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SERVICE DATE - OCTOBER 22, 1998

SURFACE TRANSPORTATION BOARD

DECISION¹

STB Finance Docket No. 33315

MINNESOTA NORTHERN RAILROAD, INC.--EXEMPTION--ACQUISITION AND
OPERATION OF RAIL LINE AND INCIDENTAL TRackage RIGHTS FROM
BURLINGTON NORTHERN RAILROAD COMPANY

STB Finance Docket No. 33316

RAILAMERICA, INC.--CONTINUANCE IN CONTROL EXEMPTION--
MINNESOTA NORTHERN RAILROAD, INC.

STB Finance Docket No. 33337

MINNESOTA NORTHERN RAILROAD, INC.--TRACKAGE RIGHTS--
THE BURLINGTON NORTHERN AND SANTA FE RAILROAD COMPANY

Decided: October 16, 1998

On September 3, 1997, John D. Fitzgerald, for and on behalf of United Transportation Union-General Committee of Adjustment (UTU-GCA), filed a petition for reconsideration of a Board decision served August 14, 1997 (August 1997 decision). In that decision, we denied UTU-GCA's petitions to reject the notices of exemption or to revoke the exemptions in the above related proceedings. UTU-GCA states that, although the petition is directed to all three proceedings, it seeks relief, i.e., labor protective conditions, only in the STB Finance Docket No. 33315 proceeding.² This decision denies UTU-GCA's petition for reconsideration.

BACKGROUND

The full history of these related proceedings and the three notices of exemption at issue are set forth in the August 1997 decision, and will be repeated here only to the extent necessary to address the assertions raised by UTU-GCA in its latest petition.

On December 11, 1996, in STB Finance Docket No. 33315, Minnesota Northern Railroad, Inc. (MNR), a noncarrier, filed a notice of exemption to acquire and operate a total of about 204.10 miles of rail line of what is now The Burlington Northern and Santa Fe Railway Company (BNSF

¹ These proceedings have not been formally consolidated; they are being handled together for administrative convenience.

² See Petition for Reconsideration, at 2.

or BN).³ The acquisition involved five separate lines of track and incidental overhead trackage rights.⁴ Also on that date, in STB Finance Docket No. 33316, RailAmerica, Inc. (RailAmerica)⁵ filed a notice of exemption to continue in control of MNR upon MNR's becoming a Class III rail carrier. On January 8, 1997, in STB Finance Docket No. 33337, BNSF agreed to grant overhead trackage rights to MNR over a line of railroad between mileposts 31.0 and 33.0 near Erskine, MN,⁶

³ On December 31, 1996, The Atchison, Topeka, and Santa Fe Railway Company (ATSF) merged with and into Burlington Northern Railroad Company (BN). The name of the surviving corporation is The Burlington Northern and Santa Fe Railway Company. In this decision, we will refer to this entity as BNSF, except where the context requires us to refer to BN.

⁴ The transaction in STB Finance Docket No. 33315 specifically provided for MNR to acquire the following rail lines from BNSF: (1) 33.25 miles of rail line on the MN Junction at Ada, MN, between Ada Subdivision mileposts 80.25 and 47.0; (2) 20.6 miles of rail line on the Redland Junction at Fertile, MN, between Fertile Subdivision mileposts 65.7 and 45.1; (3) 13.0 miles of rail line on the Tilden Junction at Red Lake Falls, MN, between Grand Forks Subdivision mileposts 56.84 and 13.0 miles east; (4) 44.25 miles of rail line on the MN Junction at Perley, MN, between P Line Subdivision mileposts 65.25 and 21.0; and (5) 93 miles of rail line on the St. Hilaire line at Warroad, MN, between Warroad Subdivision mileposts 11.0 and 104.0.

Concurrent with the above transaction, MNR was to acquire incidental overhead trackage rights for the sole purposes of: (1) interchanging rail freight cars and equipment between MNR and BNSF at BNSF's Crookston, MN rail yard only; and (2) moving locomotives, cars and equipment between the rail lines over BNSF's Grand Forks Subdivision rail line between milepost 81.5 west of Crookston, and milepost 31.0 at Erskine, MN, and also over all yard tracks in BNSF's Crookston rail yard. In addition, MNR would acquire BNSF's trackage rights to operate over the Soo Line Railroad Company between milepost 273.0 at or near Erskine and milepost 309.5 at or near Thief River Falls, MN. BNSF would retain overhead trackage rights only, without serving any industries on the line, to provide rail freight service over the Perley line, between P Line Subdivision milepost 65.25 and milepost 21.0.

⁵ RailAmerica controls MNR, a corporation newly formed for the purpose of acquiring and operating BNSF rail lines in Minnesota and a noncarrier until it acquired the lines. RailAmerica controls 10 Class III railroads in addition to MNR: Evansville Terminal Company, Inc.; Huron & Eastern Railway Company, Inc.; Saginaw Valley Railway Company, Inc.; West Texas & Lubbock Railroad Company, Inc.; Plainview Terminal Company; Dakota Rail, Inc.; South Central Tennessee Railroad Company; Cascade and Columbia River Railroad Company; Gettysburg Railway Company; and Otter Tail Valley Railroad.

⁶ The two miles of trackage rights supplemented the incidental trackage rights that were part of the transaction in STB Finance Docket No. 33315 and were designed to provide for more efficient operations by MNR.

subject to labor protective conditions.⁷ The Board served and published on March 12, 1997, the three related notices of exemption.⁸

UTU-GCA opposed the notices of exemption and petitioned to have them rejected or to have the exemptions revoked.⁹ UTU-GCA also filed petitions to stay the effective date of the exemptions in STB Finance Docket Nos. 33315, 33316, and 33337. However, the stay requests were filed too close to the consummation date for them to be acted upon in the first two dockets, and the request in STB Finance Docket No. 33337 was denied. The Board's August 1997 decision denied UTU-GCA's petitions to reject the notices of exemption or to revoke the exemptions in the three proceedings.

On September 3, 1997, UTU-GCA, pursuant to 49 CFR 1115.3, filed its petition for reconsideration of our prior decision on grounds of material error and new evidence. On September 19, 1997, BNSF filed an opposition statement. MNR replied to the UTU-GCA petition in a pleading filed September 22, 1997.

⁷ As part of this transaction, MNR and BNSF agreed to the imposition of labor protective conditions established in Norfolk and Western Ry. Co.--Trackage Rights--BN, 354 I.C.C. 605 (1978), as modified by Mendocino Coast Ry., Inc.--Lease and Operate, 360 I.C.C. 653 (1980).

⁸ See 62 FR 11519-21.

⁹ In STB Finance Docket Nos. 33315 and 33316. On December 16, 1996, UTU-GCA filed a petition to reject the notices of exemption or to revoke the exemptions on various grounds, including that BNSF, MNR, and RailAmerica failed to meet the notice requirements related to the date of consummation of the transactions and failed to provide adequate information on certain incidental trackage rights. To accommodate the concerns expressed by UTU-GCA, MNR and RailAmerica withdrew the notices and filed on December 20, 1996, amended notices which provided a date for consummation of the acquisition and discussed the incidental trackage rights. On December 24, 1996, UTU-GCA filed a supplemental petition to reject/revoke in both the acquisition and continuance in control proceedings on grounds that the total route miles were not accurately calculated; that the subject lines and related trackage rights were not properly described; and that a required map was not filed. UTU-GCA also contended that the consummation date provided in the amended notices was still inadequate and raised various concerns about trackage rights. On January 13, 1997, UTU-GCA filed a second supplemental petition to revoke in STB Finance Docket No. 33315 raising labor protection issues.

In STB Finance Docket No. 33337. On January 13, 1997, UTU-GCA filed a petition to reject the notice or to revoke the exemption on various grounds, including: BNSF was not an operating carrier and MNR could not be accorded trackage rights over a noncarrier; MNR's map failed to comply with Board rules and regulations; and MNR did not file a publicly available copy of the trackage rights agreement. UTU-GCA also argued that the exemption should be revoked because of the "mysteries" of the three related transactions.

In its petition, UTU-GCA asserts that the August 1997 decision contains material error in that it fails to correctly attribute arguments to the parties and confuses the issues; has adopted a new standard for rejection of a notice of exemption; and has not properly addressed UTU-GCA's claims that notice was deficient. UTU-GCA bases its "new evidence" argument on new developments since the notices of exemption were published on March 12, 1997, i.e., the listing of the subject lines as candidates for abandonment on June 16, 1997, and the filing of abandonment exemption petitions for the lines on July 29, 1997. Petitioner contends that, on these various grounds, the Board should reconsider its prior decision, reject the notices or revoke the related exemptions, and subject the transactions to the provisions of 49 U.S.C. 11323 or 10903 with the imposition of employee protective conditions.

DISCUSSION AND CONCLUSIONS

We will deny UTU-GCA's petition. Under 49 CFR 1115.3, a discretionary appeal will be granted only upon a showing that the prior action will be materially affected because of material error, new evidence, or changed circumstances. UTU-GCA here asserts as grounds for reconsideration material error and new evidence. Because the petition for reconsideration does not assert changed circumstances, we need not and will not consider this element. Upon review of the record, we conclude that UTU-GCA has not shown reconsideration of the August 1997 decision to be warranted under the remaining elements.

Material Error. (1) Fails to correctly attribute arguments to the parties and confuses the issues. UTU-GCA claims that, in the August 1997 decision, we attributed to the wrong party, UTU-GCA, the assertions that BNSF would retain dispatching control over MNR's operations and that there is a "causal connection" between the line spin-offs and the BN/ATSF merger.¹⁰ UTU-GCA claims that it was the "International UTU," not UTU-GCA, that made the assertions.

We must reject petitioner's arguments regarding the parties and issues. Our erroneous reference to UTU-GCA as the party making the assertions is not material. There is no evidence that our conclusions regarding those assertions were in any way influenced by our perception of their source. Our attributing those assertions to UTU-GCA instead of the national union, United Transportation Union (UTU), is therefore of no real consequence. Rather, what is important is the fact that the assertions as to dispatching control and causal connection were presented and fully addressed in the August 1997 decision, and that UTU-GCA has not challenged our rejection of those assertions no matter which entity made them.¹¹ Finally, we point out that the national union's

¹⁰ See August 1997 decision, at 3 and 5.

¹¹ See August 1997 decision, at 5, where we stated, "As to dispatching control, we note that not only has UTU-GCA not provided any evidence in support of its claim, but that BNSF has categorically denied that it will exercise any control over any connection aspects of MNR's
(continued...)"

leadership clearly intended that UTU and UTU-GCA present the same issues, as evidenced by the fact that UTU's petition to revoke filed on January 13, 1997, in STB Finance Docket No. 33315 specifically adopted and incorporated by reference "the Supplemental Petition to Reject, to Revoke, and/or to Stay filed by UTU-General Committee of Adjustment (GC) filed previously" in that proceeding.

Along this same line of argument, UTU-GCA claims that the August 1997 decision failed to mention either the International UTU or BNSF. This argument is also without merit. First, we have no record of a pleading filed on behalf of the "International UTU." As to BNSF, our decision at page 3 noted that MNR and BNSF replied separately to UTU-GCA's petition and, at footnote 6, we specifically stated that BNSF categorically denied: (1) any dispatching control over MNR's train operations; and (2) any causal connection between the BN/ATSF rail merger and the subject acquisition/operation exemption.

(2) Rejection standard and deficient notice claims. UTU-GCA contends that the Board erred in that it has advanced a "novel and amazing" standard for rejection of a notice of exemption here, i.e., that a petitioner must demonstrate that the notice contains false or misleading information. UTU-GCA further asserts that we failed to cite authority for confining rejection to such a standard. It argues that failure to follow the Board's filing requirements heretofore has been sufficient to warrant rejection, even though the information submitted is not false or misleading.

UTU-GCA is incorrect that the false or misleading standard is a "novel and amazing" standard for rejection. To the contrary, that standard has traditionally been a basis for finding a notice of exemption void ab initio and for rejecting the notice. See 49 CFR 1150.32(c). Here, because UTU-GCA has neither demonstrated that the notice contained false or misleading information nor that it otherwise failed to meet Board rules and regulations, there is no basis for rejection.

UTU-GCA also contends that the notices of exemption, even as published in the Federal Register, did not follow the Board's own regulations, and that the "corrective" notice of exemption in STB Finance Docket No. 33337 to acquire additional trackage rights from BN did not, in fact, cure the deficiencies. That argument was thoroughly discussed in the August 1997 decision and was found to be meritless and not to warrant either rejection of the notices or revocation of the exemptions.¹² Thus, we need not and will not discuss it further here.

¹¹(...continued)

operations. We further conclude that UTU-GCA has not demonstrated any connection between the merger and the lines at issue in STB Finance Docket No. 33315 that would bring that transaction within the coverage of the merger and the labor conditions."

¹² See August 1997 decision, at 5 (paragraph 6).

New Evidence. UTU-GCA contends that new developments have occurred since the notices of exemption were published on March 12, 1997. According to petitioner, MNR listed two of the five acquired BNSF lines as candidates for abandonment in category 1 of its System Diagram Map (SDM), by its amended SDM filed June 16, 1997. MNR followed with formal petitions for exemption from the abandonment provisions, filed July 29, 1997. UTU-GCA argues that the two-step transfer from BNSF to MNR, and then the filing of almost immediate abandonment exemption petitions by MNR, all without mandatory protective conditions for BNSF employees in the crafts or classes of engine and train service (other than for the short MNR trackage rights over BNSF for two miles at Erskine), constituted false or misleading information in the exemption notices. UTU-GCA also alleges that the transaction by MNR and BNSF was a sham, done solely for the purpose of avoiding labor protection in the STB Finance Docket No. 33315 proceeding.

As part of its new evidence, UTU-GCA attaches to its petition a copy of the BNSF/MNR agreement. UTU-GCA asserts that the agreement contains numerous provisions whereby BNSF controls the commercial aspects of the spin-off lines, including restricted routing and interchange provisions. According to petitioner, the line sale is so tied to BNSF's interest that it should bear the cost of employee protection here. Finally, UTU-GCA asserts that BN appears to have established a pattern for a spin-off of lines under the carrier or noncarrier class exemption not for continued operation but for abandonment.¹³

Here, UTU-GCA raises serious allegations but fails to substantiate any of them. There is nothing in the way of new evidence that validates such allegations or warrants reconsideration of the August 1997 decision. The BNSF/MNR agreement now submitted by UTU-GCA as new evidence is not new at all but was submitted as part of the record in the trackage rights transaction in STB Finance Docket No. 33337. Because UTU-GCA indicates that it had available a copy of the agreement, any concerns or arguments it had regarding the terms of that agreement should have been presented in its earlier petitions to reject/revoke the exemptions.

As to MNR's abandonment of two of the five lines acquired from BNSF, there is nothing of record here to substantiate that MNR acquired the lines for the sole purpose of abandoning them so that BNSF could avoid labor protection. To the contrary, in Minnesota Northern Railroad, Inc.--Abandonment Exemption--In Red Lake and Polk Counties, MN, STB Docket No. AB-497 (Sub-No. 1X) (STB served Nov. 14, 1997), the Board found that, by permitting MNR to forgo operating the Red Lake Falls-Strata line at a substantial loss and to apply its assets more productively elsewhere on its rail system, an exemption would promote a safe and efficient rail transportation system, foster sound economic conditions, and encourage efficient management. In Minnesota Northern Railroad, Inc.--Abandonment Exemption--Between Redland Junction and Fertile, In Polk County, MN, STB Docket No. AB-497 (Sub-No. 2X) (STB served Nov. 14, 1997), the Board found that continued operation of the Fertile Branch would be a drain on MNR and pose a threat to

¹³ In support, petitioner points to various examples, including the Fertile and Red Lake Falls lines discussed infra.

service on its remaining rail lines. The record indicates that, subsequent to MNR's acquiring the two lines at issue, rail traffic declined and shifted to truck service due in part to one of the worst winters in Minnesota history, thus necessitating the abandonment of those unprofitable lines. These facts certainly belie petitioner's claim that the parties' actions here resulted in the filing of false or misleading information warranting rejection of the notices.

There is also no justification here for revocation of the exemptions and the imposition of employee protective conditions in the lead proceeding. UTU-GCA argues that the Board should invoke its policy that it will revoke an exemption when a challenge is made concerning the bona fides of a transaction, i.e., that the transaction is a sham. Here petitioner alleges that BN has effected a sham abandonment without the employee protective conditions mandated by 49 U.S.C. 10903 or 11326. The Board has not, however, adopted such a policy. Rather, the Board will revoke an exemption when and only when it is proven with hard evidence that the transaction is a sham, not just when the bona fides of a transaction is challenged. UTU-GCA's reliance on hindsight and what it surmises or alleges to be the reason for the MNR acquisition and subsequent abandonment of lines of railroad is not enough in this case to warrant reconsideration of the August 1997 decision. There is simply no evidence of a "sham" transaction here; in fact, to the contrary, we believe that the record supports the conclusion that MNR made a good faith effort to operate all five of the acquired lines, including the two lines for which it subsequently sought abandonment authority.

In sum, we conclude that petitioner has failed to establish material error or new evidence warranting reconsideration of the August 1997 decision. As such, the petition requesting such relief will be denied.

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

It is ordered:

1. The petition for reconsideration is denied.
2. This decision is effective on its service date.

By the Board, Chairman Morgan and Vice Chairman Owen.

Vernon A. Williams
Secretary