

STB FINANCE DOCKET NO. 33323

CHICAGO RAIL LINK, L.L.C.--
LEASE AND OPERATION EXEMPTION--
UNION PACIFIC RAILROAD COMPANY

Decided August 18, 1997

The Board denies: (1) United Transportation Union-Illinois Legislative Board's (UTU-IL) petition to revoke; and (2) Chicago Rail Link, L.L.C.'s motion to strike UTU-IL's supplement to its petition.

BY THE BOARD:

On December 18, 1996, Chicago Rail Link, L.L.C. (CRL) a Class III rail carrier, filed a notice of exemption under 49 CFR 1150.41 to lease and operate approximately 8.5 miles of rail lines owned by Union Pacific Railroad Company (UP). The lines are comprised of track numbers 1 through 9, 110, 500, 501, 702, 710, and 711 in UP's Irondale Yard, Chicago, IL, east of Torrence Avenue between 117th Street and 122nd Street. The exemption became effective on December 25, 1996, and the transaction was consummated on January 2, 1997. Notice of the exemption was served and published on January 9, 1997 (62 Fed. Reg. 1357).

On January 13, 1997, Joseph C. Szabo, on behalf of United Transportation Union-Illinois Legislative Board (UTU-IL or petitioner), filed a petition to revoke the exemption. CRL replied to the petition on January 31, 1997. Then, on February 27, 1997, UTU-IL filed a supplement to its petition. CRL moved to strike the supplement on March 19, 1997, and UTU-IL replied to the motion on March 31, 1997.

By a decision served May 28, 1997, the Board instituted a proceeding under 49 U.S.C. 10502(d) to consider UTU-IL's revocation request. Our decision here denies UTU-IL's petition to revoke the exemption.

PRELIMINARY MATTER

CRL has moved to strike UTU-IL's supplement to its petition to revoke. Whereas UTU-IL characterizes its pleading as an update¹ and a clarification, CRL assails it as a reply to a reply, which is impermissible under our Rules of Practice at 49 CFR 1104.13(c).

CRL is correct in its contention that the union's pleading consists of impermissible reply matter. We note, however, that UTU-IL has requested that, if necessary, its pleading be deemed to incorporate a request for leave to file the supplement.² We note further that CRL's motion contains tendered reply argument and that the union's reply to the motion also contains reply argument. We admonish the parties in the future to submit their entire cases at one time. Here, however, in the interest of having thorough presentations in a proceeding involving issues of interpretation and application of case law and our rules, we will deny the motion to strike and consider all of the parties' tendered evidence and argument.

REGULATORY FRAMEWORK

In the *ICC Termination Act of 1995*, Pub. L. No. 104-88, 109 Stat. 803 (ICCTA), Congress established a new statutory section, 49 U.S.C. 10902 - *Short line purchases by Class II and Class III rail carriers*. Under section 10902, a Class II or Class III rail carrier "may acquire or operate an extended or additional rail line" only if the Board issues a certificate authorizing such activity. In *Class Exem. for Acq. or Oper. under 49 U.S.C. 10902*, 1 S.T.B. 95 (1996) (*10902 Class Exem.*), acting pursuant to our authority under 49 U.S.C. 10502 to exempt rail carrier transportation from regulation, we established a new class exemption to apply to transactions in which Class III rail carriers acquire

¹ UTU-IL's update of the effect of the transaction on the lessor's employees, as well as the parties' entire exchange on the matter, is immaterial. The union seeks revocation on jurisdictional grounds. It raised the matter of employee impact as justification for a request for expedited handling.

² There is no merit to the union's position that the notice of exemption's stating that "petitions to revoke * * * may be filed at any time" obviates the need for requesting leave to file a reply to a reply. The statement does not give parties leave either to supplement or repeatedly to file petitions for revocation.

forth at 49 CFR Part 1150, Subpart E, sections 1150.41-1150.45. The notice of exemption that is the subject of this proceeding was filed and processed under the new rules.

The new procedures are similar to those adopted more than a decade ago in connection with a class exemption for noncarrier transactions under former 49 U.S.C. 10901.³ The regulations governing the class exemption for noncarrier transactions are set forth at 49 CFR Part 1150, Subpart D, sections 1150.31-1150.36. See, *Class Exemption--Acq. & Oper. of R. Lines Under 49 U.S.C. 10901*, 1 I.C.C.2d 810 (1985) (*10901 Class Exem.*), *aff'd*, *Illinois Commerce Commission v. ICC*, 817 F.2d 145 (D.C. Cir. 1987), revised at 4 I.C.C.2d 309 (1988) and 4 I.C.C.2d 822 (1988).

Also relevant to this proceeding is the statutory provision at 49 U.S.C. 10906 setting forth exceptions from Board jurisdiction.⁴ Section 10906 provides:

Notwithstanding section 10901 and subchapter II of chapter 113 of this title [regulating carrier combinations⁵], and without the approval of the Board, a rail carrier providing transportation subject to the jurisdiction of the Board under this part may enter into arrangements for the joint ownership or joint use of spur, industrial, team, switching, or side tracks. The Board does not have authority under this chapter [Chapter 109-Licensing] over construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks.

POSITIONS OF THE PARTIES

UTU-IL seeks revocation principally on jurisdictional grounds.⁶ Petitioner points to the second provision of section 10906, which indicates that the Board does not have jurisdiction under section 10902 over the acquisition or operation

³ New section 10901 retains the substance of its predecessor section, and the rules have been carried forward.

⁴ This section is substantially the same as its predecessor, former 49 U.S.C. 10907.

⁵ Under 49 U.S.C. 11323 - *Consolidation, merger, and acquisition of control*, specified transactions may be carried out only with the approval and authorization of the Board. Among these is a rail carrier's lease of the property of another rail carrier. 49 U.S.C. 11323(a)(2).

⁶ Petitioner also contends that the exemption should be found void *ab initio* on the basis that the notice contains false or misleading information. However, there is no suggestion that CRL has misdescribed the subject transaction or track. Rather, there is honest disagreement as to the proper characterization of the track.

of switching track.⁷ UTU-IL argues, first, that the subject track is switching track.

In support of its position, petitioner asserts that CRL must operate over the line of the Indiana Harbor Belt Railroad Company (IHB) to reach Irondale Yard, where, petitioner avers, there are no "through" tracks. Petitioner describes the tracks as follows. Track 110 is used for storage; tracks 1 and 2 are holding tracks; tracks 3 and 4 are used by IHB and Belt Railway Company of Chicago (BRC) to pull cars; tracks 5, 6, and 7 are used for deliveries from IHB and BRC; tracks 8 and 9 are used for Bulkmatic business; and tracks 500, 501, 710, and 711 are used for Cargill business.⁸ All of the tracks, UTU-IL argues, are thus "spur, industrial, team, switching, or side tracks." In a similar vein, UTU-IL argues that section 10902 covers the acquisition and operation of *rail line* and that the subject tracks do not constitute a line of railroad, emphasizing that the Irondale Yard has no "through lines."

UTU-IL argues further that, even if the subject lines constituted rail line, acquisition or operating authority under section 10902 does not embrace *lease* authority. Expanding on this argument, UTU-IL avers that the Board's class exemption does not cover leases. It asserts that the regulations do not mention leases in the listing of transactions and carriers that qualify, and, whereas the decision in *10901 Class Exem.* specifically pointed out that leases were included, the decision in *10902 Class Exem.* does not.

Finally, UTU-IL argues that, regardless of whether the subject track is switching track, the provisions of 49 U.S.C. 11323(a)(2) apply here because the transaction involves a "lease * * * to operate property of another rail carrier by any number of rail carriers." Petitioner agrees that the transaction is a lease transaction, and believes it is clear that the subject track is the property of a rail carrier. Petitioner notes that the first provision of section 10906 excludes switching track from regulation under section 11323 only when an arrangement for joint ownership or joint use is involved, which is not the situation here.

In reply, CRL argues that, as to it, the subject track is not switching track and that, therefore, section 10902 and the class exemption are applicable because the transaction falls outside the section 10906 exception. Citing the decision in *Nicholson v. ICC*, 711 F.2d 364 (D.C. Cir. 1983), *cert. denied*, 464

⁷ We note that petitioner appears to use the terms "switching track" and "yard track" synonymously in its pleadings. No distinction is necessary here.

⁸ Bulkmatic and Cargill are not further identified in the record.

U.S. 1056 (1984) (*Nicholson*), CRL asserts that, in determining whether a particular track segment is excepted from Board jurisdiction by section 10906, the ICC and the courts have focused on the intended use of the track. Citing *Brotherhood of Locomotive Eng'rs v. STB*, 101 F.3d 718 (D.C. Cir. 1996) (*BLE v. STB*), CRL contends further that the focus must be on the *tenant* railroad's use of the track as the controlling factor in determining the character of the track. Thus, the railroad argues, although the lines it is leasing are located in a UP yard, it is using those lines to serve new shippers in addition to performing switching operations. Because it is using the leased track to serve new shippers, CRL avers, the involved tracks are a line of railroad subject to the Board's jurisdiction under section 10902.

In CRL's view, not only are the subject tracks "rail line" as contemplated by section 10902, but, contrary to UTU-IL's contentions, the *lease* of the line also is governed by section 10902. CRL points out that, under that section, a carrier may "acquire *or* operate" a rail line, not, as UTU-IL apparently claims, "acquire *and* operate" a rail line. Therefore, CRL concludes that, in enacting section 10902, Congress granted the Board jurisdiction to authorize transactions involving a lesser interest than fee simple ownership.

CRL also points out that the class exemption rules under section 10902 for Class III carriers were patterned on the class exemption rules under section 10901 for noncarriers. The railroad notes that the term "lease" is not contained in either set of rules, but it takes the position that it is clear that the new class exemption rules are intended to cover lease transactions just as the old rules have done. CRL notes that, in *10901 Class Exem.*, at 810 n.1, the ICC stated: "The terms 'acquire' and 'operate' include interests in railroad lines of a lesser extent than fee simple ownership, such as a lease or a right to operate." CRL avers that the Board, in adopting the section 10902 class exemption, did not feel compelled to define the words "acquire or operate" as including leases, for the ICC had already done so.

Finally, CRL argues that, in cases such as that before us here where regulated lines are involved, Class II and Class III carriers now have the option of seeking approval for lease transactions under either section 10902 or section 11323. CRL cites portions of the legislative history of sections 10902 that, it claims, confirm that Congress did not intend for sections 10902 and 11323 to be

be mutually exclusive.⁹ Thus, according to CRL, it could properly choose to obtain Board approval for this transaction under section 10902 rather than under section 11323.

DISCUSSION AND CONCLUSIONS

Under 49 U.S.C. 10502(d), we may revoke an exemption if we find that regulation is necessary to carry out the rail transportation policy of 49 U.S.C. 10101. Labor interests may raise issues concerning the appropriate level of labor protection in a petition for revocation. See, 49 U.S.C. 10502(g) and *Simmons v. ICC*, 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.--BNR.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, supra*, at 35. *Accord, Norfolk Southern Railway Company--Trackage Rights Exemption--Norfolk and Western Railway Company*, Finance Docket No. 32661 (STB served February 21, 1996).

UTU-IL seeks revocation on jurisdictional grounds. We conclude that petitioner's arguments lack merit and that it has failed to establish that revocation is warranted. Accordingly, we will deny its petition to revoke.

We will first address the matter of the proper characterization of the subject track. CRL has cited appropriate authorities governing our analysis. In *BLE v.*

⁹ In support, CRL cites the following: (1) "By providing this clear delineation of requirements of Class II and Class III rail carriers acquiring rail lines, the Conference does not intend to limit the availability of Section 10901 for noncarrier acquisitions. In addition, Class II and Class III carriers retain the existing option (as do Class I carriers) to obtain approval of intercarrier transactions under section 11323, such as trackage rights agreements under section 11323(a)(6)." H.R. Conf. Rep. No. 422, 104th Cong., 1st Sess. 179-180 (1995); and (2) "Although substantial changes are made in this legislation to the line acquisition provisions as to acquisitions by noncarriers (section 10901) and acquisitions by Class II and Class III railroads (section 10902), the option of using existing authority to approve intercarrier transactions under this subchapter is not affected." H.R. Conf. Rep. No. 422, 104th Cong., 1st Sess. 190 (1995).

STB,¹⁰ *supra* at 727, the court discussed and adopted the holding of *Nicholson*¹¹ and several other cited cases that the jurisdictional status of track must be determined by its intended use. As the ICC stated, "the focus is more properly on the use of the trackage under the terms of the transaction rather than on the character of the trackage itself." *Chevron U.S.A., Inc.--Lease and Operation Exemption--Richmond Belt Railway*, Finance Docket No. 32352 (ICC served June 12, 1995) (*Richmond Belt*), *appeal dismissed, BLE v. STB, supra*.

When two carriers involved in a transaction use track in different ways, the question arises as to which carrier's use controls. In a lease transaction such as this, we focus on the tenant railroad's use as the controlling factor in determining the character of the track as to the lessee. The court in *BLE v. STB*, at 727-28, discussed and found "solid support" for the agency's tenant-use test. *See also*, the ICC's decision in *Brotherhood of Locomotive Engineers v. Union Pacific Railroad Company and Chicago Central and Pacific Railroad Company*, Finance Docket No. 32127 (ICC served May 16, 1995) (*Chicago Central*), *aff'd, BLE v. STB, supra*.

Significantly, the courts have noted an important qualification to the tenant-use test. In *Texas & Pacific Railway Co. v. Gulf, Colorado & Santa Fe Railway Co.*, 270 U.S. 266 (1926) (*Texas & Pacific*), the Supreme Court looked beyond the immediate use of the track segment in question and examined the "purpose and effect" of its construction. The Court stated that:

If the purpose and effect of the new trackage is to extend substantially the line of a carrier into new territory, the proposed trackage constitutes an extension of the railroad * * * although the line be short and although the character of the service contemplated be that commonly rendered to industries by means of spurs or industrial tracks.

¹⁰ In *BLE v. STB*, the court considered petitions to review three agency decisions declining to exercise jurisdiction over trackage rights agreements (in *Chicago Central, infra*, and another decision) or lease agreements (in *Richmond Belt, infra*). The central issue in all three petitions was the reasonableness of the ICC's definition of switching track. In two cases, the court denied the petitions, finding the definition of switching track reasonable and its application neither arbitrary nor capricious. In the third case (*Richmond Belt*), the court dismissed the petition for review on the grounds that petitioners lacked standing to challenge the decision.

¹¹ In *Nicholson*, the court upheld the ICC's refusal of jurisdiction over construction of a yard for breaking up and reassembling trains. The *Nicholson* holding was not, as UTU-IL appears to contend here, based on a holding that the subject track was in a yard. Rather, the track was found to be within the exception from jurisdiction because it was to be used solely for storage, switching, and classification.

Texas & Pacific, supra, at 278.¹²

And the court in *BLE v. STB*, at 728, considered the holding of *Texas & Pacific* and cautioned that:

While the Commission may look to the tenant's use as the controlling factor determining the character of track for the purpose of finding exceptions to its jurisdiction, it may not allow its focus on use to obscure the larger purpose and effect of the transaction at issue.

Applying the law to the facts of this case, we conclude that, as to the tenant, CRL, the subject track is not yard or switching track. This is not a case in which a carrier simply proposes to serve its existing customers more efficiently. *Cf. BLE v. STB, supra*, at 728. By means of the lease transaction, CRL intends to extend its operations to reach new customers. Thus, the transaction contemplates "an extended or additional rail line." The fact that the subject trackage is short is not significant here. As CRL's operations under its lease take the subject track beyond switching track, the lease transaction falls outside of the exception of section 10906 and is subject to section 10902.¹³

UTU-IL has contended that, even if the subject track were not switching track, section 10902 nevertheless would be inapplicable. We find no merit in petitioner's arguments in this area. UTU-IL offers no support for the position that the words "rail line" in section 10902 contemplate a "through line" or a line of any particular character or minimum length. It is sufficient here that CRL will be operating over new trackage to reach new customers. Similarly, UTU-IL offers no support for the position that the words "acquire or operate" of section 10902 do not embrace a lease transaction. The ICC long adhered to the contrary position, we have continued the ICC's interpretation, and petitioner has not presented anything that would warrant our departing from it.

Finally, we find no merit in UTU-IL's arguments that the lease transaction is not covered by our class exemption regulations. The fact that the regulations do not specifically mention leases is of no consequence. At 49 CFR 1150.41 - *Scope of exemption*, the regulations indicate that "this exemption applies to

¹² See also, the discussion in *Southern Pacific Transportation Company--petition for Declaratory Order--Extension of Rail Line*, Finance Docket No. 30568 (ICC served March 29, 1985); and compare *Chicago Central, supra*.

¹³ Inasmuch as we have found that the involved track is *not* switching track, we need not consider hypothetical jurisdictional questions that presume that the track is switching track.

acquisitions or operations by Class III rail carriers under section 10902.” The section goes on to list additional transactions that are covered. No section 10902 transactions are excluded. It also is of no consequence that, in *10902 Class Exem.*, we did not reiterate or reference the ICC’s clarification in *10901 Class Exem.* that a lease or a right to operate is included in the terms “acquire” and “operate.” Had we intended to *change* the interpretation, we would have discussed the matter. There was no need to discuss a longstanding interpretation that was not to be disturbed.

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

It is ordered:

1. CRL’s motion to strike is denied.
2. UTU-IL’s petition to revoke is denied.
3. This decision will be effective on October 2, 1997.

By the Board, Chairman Morgan and Vice Chairman Owen.