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SERVICE DATE - JUNE 24, 1998

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 33285

RAILAMERICA, INC., AND THE DELAWARE VALLEY RAILWAY COMPANY, INC.,  
PETITION TO SET SUBSIDY TERMS UNDER  
45 U.S.C. 744(c) AND 49 CFR PART 1155

Decided: June 22, 1998

By petition filed October 29, 1996, RailAmerica, Inc. (RA), and its wholly owned subsidiary Delaware Valley Railway Company, Inc. (DV), request that we set terms for DV's use of a line of railroad owned by Wilmington and Northern Railroad Company (W&N), a subsidiary of the Reading Company (collectively Reading), successor to the former Reading Railroad Company.<sup>1</sup> On November 19, 1996, Reading filed a response. On December 6, 1996, petitioners filed a rebuttal statement. On December 23, 1996, Reading submitted an "informal rejoinder" to petitioners' rebuttal.<sup>2</sup> On September 11, 1997, petitioners filed a supplemental statement and a request for expedited action.<sup>3</sup> Reading replied on September 23, 1997. On May 6, 1998, and May 12, 1998, respectively, DV and W&N informed the Board about court litigation.<sup>4</sup>

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<sup>1</sup> On October 28, 1997, RA gave notice of its withdrawal from the proceeding. DV remains a party, and, accordingly, we will process the petition.

<sup>2</sup> Under our general rules of practice, a reply to a reply is not permitted. 49 CFR 1104.13(c). Because DV did not object to the filing, it will be accepted.

<sup>3</sup> Petitioner requested a decision by November 11, 1997. While we have attempted to accommodate petitioner's request, we have awaited the issuance of our decision in STB Ex Parte No. 566, Rail Service Continuation Subsidy Standards, addressing broader issues, as discussed infra, before completing the processing of this matter.

<sup>4</sup> DV indicates that the lawsuit filed in Delaware state court by W&N had been settled and dismissed with prejudice. Wilmington Northern Railroad Company v. Delaware Valley Railway Company, Inc. and RailAmerica, Inc., C.A. No. 15966-NC-SPL. According to DV, the suit concerns payment by DV of liquidated damages allegedly owed W&N for the early termination of the lease for the rail line at issue. W&N submits that the issue of DV's continued occupancy of the line following the termination of the lease is pending in the United States District Court for the District of Delaware.

DV's original petition sought to have the subsidy set under former 49 CFR 1155 (regional subsidy standards). After its petition was filed, the Board issued a notice of proposed rulemaking proposing to remove the regional subsidy standards of part 1155 and we sought comments, inter alia, as to whether parts of the regional subsidy standards should be transferred to the offer of financial assistance regulations (OFA or national standards) at 49 CFR 1152. Rail Service Continuation Subsidy Standards, STB Ex Parte No. 566 (STB served Aug. 8, 1997) (63 FR 28287) (STB Ex Parte No. 566). DV, in its September 11, 1997 supplement, noted the existence of the then-pending STB Ex Parte No. 566, and stated that if the national OFA standards were amended to apply to situations presently covered by the regional standards, then DV sought recovery under the national standards. The Board issued a decision in STB Ex Parte No. 566 on May 22, 1998, that eliminated the part 1155 regulations and amended the OFA regulations by adding a new provision at 49 CFR 1152.27(n) to provide rules for the purchase or subsidization of rail lines that have been continuously subsidized since the inception of the Final System Plan, described infra.

DV's petition to set terms will be denied. However, if the line has been continuously subsidized and it is abandoned or rail service is discontinued, our new section 1152.27(n) procedures are available to govern the subsidization or purchase of the line.

#### BACKGROUND

This dispute involves a lease between DV and W&N for DV's use of and operations over a line of railroad approximately 9.8 miles long between milepost 12.7 at the Delaware-Pennsylvania state line and milepost 2.9 at Elsmere Junction near Wilmington, DE (the Line). The Line is used exclusively for its operating efficiencies; there are no shippers. DV moves traffic originating from other points on its system over the Line to interchange with Consolidated Rail Corporation (Conrail) through the intermediate switching facilities of CSX Transportation, Inc.

The Line was originally owned by the Reading Railroad, which sought reorganization in 1970 under former section 77 of the Bankruptcy Act, 11 U.S.C. 205. In response to the bankruptcy of the Reading Railroad and several other midwestern and eastern railroad companies, the Congress enacted the Regional Rail Reorganization Act of 1973, Pub. L. No. 93-236, 87 Stat. 985 (the 3R Act). Under the 3R Act, a Final System Plan (FSP) was developed by the United States Railway Association.<sup>5</sup> This plan designated which lines would be retained in active service and consequently would be transferred to Conrail, a government-created successor railroad to the various railroads in reorganization, and which lines would be allowed to be abandoned.

Under the FSP, the Line was not designated for transfer to Conrail. Accordingly, the line could have been abandoned and service discontinued pursuant to section 304 of the 3R Act, codified

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<sup>5</sup> The Final System Plan was submitted to Congress on July 26, 1975, and was specifically approved in section 601(e) of the Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, 90 Stat. 127 (4R Act).

at 45 U.S.C. 744, unless an offer to purchase the line was made under section 304(f) or a rail service continuation payment was offered under section 304(c). Subsequently, Conrail operated the Line under a section 304(c) subsidy agreement pursuant to Certificate of Designated Operator, The Consolidated Rail Corporation (Operations in Delaware), (ICC served Apr. 21, 1976).<sup>6</sup> Conrail operated the Line for a short time, and it was later operated by the Octoraro Railway, Inc. (Octoraro). On July 1, 1994, DV assumed operations from Octoraro pursuant to Certificate of Designated Operator, Delaware Valley Railway Co., Inc., D-OP 59 (USRA Line No. 907/939) (ICC served Oct. 14, 1994) (D-OP 59). According to DV, “[w]ith the exception of a brief period of time around 1977-78, between Conrail and Octoraro’s operations, [t]he Line has seen continuous rail service.”<sup>7</sup>

DV entered into its lease with Reading on July 6, 1994. Under the 10-year lease, DV agreed to pay \$10,150 per month for use of the line with an option to purchase the line for \$1.5 million. DV claimed that the lease terminated under its own provisions, effective June 30, 1996, when its original operating agreement with the State of Pennsylvania to operate connecting lines in that state expired. Reading insisted that the lease did not terminate under its own provisions, but rather that DV attempted to terminate the lease by its unilateral actions. Under the terms of Section 9.02 of the lease, this dispute was submitted to arbitration. On August 11, 1997, the arbitrator found that petitioners had terminated the lease pursuant to an escape clause in Section 4.03 and ordered petitioners to pay W&N a termination fee equal to one year’s rent or \$121,800. Accordingly, DV argues that it has no lease with Reading, that Reading is unwilling to negotiate a new subsidy arrangement, that the Board has jurisdiction over this matter, and that we should resolve the dispute and establish the level of the subsidy payment, retroactive to July 1, 1996, for its use of the line.<sup>8</sup>

Petitioner originally asked that we set subsidy terms for its use of the line under section 304(c) of the 3R Act, and the implementing regional subsidy standards at 49 CFR part 1155. In its

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<sup>6</sup> Congress amended portions of the 3R Act and also added new sections when it enacted the 4R Act. As here relevant, the 4R Act amended the 3R Act by adding a new section 45 U.S.C. 744(d) which specified that a “designated operator” would be the rail carrier conducting operations when a subsidizer guaranteed payment.

<sup>7</sup> As noted, Conrail received its certificate of designated operator (D-OP) on April 21, 1976. Reading states that, in 1977, Conrail petitioned to abandon service, and Octoraro obtained subsidy agreements and began rail operations. Our records also indicate that Octoraro received its D-OP certificate on February 22, 1977. Certificate of Designated Operator, Octoraro Railway, Inc., D-OP 10 (USRA Line No. 907/939-RDG) (ICC served Feb. 22, 1977). It is thus unclear why any break in service occurred between 1977-78.

<sup>8</sup> The arbitrator found that he had no authority to award holdover rent or other compensation for the period after the termination of the lease during which time DV continued to use the line. We also note that the arbitrator did not set a date certain on which the lease was terminated.

supplemental petition, it requested that we use the national OFA rules to set the subsidy if those rules are applicable. DV submitted an appraisal of the line prepared by Main Line Management Services, Inc., as well as two inventories and valuations of track material prepared by the Tie Yard of Omaha and the L.B. Foster Company, two railroad salvage companies. Petitioner argues that because DV is both the subsidy offeror and the operating carrier, the only payment required is compensation for a return on value to Reading for DV's use of the line. Alternatively, DV contends that the Board has jurisdiction to establish terms and conditions for use of the line in light of Thompson v. Texas Mexican Ry. Co., 328 U.S. 134 (1946) and related cases. Petitioner estimates that, according to the subsidy standards, the monthly subsidy for the line should be \$1,663.37.<sup>9</sup>

Reading objects to the determination of the Board of any lease issues. It claims that the parties have established the terms of the lease through arm's-length negotiations. It also argues that relief is not available under the 3R Act because the 3R Act was intended to resolve cases involving railroads in reorganization. Citing Consolidated Rail Corp. v. Reading Co., 654 F. Supp. 1318 (Sp. Ct. R.R.R.A. 1987) (Conrail v. Reading), Reading contends that the former railroad companies that had emerged from reorganization were not "railroads in reorganization" and the 3R Act cannot be applied to non-bankrupt entities.<sup>10</sup>

Reading also submits that the regional subsidy standards are applicable only where the property owner is threatening abandonment or the carrier is threatening discontinuance. If DV is considering discontinuance, Reading argues that the issue becomes whether some party offers DV a subsidy to continue operations. According to Reading, it is not seeking to abandon and DV is not seeking to discontinue service.

Reading also argues that the national OFA standards at 49 U.S.C. 10904 are not applicable because Reading is not a "rail carrier" as defined by 49 U.S.C. 10102(5).<sup>11</sup> Reading states that the arbitrator held that the lease was terminated by DV's refusal to pay the agreed rent and that the issue of damages for post-breach detention of the premises was not arbitrable, but is properly heard by a law court.

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<sup>9</sup> DV estimates that the net liquidation value for the line, minus dismantling costs, is \$359,000. It uses the treasury bill rate of June 26, 1996, which DV states was 5.56%, to calculate the subsidy amount.

<sup>10</sup> Reading argues that the subsidy determination methods of section 744 of the 3R Act have expired, noting that 45 U.S.C. 715 and its successor, 49 U.S.C. 10362, have been repealed.

<sup>11</sup> Under that section, a rail carriers is "a person providing common carrier railroad transportation for compensation, but does not include street, suburban, or interurban electric railways not operated as part of the general system of rail transportation. . . ."

## DISCUSSION AND CONCLUSIONS

We are denying DV's request for relief. First, the Board does not have authority to set terms for designated operator leases under the Thompson line of cases. Second, the national OFA standards, as modified, are not applicable to this situation, because there has been no notice of intention to abandon or discontinue operations.

The ICC and the Board have each asserted jurisdiction to set terms and conditions of transactions that have been approved and authorized under 49 U.S.C. 11323 (former 49 U.S.C. 11343 and, prior to recodification, section 5(2) of the Interstate Commerce Act). See Arkansas & Missouri R. Co. v. Missouri Pacific R. Co., 6 I.C.C.2d 619, clarified, 7 I.C.C.2d 164 (1990) (A&M), and North Carolina Railroad Company--Petition to Set Trackage Compensation and other Terms and Conditions--Norfolk Southern Railway Company, et al., STB Finance Docket No. 33134 (STB served May 29, 1997) (NCRC).<sup>12</sup> Thompson noted that former section 5(2) gave the ICC the power to approve and authorize trackage rights. The Court found at 328 U.S. 146-47 (citation omitted) that:

[t]he authority of the Commission under §5(2)(a) extends to fixing terms and conditions, including rentals, for any trackage agreements. . . . The jurisdiction of the Commission is exclusive.

Leases of designated operators do not fall within the ambit of 49 U.S.C. 11323. As noted, under 45 U.S.C. 744(d), the designated operator is the rail carrier conducting operations when a subsidizer guarantees payment. Although they are common carriers, designated operators did not need ICC authority to commence operations or abandon operations.<sup>13</sup> Accordingly, we do not have

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<sup>12</sup> Section 11323(a) reads in relevant part: "The following transactions involving rail carriers . . . may be carried out only with the approval and authorization of the Board: . . . (2) a purchase, lease or contract to operate property of another rail carrier by any number of rail carriers. . . (6) Acquisition by a rail carrier of trackage right over . . . a railroad line . . . owned or operated by another rail carrier."

The NCRC proceeding found that our jurisdiction under section 11323(a)(2) to approve and authorize leases between rail carriers gives us authority to prescribe the terms and conditions of the lease. In A&M, the ICC based its jurisdiction to set the compensation for trackage rights on the ICC's authority to approve trackage rights between carriers under former 49 U.S.C. 11343(a)(6) (the predecessor to 49 U.S.C. 11323(a)(6)). See Arkansas and Missouri Railroad Company v. Missouri Pacific Railroad Company, Finance Docket No. 31281 (ICC served Mar. 17, 1989).

<sup>13</sup> See STB Ex Parte No. 566, May 22, 1998 decision; Exemption of Certain Designated Operators from Section 11343, 361 I.C.C. 379 (1979), aff'd in part and remanded in part sub nom.

(continued...)

the jurisdiction to set terms and conditions for designated operator leases as we have to set compensation for trackage rights and leases between rail carriers under 49 U.S.C. 11323.

In the alternative, DV asks that we set compensation under the applicable subsidy standards. In STB Ex Parte No. 566, the part 1155 subsidy rules were eliminated, but we modified the OFA regulations at 49 CFR 1152.27 to encompass the lines that are still being subsidized under the regional subsidy standards.<sup>14</sup> These rules, however, pertain to the summary abandonment or discontinuance of rail lines that have been continuously subsidized since the inception of the FSP. (Because the lines have already been approved for abandonment or discontinuance, Board authority to abandon or discontinue is not needed.) We are not aware that DV has given the notice of discontinuance to shippers required of it (49 CFR 1150.11), nor has the line owner given notice to the Board of any discontinuance or its intention to abandon.<sup>15</sup> See 49 CFR 1152.27(n). If appropriate notice is given, and the line otherwise qualifies under 49 CFR 1152.27(n), interested persons will have the opportunity to purchase or subsidize the line under our amended national OFA rules.

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

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<sup>13</sup>(...continued)

McGinness v. ICC, 662 F.2d 853 (D.C. Cir. 1981). See also 49 CFR 1150.16: “Although the designated operator will not be required to seek and obtain authority from the Board either to commence or terminate operations, the designated operator is a common carrier by railroad subject to all other provisions of 49 U.S.C. Subtitle IV.”

<sup>14</sup> Reading argues that relief is not available under the 3R Act, because, under Conrail v. Reading, it is not a “railroad in reorganization” subject to 45 U.S.C. 744. In STB Ex Parte No. 566, we discussed Conrail v. Reading, and noted that the court found that certain predecessor railroads of Conrail were not railroads in reorganization because they were not involved in a bankruptcy proceeding. We held that this meant that there would be no new rail lines added to the regional subsidy system. Nevertheless, we noted that lines that have been subsidized since the beginning of the regional subsidy program have already been approved for discontinuance and abandonment and arguably still fell within the ambit of 45 U.S.C. 744. Accordingly, we modified our OFA rules for situations pertaining to rail lines still being subsidized under the regional subsidy standards which have been continuously operated under subsidy. The focus of this analysis is not on the character of the owner of the line but on the line itself.

<sup>15</sup> Reading argues that it is not a rail carrier and is thus not subject to 49 U.S.C. 10904. We do not need to decide this issue, because it appears from the record that W&N is the owner of the line and would be obligated to give the necessary notices under 49 CFR 1152.27(n).

It is ordered:

1. The DV's request to set terms is denied.
2. This decision is effective on July 24, 1998.

By the Board, Chairman Morgan and Vice Chairman Owen.

Vernon A. Williams  
Secretary