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SERVICE DATE - SEPTEMBER 11, 1998

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 33438

ALABAMA & GULF COAST RAILWAY, LLC—  
ACQUISITION AND OPERATION EXEMPTION—  
THE BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY

Decided: August 31, 1998

On July 23, 1997, the Alabama & Gulf Coast Railway, LLC (ALA), a noncarrier, filed a verified notice of exemption under 49 CFR 1150.31 et seq. to acquire from The Burlington Northern and Santa Fe Railway Company (BNSF) and to operate a 140.58-mile rail line between milepost 776.10 near Kimbrough, AL, and milepost 916.68 in Pensacola, FL. The notice also provided that ALA would acquire incidental trackage rights over 13.6 miles of BNSF's line between milepost 776.10 near Kimbrough, AL, and milepost 762.5 near Magnolia, AL. ALA's notice of exemption indicates that these trackage rights enable the carriers to interchange traffic at Magnolia. Under this notice, ALA would also temporarily be assigned trackage rights over a 43.1-mile line of CSX Transportation, Inc. between milepost L621.7 near Atmore, AL, and milepost L635.4 near Catonment, FL, pending completion of repairs to the line to be acquired from BNSF. The transaction was scheduled to be consummated on or after September 1, 1997. Notice of the exemption was served and published in the Federal Register on August 14, 1997 (62 FR 43576).<sup>1</sup>

On August 7, 1997, the United Transportation Union (UTU) filed a petition to revoke the exemption. On August 26, 1997, ALA and BNSF filed replies. By decision served November 5, 1997, the Board instituted a proceeding to consider the petition to revoke. We will deny the petition to revoke.

UTU claims that the trackage rights sought over BNSF's line between Kimbrough and Magnolia, AL, are not incidental to the transaction. UTU asks that the exemption either be revoked entirely or partially, and that ALA be required to seek authority for trackage rights in a separate proceeding, citing Indiana & Ohio Railway Company—Acquisition Exemption—Lines of the Grand Trunk Western Railroad Inc., STB Finance Docket No. 33180 (STB served Feb. 3, 1997) (I&O).

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<sup>1</sup> Notice of an exemption under 49 CFR 1180.2(d)(2) and 1180.4(g) was concurrently served and published in Kauri, Inc. and StatesRail LLC—Continuance in Control Exemption—Alabama & Gulf Coast Railway LLC, STB Finance Docket No. 33439, permitting Kauri, Inc. and StatesRail LLC to continue in control of ALA when it becomes a Class III railroad.

ALA responds that UTU has failed to meet the statutory standards for revoking the exemption and has failed to show that the notice of exemption contains false or misleading information. ALA further claims that UTU has failed to establish that the trackage rights are not incidental. BNSF responds that the trackage rights it proposes to grant ALA are clearly incidental to the sale of the Kimbrough-Pensacola rail line.

BNSF argues further that UTU has misconstrued the I&O decision. BNSF notes that, in I&O, we considered a grant of trackage rights by the selling carrier to the purchaser for more efficient interchange and the assignment of existing trackage rights over three segments of track owned by other carriers.

#### DISCUSSION AND CONCLUSIONS

Under 49 U.S.C. 10502(d), we may revoke an exemption if we find that regulation of the transaction is necessary to carry out the rail transportation policy (RTP) of 49 U.S.C. 10101. Under this standard, we evaluate the revocation petition to see if regulation is needed. The party seeking revocation has the burden of proof, and petitions to revoke must be based on reasonable, specific concerns demonstrating that reconsideration of the exemption is warranted and regulation of the transaction is necessary. See CSX Transp., Inc.—Aban.—In Randolph County, WV, 9 I.C.C.2d 447, 449 (1992); and I&M Rail Link LLC—Acquisition and Operation Exemption—Certain Lines of Soo Line Railroad Company D/B/A Canadian Pacific Railway, STB Finance Docket No. 33326, et al., (STB served Apr. 2, 1997), slip op. at 6 (I&M), aff'd, City of Ottumwa v. STB, No. 97-1848 (8th Cir. Aug. 20, 1998) (Ottumwa). Our inquiry when revocation of an exemption is sought is similar to the analysis for determining if an exemption is proper at the outset of a proceeding, i.e., whether regulation of the transaction is necessary to carry out the RTP. This analysis focuses on the sections of the RTP related to the underlying statutory sections from which the exemption is sought. We apply this analysis in determining petitions to revoke an exemption under 49 U.S.C. 10502(d). See Missouri Pac. R. Co.—Aban. Exempt.—Counties in Oklahoma, 9 I.C.C.2d 18, 25; and I&M slip op. at 6-7.

We find that UTU has not met the statutory standards in section 10502(d) for revoking the exemption and has not presented any reasons under the RTP for regulating the trackage rights transaction. Nor has it shown that the notice of exemption contains false or misleading information. UTU has not supported its claim that the ALA's acquisition of trackage rights over BNSF's line should be considered in a separate proceeding. Section 10901 applies both to the sale by BNSF of its line to ALA, a noncarrier, and the grant of incidental trackage rights acquired as part of the sale. See Railway Labor Executives' Ass'n. v. ICC, 791 F.2d 994, 1003-04 (2nd Cir. 1986); Alabama Southern R. Co. Inc., et al.—Exemption, 1 I.C.C.2d 298 (1984); and Ottumwa, 1998 U.S. App. Lexis 20285, at 4-5. The exemption procedures in 49 CFR 1150.31 specifically include the acquisition of incidental trackage rights, which is defined as: "the grant of trackage by the seller . . . that occurs at the time of the acquisition or operation." And here the grant of trackage rights by BNSF has occurred at the time of the acquisition as contemplated under our rules.

In I&O, we determined that the trackage rights at issue were incidental to a line sale. We observed there that the trackage rights segments had “no independent economic utility apart from the lines that [were] being transferred” and that the rest of the lines had no “economic utility without those trackage rights segments.” I&O at 4 and 5. BNSF states that the trackage rights it proposes to grant ALA will extend the north end of ALA’s line to provide an efficient and economic rail interchange. According to BNSF, most of the rail traffic the carriers intend to interchange currently moves over BNSF’s routes north and west of Magnolia. BNSF’s operating plans assertedly are geared to an interchange at Magnolia, where traffic moving to and from Mobile will be separated or combined with traffic moving from or to stations south of Kimbrough. BNSF further says that an interchange at Magnolia would be faster and more efficient for handling trains for most BNSF-ALA interline rail traffic than an interchange at Kimbrough.

According to BNSF, there is insufficient yard capacity at Kimbrough to accommodate an efficient interchange. There are only two yard tracks at Kimbrough, one on each side of the main line. Often at least one of the tracks is filled with cars interchanged with the Norfolk Southern Railway Company. BNSF says that these tracks cannot handle a new interchange. BNSF indicates that the tracks at Magnolia can accommodate current traffic and can be expanded for future traffic. BNSF states that there are currently three existing interchange tracks at Magnolia located on the west side of the main line, and three more tracks could be added. BNSF says that Magnolia offers the capacity for both current and future interchange and classification operations.

Trackage rights over the 13.6 miles of BNSF track between Kimbrough and Magnolia have no independent economic utility apart from the line that ALA is acquiring from BNSF. ALA and BNSF must interchange traffic. BNSF has provided extensive evidence that it and ALA cannot efficiently interchange traffic at Kimbrough. Magnolia is the closest point to Kimbrough on the BNSF line that affords adequate facilities for interchange.

Here, as in I&O, requiring the seller to transfer the Kimbrough to Pensacola Line and the Magnolia to Kimbrough trackage rights in two separate cases would preclude effective consideration of these transfers. Requiring or even permitting the segmentation of the transfer into separate proceedings requiring separate evaluation under different statutory standards would be inconsistent with the exercise of our authority under the statute to provide a vehicle for a comprehensive review of the impact of what is a single transaction on the public interest.

Accordingly, we will deny UTU’s petition to revoke.

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

It is ordered:

1. UTU’s petition to revoke the exemption is denied.

2. This decision is effective on the date of service.

By the Board, Chairman Morgan and Vice Chairman Owen.

Vernon A. Williams  
Secretary