

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 32985¹

UNION PACIFIC RAILROAD COMPANY--TRackage RIGHTS EXEMPTION--
ELGIN, JOLIET AND EASTERN RAILWAY COMPANY

STB Finance Docket No. 32986

MISSOURI PACIFIC RAILROAD COMPANY--TRackage RIGHTS EXEMPTION--
ELGIN, JOLIET AND EASTERN RAILWAY COMPANY

Decided: November 25, 1996

BACKGROUND

On August 21, 1996, in STB Finance Docket No. 32985, the Union Pacific Railroad Company (UP) filed a notice of exemption under 49 CFR 1180.2(d)(7) to acquire overhead trackage rights over a line of the Elgin, Joliet and Eastern Railway Company (EJ&E) from the northern end of the EJ&E at Waukegan, IL, at approximate milepost 74, through West Chicago, IL (milepost 29), Joliet, IL (milepost 0), and Chicago Heights, IL (milepost 25), and Gary, IN (milepost 12 and milepost 45, including Kirk Yard), to South Chicago, IL (milepost 0), including EJ&E's City Track Line between Gary and Goff, IN, and EJ&E's Whiting Line from Cavanaugh, IN, to Calumet Tower, IN, a total distance of approximately 130 miles. Concurrently, in STB Finance Docket No. 32986, the Missouri Pacific Railroad Company (MP) filed a notice of exemption to acquire overhead trackage rights over the same line.²

Both UP and MP submitted with their notices of exemption a Letter of Understanding (the Letter), dated August 2, 1996, setting forth the agreement that they have reached with EJ&E concerning the initiation of operations under trackage rights over the subject line. The Letter does not describe any specific operations. Rather, the Letter recites that the parties contemplate that operations will commence over "individual discrete segments" in phases.

The parties say that they will execute and file a specific trackage rights agreement for each separate operation. Each specific agreement will fully describe (1) special operating considerations, (2) compensation for the rights granted and method of payment, and (3) joint facility conditions covering, among other matters, labor protection.

According to the Letter, each trackage rights agreement filed with the Board will be filed in a redacted version to

¹ These proceedings are not consolidated. A single decision is being issued for administrative convenience.

² In the UP notice, the line is described essentially from north to south. In the MP notice, it is described in the opposite direction.

protect information deemed confidential or proprietary. Until the parties enter into and file a specific agreement setting forth the terms and conditions of operations over an individual discrete segment of EJ&E's line, no operations under the trackage rights will commence.

The Letter also provides that if the parties do not enter into a specific trackage rights agreement by December 31, 1996, their obligations to negotiate will terminate, unless extended by mutual consent. If, however, the parties have entered into at least one such agreement by December 31, 1996, the obligations of the parties to negotiate regarding additional segments will expire on June 30, 1997, unless extended by mutual consent. Neither UP nor MP has submitted a specific trackage rights agreement.

On August 27, 1996, Joseph C. Szabo, representing the Illinois Legislative Board-United Transportation Union (UTU) filed a petition to reject, revoke, and/or to stay operation of both notices of exemption pending disposition of the petition to reject or revoke. Also on August 27, the City of West Chicago, IL, filed a petition to reject or revoke the notices of exemption. UP and MP jointly replied to the UTU petition on August 28, 1996.

On August 29, 1996, the Brotherhood of Locomotive Engineers (BLE), representing engineers of UP and EJ&E, filed a pleading joining in the UTU and City of West Chicago petitions. UP and MP jointly replied to the BLE and City of West Chicago pleadings on September 6, 1996. Also on September 6, the United Transportation Union (national office) filed a letter seeking the imposition of labor protection conditions.

The notices of exemption were served and published on September 10, 1996 (61 FR 47781). Thereafter, in a decision served September 12, 1996, the Chairman stayed operation of the notices of exemption pending resolution of the requests for rejection and revocation.

POSITIONS OF THE PARTIES

Request for rejection. UTU argues that the Board's regulations governing trackage rights exemption notices require the parties to have reached or entered into a trackage rights agreement. Here, the parties have executed only a "master" Letter of Understanding, which the union argues cannot suffice. The City of West Chicago and BLE concur. The City of West Chicago avers that, instead of a written agreement for trackage rights, the parties have presented an "agreement to negotiate" for trackage rights. The City asserts that there is no class exemption for "anticipatory trackage rights."

UTU argues, also, that the parties have failed to specify a consummation date, as is required. The City of West Chicago adds that it is possible that trackage rights operations never will be consummated. In the City's view, statements in the notices of exemption regarding consummation are false and misleading, making the exemptions void ab initio.

UTU complains, further, that the railroads' proposal to submit redacted copies of agreements is inconsistent with the regulations and the proceeding in which they were promulgated.

In this regard, UTU cites the ICC's statement that, "we will require that written agreements be filed with the Commission, and thus they will be open to public scrutiny." Railroad Consolidation Procedures, 1 I.C.C.2d 270, 278 (1985).

In reply, UP and MP contend that the Letters of Understanding attached to the notices are entirely appropriate. They believe that the procedure they have used is consistent with the provisions of the regulations. They point out that the exemptions are permissive. UP may, but is not required to, operate over some portions or all of the EJ&E trackage. Thus, in the railroads' view, there need not be definitive trackage rights agreements covering all of the involved trackage. They assert that the regulations recognize these facts in that they permit parties to submit a copy of their executed agreement either with the notice or within 10 days of the date the agreement is executed, whichever is later. 49 CFR 1180.6(a)(7)(ii). The railroads argue, then, that the Board will have an accurate record of operations and will be able to ensure the existence of an agreement or agreements at the time such documents are filed.

The railroads assert, also, that they properly have specified a proposed consummation date by indicating that consummation would occur "on or as soon as possible after August 28, 1996."

Finally, the railroads see no reason why they should not be permitted to delete confidential and proprietary information from their trackage rights agreements filed with the Board. They aver that, in this regard, there is no valid distinction between the treatment that is afforded to applications and petitions for exemption and that which should be given to notices filed under the class exemption.

Request for revocation. UTU contends that the railroads' use of a "master" Letter of Understanding requires regulation to carry out the Rail Transportation Policy (RTP) at 49 U.S.C. 10101. UTU asserts, further, that the request for "blanket" trackage rights authority, with undisclosed terms, should be subject to Board scrutiny under the provisions of 49 U.S.C. 11323-26.³

The railroads reply that petitioners have failed to meet the stringent requirements for revocation. Specifically, citing Rail Consolidation Procedures, supra, at 274, they assert that a showing of adverse impact is required to support revocation but that no such showing has been made here. They argue further that, if the Board were to revoke the exemption, the substantial additional time, expense, and effort required to process either an individual petition for exemption or a trackage rights application would contravene various specified goals of the RTP.

DISCUSSION AND CONCLUSIONS

³ Petitioners object to the proposal to submit redacted copies. Such a procedure is not impermissible when used to protect confidential or proprietary information where parties may gain access pursuant to a protective order.

The process UP, MP and EJ&E propose to employ in these cases is unusual and warrants additional comments by the parties on several issues.

A primary issue is notice. Typically, a notice invoking the class exemption for trackage rights is published in the Federal Register, and anyone reading the notice can perceive the scope of the proposed rights, assess the impact of the rights on his or her interests, and act to protect those rights before the Board.

Here, the initial notice identified the maximum extent of rights that might be granted, but did not include any actual grant of rights. Thus, a person reading the Federal Register would have only a general idea of the scope of the rights that the EJ&E might confer on UP and MP. The parties would evidently file copies of any specific agreements with the Board as they are subsequently reached. The railroads propose to file those agreements with the Board in the public docket of the proceedings. But they do not propose that any further notice be published in the Federal Register. At least arguably, the process advanced by UP and MP (with general notice given up front and additional detail filed in the docket as subsequent specific agreements are reached) may put interested persons at a disadvantage vis-a-vis the normal process of providing notice, including Federal Register notice of each grant of trackage rights as it occurs.

A related concern is our compliance with various provisions of environmental law. Our regulations require an environmental assessment of proposed trackage rights resulting in significant changes in rail operations, i.e., an increase in rail traffic of 100 percent, an increase of at least 8 trains per day on any segment of track, or an increase in rail yard activity of at least 100 percent. The UP and MP have certified that the rights identified in the notice they filed will not produce these changes in operations. Even though these notices may have no direct effect on operations, future notices using this format may have significant environmental impacts. How are we to assess the environmental impact of trackage rights when they are submitted in the format used by the railroads in this case?

A third question relates to labor protection. While protection for adversely affected employees is a given, more information might be needed for workers to assess whether or not they will be adversely affected by these generally described, but largely undefined, transactions. Does this new procedure create difficulties in asserting these rights? UTU and BLE should identify specifically any problems created by the new procedure.

Finally, we would like the railroads to explain why they have proposed to employ this procedure. What are the benefits to the parties? Why is not the existing procedure sufficient?

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

It is ordered:

1. The parties must file supplemental pleadings addressing the issues noted by the Board.
2. The supplemental pleadings are due January 2, 1997.

3. The reply supplemental pleadings are due January 13, 1997.

4. This decision is effective on its service date.

5. The September 12, 1996 stay is continued pending resolution of the issues following the receipt of supplemental pleadings by the Board.

By the Board, Chairman Morgan, Vice Chairman Simmons, and Commissioner Owen.

Vernon A. Williams
Secretary