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SERVICE DATE - JUNE 18, 1998

SURFACE TRANSPORTATION BOARD¹

DECISION

Finance Docket No. 32662

CONSOLIDATED RAIL CORPORATION--TRACKAGE RIGHTS
EXEMPTION--MISSOURI PACIFIC RAILROAD COMPANY

Decided: June 11, 1998

The Brotherhood of Locomotive Engineers (BLE) and the United Transportation Union (UTU) (collectively, the unions) filed petitions to revoke the notice of exemption in this proceeding on April 13, 1995, and May 24, 1995, respectively. On May 23, 1995, Consolidated Rail Corporation (Conrail) and Missouri Pacific Railroad Company (MP)² (collectively, the railroads) jointly replied.³ The petitions will be denied.

BACKGROUND

On February 3, 1995, Conrail filed a notice under the class exemption procedures at 49 CFR 1180.2(d)(7) to acquire overhead trackage rights over 33.28 miles of MP's St. Louis Division,

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. 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 At the time the notice of exemption was published, MP was a subsidiary of the Union Pacific Corporation, parent of the Union Pacific Railroad Company (UP). MP merged into UP on January 1, 1997. Therefore, UP is the successor-in-interest to MP.

³ The reply to BLE's petition was filed before UTU's petition was received. On May 30, 1995, the railroads filed a letter requesting that their May 23 reply be considered as applicable to both petitions.

Chicago Subdivision main line from milepost 220.82,⁴ at St. Elmo, IL, to milepost 254.10, at Salem, IL.⁵ Conrail's notice also included certain tracks within a common yard to be established by MP at its Salem Yard for the purpose of receiving and delivering bridge traffic between Conrail and MP.⁶ Notice of the exemption was served on February 23, 1995, and published in the Federal Register (60 FR 10406) on February 24, 1995. The trackage rights became effective on February 10, 1995.

DISCUSSION AND CONCLUSIONS

Under 49 U.S.C. 10505(d), we may revoke an exemption if we find that regulation is necessary to carry out the rail transportation policy (RTP) of 49 U.S.C. 10101a.⁷ Labor interests may raise issues concerning the appropriate level of labor protection in a petition for revocation. See 49 U.S.C. 10505(g)(2) and Simmons v. I.C.C., 900 F.2d 1023 (7th Cir. 1990). To the extent that a party wishes to challenge the bona fides of a transaction, we retain the right to review the transaction to protect the integrity of our processes. Minnesota Comm. Ry., Inc.--Trackage Exempt.--BN R.R. Co., 8 I.C.C.2d 31 (1991) (Minnesota). The party seeking to revoke an exemption must meet its burden of proof by articulating reasonable, specific concerns to satisfy the revocation criteria. Wisconsin Central Ltd.--Exemption Acquisition and Operation--Certain Lines of Soo Line Railroad Company, Finance Docket No. 31102 (ICC served July 28, 1988), and Minnesota, 8 I.C.C.2d at 35. Accord Norfolk Southern Railway Company--Trackage Rights Exemption--Norfolk and Western Railway Company, Finance Docket No. 32661 (ICC served Feb. 21, 1996) (Norfolk Southern).

The unions seek revocation of the exemption on the grounds that the notice of exemption contains false and misleading information, alleging that the trackage rights are not "bridge trackage rights" and that the Salem Yard is not a "common yard." They also contend that revocation is

⁴ MP's milepost 220.82 is located at the connection between MP and Conrail at approximately milepost 154.10 of Conrail's east-west main line between Avon and East St. Louis, IL.

⁵ The Eastern Region of UP includes the lines MP acquired from the former Chicago and Eastern Illinois Railroad (C&EI). The UP line between St. Elmo and Salem was part of the former C&EI trackage.

⁶ Conrail's caption summary of the notice of exemption states that the tracks are located within the "Common Yard owned by MP at Salem, as designated from time to time by the appropriate operating officer of MP." Paragraph 6 of the notice of exemption makes clear that the common yard is not in existence, but rather "will be established" at MP's Salem Yard. Like the line between St. Elmo and Salem, the Salem Yard was formerly owned by C&EI.

⁷ We also note that, if the notice invoking an exemption contains false or misleading information, we will summarily revoke the exemption. 49 CFR 1180.4(g)(1)(ii).

necessary to carry out the RTP, alleging that the sole purpose of the transaction is to avoid the carriers' obligations to labor.

Bridge trackage rights. The unions state that the trackage rights MP granted Conrail are not intended to permit Conrail to go from a point on one of its lines to a point on another of its lines. Therefore, according to the unions, the traffic hauled under these rights is not bridge traffic and Conrail will not be using MP's track as a bridge between its lines. Rather, the unions argue, Conrail will be doing work now performed by UP crews (formerly MP/C&EI crews).

In reply, the railroads state that bridge trackage rights are transactions which "will maintain the competitive balance among carriers, preserve shippers' existing transportation choices, give shippers access to alternative routes with shorter, faster, or otherwise improved routing and increase the operational efficiency of the participating carriers," citing Railroad Consolidation Procedures, 1 I.C.C.2d 270, 275-76 (1985) (Procedures).⁸ The railroads argue that the subject trackage rights operation is within the class of transactions exempted in Procedures and is a bona fide transaction undertaken to provide improved service to shippers and to achieve operational efficiencies and economies which otherwise could not be accomplished in the absence of the operation.⁹ The railroads also argue that, in the context of a trackage rights notice of exemption, the distinction among bridge, overhead, and local trackage rights is of no legal significance, as the exemption includes all such trackage rights so long as they are based on a written agreement of the parties and are not sought as a condition to a consolidation proposal.

⁸ As explained in Procedures at 272, n.3:

Bridge trackage rights maintain the *status quo* with respect to shipper access to services and with respect to the competitive balance among carriers in the area because the tenant carrier acquires the right to operate over the lessor's tracks and is not permitted to serve local shippers in competition with the lessor or other local carriers. Carriers acquire bridge rights to gain access to routes that are faster, shorter, better maintained, or less costly to operate over. Thus, bridge rights enhance the efficiency of a tenant's operations but do not affect shippers or other carriers on that line.

⁹ According to the railroads, unlike the Salem Yard, there are no crew facilities at St. Elmo. Prior to the trackage rights, Conrail trains had to stop at St. Elmo to wait for MP local crews to travel the 27 miles by van from Salem in order to move the Conrail trains received in interchange. In addition to the significant delays, averaging two hours prior to departure for traffic received from or delivered to Conrail, the railroads state that the crew changes were dangerous because MP crews had to walk across Conrail's busy main line to reach the trains on the siding. The railroads submit that these problems have been eliminated by the trackage rights now that Conrail is permitted to move trains directly over MP's line to Salem where they are interchanged to MP and then handled by MP's road haul crew to another interchange or to final destination.

We agree with the railroads that what is important is that the trackage rights qualify for the class exemption, not whether they are bridge trackage rights. In any event, there is no false and misleading information in the notice because these are bridge trackage rights. Contrary to the unions' assertion, there is no requirement that bridge trackage rights extend from one point to another point on a tenant railroad's line and the definition of bridge traffic includes no such requirement.¹⁰ The involved trackage rights do not permit Conrail to serve local shippers. Rather, they are intended only to improve the efficiency of the carriers' operations by allowing Conrail to complete the interchange with MP at the Salem Yard instead of at St. Elmo.

Common yard. The unions assert that the notice creates the impression that Conrail has access to and operates in a common yard at Salem, but the unions claim that the Salem Yard is and always has been within the exclusive jurisdiction of MP/UP or, formerly, C&EI. In addition, the unions contend that a Bulletin issued by UP to its engine and train service crews stating that all tracks in the Salem Yard are designated for interchange, conflicts with the text of the notice, which provides that certain tracks in MP's Salem Yard, but not the entire yard and tracks therein, would be designated by MP for exercise of Conrail's trackage rights. Finally, the unions argue that the carriers are engaged in a subterfuge and that Conrail and MP will make a "de facto interchange" in the yard without lawful authority. Accordingly, the unions allege that the sole purpose of the transaction is to circumvent their labor contract.

In response, the railroads point out that the notice of exemption does not indicate that the Salem Yard is a common yard, but states that a common yard "will be established" at Salem with implementation of the trackage rights operation. The railroads state that the unions mistakenly interpret the words "de facto interchange" in the Bulletin to mean that there is an interchange without lawful authority, when all that is meant by the term "de facto" is that the interchange between the railroads actually will take place at Salem instead of at St. Elmo.

Both the notice and the underlying trackage rights agreement make it clear that the establishment of a common yard at Salem is prospective. Conrail's notice specifically states that the common yard "will be established" at MP's Salem Yard, and "establishing a common yard at owner's Salem Yard" is given as a reason for the agreement in the preamble to the trackage rights agreement. Also, the trackage rights give Conrail the right to operate over certain tracks within the Salem Yard "as designated from time to time by . . . MP." According to the railroads, MP designated all of the tracks in the Salem terminal as a common yard in order to give both Conrail and MP the flexibility to use any yard track to expedite through movement of the involved trains. Because MP has the right to designate which tracks within the Salem Yard Conrail may operate over, its designation in the Bulletin of all tracks in the Yard does not conflict with the notice of

¹⁰ See Chicago & N.W. RY. Co.--Abandonment, 317 I.C.C. 207, 212 (1961) (defining "bridge traffic" as "that which neither originated at, or was destined to a point on a line"); Southern Pac. Co.--Abandonment, 312 I.C.C. 685, 691 (1961) (defining "bridge traffic" as "neither originating at nor being destined to points on the segment but passing over the line").

exemption. Finally, there is no unlawful interchange between the carriers at Salem. The trackage rights give Conrail only the right to handle traffic for interchange with MP at the Salem Yard, and restrict it from handling any local traffic on the line or using the trackage rights for interchange with any other railroad. The traffic interchanged at the Salem Yard is the same traffic which was being interchanged between MP and Conrail at St. Elmo. While MP's Salem Yard is designated a common yard, it remains under control of MP, and Conrail's operations within the yard are limited to functions necessary to complete the interchange.

Rail transportation policy. The unions contend that this transaction does not have as its basic purpose the furtherance of the rail transportation policy of 49 U.S.C. 10101a, because there has been no showing of any public need for Conrail to operate over MP's tracks or to run its trains and equipment into and around MP's Salem Yard. Rather, the unions contend that the only purpose of the trackage rights arrangement is to enable the railroads to bypass the collective bargaining procedures set forth in the Railway Labor Act and to use our powers to obtain what they could not achieve through negotiations with the unions.¹¹ The unions submit that we were not commissioned as a labor regulator or labor relations agency and that the primary relief the carriers seek concerns a labor dispute under the jurisdiction of the Federal courts and the National Mediation Board.¹²

In response, the railroads argue that the sole purpose for the trackage rights operation is to improve service to shippers and to achieve operating efficiencies and economies, not to bypass or to change CBAs. The railroads state that there has been no change in any CBA for the involved trackage rights operation and that UP/MP has no intention of removing any MP crews from coverage of their CBAs.

There is no merit to the union's arguments regarding our jurisdiction. We do not somehow lose jurisdiction over a trackage rights transaction when implementing such rights may give rise to a labor dispute. See Norfolk Southern, slip op. at 3. The unions have not shown that this is a sham transaction to avoid collective bargaining. The railroads, on the other hand, have demonstrated that

¹¹ Specifically, BLE reports that UP had actively sought to negotiate to implement changes to the collective bargaining agreements (CBAs) that would have permitted Conrail crews to operate Conrail trains over MP's tracks and within the Salem Yard.

¹² Although the unions argue that the matter is outside this agency's jurisdiction, citing Burlington Northern R. Co. v. United Transp. Union, 862 F.2d 1266 (7th Cir. 1988) (Winona Bridge), they fail to demonstrate how the holding in Winona Bridge applies to the facts in this case. The court in Winona Bridge, was concerned that a parent carrier was transferring rights to an extension of itself (Winona Bridge) and, thus, condemned the transaction as a sham. See Minnesota, 8 I.C.C.2d at 42, and Norfolk Southern, slip op. at 4. Thus, it appears that Winona Bridge has no bearing on this proceeding.

there is a legitimate transportation purpose to the trackage rights arrangement and, most importantly, that no CBA has been or will be modified as a result of its implementation.¹³

We conclude that the unions have not made the requisite showing under 49 U.S.C. 10505(d) for revocation of the exemption and have not otherwise shown that the notice of exemption contains false or misleading information or fails to comply with applicable requirements that would make the exemption void ab initio. Accordingly, we find no basis for revoking the trackage rights exemption in this proceeding, and, therefore, we will deny the petitions to revoke.

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

It is ordered:

1. The petitions to revoke are denied.
2. This decision is effective on its service date.

By the Board, Chairman Morgan and Vice Chairman Owen.

Vernon A. Williams
Secretary

¹³ The unions argue that we have no power to require that a CBA be modified. Although no modification of a CBA has occurred or is contemplated as a result of this transaction, we note that it is now well settled that, under 49 U.S.C. 11347 and 49 U.S.C. 11341(a), CBAs may be modified to the extent necessary to permit implementation of transactions, which provide public transportation benefits, that we exempt or approve. See Norfolk & Western R. Co. v. Train Dispatchers, 499 U.S. 117 (1991); Railway Labor Executives' Ass'n v. U.S., 987 F.2d 806 (D.C. Cir. 1993); and United Transp. Union v. Surface Transp. Bd., 108 F.3d 1425 (D.C. Cir. 1997).