all train dispatching for D&H, including on the D&H South Lines.⁴

ATDA asserts that NSR intends to transfer train dispatching on the D&H South Lines from Soo's Minneapolis, Minn. dispatching office to NSR's Harrisburg, Pa. train dispatching office and to hire several new train dispatching employees in Harrisburg.⁵ According to ATDA, the new NSR employees are scheduled to assume train dispatching responsibilities on September 19, 2015.⁶ ATDA argues that this transfer of dispatching responsibilities should not occur until the parties arrive at implementing agreements with the train dispatching employees of both NSR and Soo.

With respect to the NSR train dispatchers, ATDA states that on May 18, 2015, NSR served a notice on ATDA that would have resulted in an implementing agreement. However, on August 7, 2015, NSR allegedly ended negotiations and withdrew its notice, informing ATDA that it no longer believed an implementing agreement was required.⁷ According to ATDA, the parties have been unable to resolve their differences regarding the application of the employee protective conditions, and no implementing agreement is in place.⁸

With respect to the Soo train dispatchers, ATDA states that it has been unable to resolve a dispute with Soo regarding whether the labor protective conditions imposed in Decision No. 6 apply to Soo and, if so, whether Soo must reach an implementing agreement with its dispatching employees prior to relinquishing its dispatching operations on the D&H South Lines. According to ATDA, Soo maintains that the conditions imposed in Decision No. 6 do not apply because Soo was not a party to the line sale proceeding.⁹ ATDA, however, believes that because the Soo train dispatchers "are as affected by the sale as any other employee working on the line, Soo

³ See ATDA Pet. for Declaratory Order 1, 6.

⁴ Id. at 1-3, Ex. 1.

⁵ Id. at 5-6.

⁶ Id.

⁷ Id.

⁸ Id.

⁹ Id. at 3.

must comply” with Decision No. 6’s labor protective conditions.¹⁰ ATDA asserts that because Soo “holds itself out as D&H insofar as train dispatching is concerned,” Soo must protect its train dispatchers in the same way as D&H must protect its employees.¹¹ ATDA also contends that Soo must reach an implementing agreement with its dispatching employees prior to relinquishing its dispatching operations on the D&H South Lines.

In light of the proposed September 19th transfer of dispatching responsibilities, ATDA seeks expedited consideration of its petition. ATDA also asks the Board to “stay the transaction until implementing agreements protecting the employees from the effects of the train dispatching transfer are in place.”¹²

NSR and Soo have both filed letter replies opposing ATDA’s petition for a declaratory order. They state that these disputes are already in arbitration and argue that, under well-established Board precedent, ATDA must first arbitrate these disputes before seeking relief from the Board.¹³

NSR and Soo also argue that there is no merit to ATDA’s claim that implementing agreements are required as to NSR’s and Soo’s respective train dispatching employees. NSR notes that it has created four new positions at its Harrisburg dispatching office to handle train dispatching over the D&H South Lines.¹⁴ However, NSR claims that the creation of these new jobs will not adversely affect any current NSR employees or cause a reallocation of employees among positions in the Harrisburg office.¹⁵ Soo maintains that, because it is not a party to the underlying line sale transaction, the labor protective conditions imposed in Decision No. 6 do not apply to it.¹⁶ Soo adds that, even assuming those protective conditions do apply, it has not failed to do anything required by those conditions.¹⁷ It states that although it will stop dispatching

¹⁰ Id.

¹¹ Id. at 3-4.

¹² Id. at 6.

¹³ See NSR Reply 2; Soo Reply 1. NSR states that it initiated arbitration under Article I, Section 11 of the New York Dock conditions after ATDA incorrectly sought to arbitrate under Article I, Section 4. NSR Reply 2, Ex. 1. Soo claims that ATDA itself initiated an arbitration proceeding with Soo under Article I, Section 11 of the New York Dock conditions, and the parties are presently awaiting a list of potential neutrals from the National Mediation Board. Soo Reply 1-2.

¹⁴ NSR Reply 1-2.

¹⁵ Id. at 3.

¹⁶ Soo Reply 2.

¹⁷ Id.

trains over the D&H South Lines once they are acquired by NSR, this will simply mean that “one of Soo’s dispatching desks at its Minneapolis Operations Center will have less work to do.”¹⁸ According to Soo, “[r]educing the work of a single dispatching desk will not cause any Soo employees to be dismissed or moved to other jobs.”¹⁹ Therefore, Soo asserts that no implementing agreement with Soo’s employees would be required under New York Dock. Finally, Soo claims that there is no possibility that any of Soo’s ATDA-represented employees would be irreparably harmed by the consummation of the line sale transaction. Soo states that, even though it does not expect any train dispatchers to be adversely affected by the transaction, it nonetheless has “unilaterally and unconditionally committed to ATDA that if any of its train dispatchers are adversely affected as a result of the transaction, Soo will provide each affected employee full monetary benefits equal to the benefits provided in the New York Dock conditions.”²⁰

DISCUSSION AND CONCLUSIONS

Under 5 U.S.C. § 554(e) and 49 U.S.C. § 721, the Board may issue a declaratory order to terminate a controversy or remove uncertainty. The Board has broad discretion in determining whether to issue a declaratory order. See Intercity Transp. Co. v. United States, 737 F.2d 103 (D.C. Cir. 1984); Delegation of Auth.—Declaratory Order Proceedings, 5 I.C.C. 2d 675 (1989). See also CSX Transp., Inc.—Pet. for Declaratory Order, FD 35832, slip op. at 3 (STB served July 31, 2015).

ATDA’s petition for a declaratory order will be denied. Although there is a dispute that turns on whether implementing agreements are required under Article I, Section 4 of New York Dock regarding the anticipated changes in dispatching responsibilities, it would not be appropriate for the Board to resolve it at this time. Rather, this matter must be resolved in the first instance by arbitration. See, e.g., Canadian Pac. Ry.—Control—Dakota Minn. & E. R.R., FD 35081 (Sub-No. 1), slip op. at 6 (STB served Aug. 16, 2011) (“the Board will not intervene in matters subject to arbitration under New York Dock before they have been considered in arbitration”); Canadian Nat’l. Ry.—Control—Wis. Cent. Transp. Corp., FD 34000, slip op. at 3-4 (STB served June 6, 2008); Kan. City S. Indus.—Control—Gateway W. Ry. Co., FD 33311, slip op. at 3-4 (STB served Dec. 4, 1997). Moreover, courts have consistently upheld the agency’s decisions not to hear such disputes prior to arbitration. See, e.g., United Transp. Union v. ICC, 905 F.2d 463, 470 (D.C. Cir. 1990); Bhd. of Locomotive Eng’rs v. ICC, 808 F.2d 1570, 1578-1579 (D.C. Cir. 1987); Walsh v. ICC, 723 F.2d 570 (7th Cir. 1983).

¹⁸ Id.

¹⁹ Id.

²⁰ Id.

After ATDA's claims are fully arbitrated, any decision by the arbitration panel would be subject to an appeal to the Board under the standard of review set forth in Chicago & North Western Transportation Co.—Abandonment—Near Dubuque & Oelwein, Iowa, 3 I.C.C. 2d 729 (1987), commonly known as "Lace Curtain." See In re Arbitration Between Union Pac. R.R. & Bd. of Locomotive Eng'rs & Trainmen, FD 32760 (Sub-No. 47), slip op. at 4 (STB served July 31, 2015). Finally, the Board will not postpone implementation of the line sale transaction as ATDA requests. The effective date has already passed, and nothing in the record suggests that injunctive relief is appropriate here. See 49 U.S.C. § 721(b); Wash. Metro. Area Transit Comm'n v. Holiday Tours, Inc., 559 F.2d 841, 843 (D.C. Cir. 1977); Va. Petroleum Jobbers Ass'n v. Fed. Power Comm'n, 259 F.2d 921, 925 (D.C. Cir. 1958).

It is ordered:

1. ATDA's petition for a declaratory order is denied.
2. This decision is effective on its service date.

By the Board, Chairman Elliott, Vice Chairman Begeman, and Commissioner Miller.