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SERVICE DATE - FEBRUARY 13, 1998

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 33514

BUFFALO & PITTSBURGH RAILROAD, INC.--TRACKAGE
RIGHTS EXEMPTION--CONSOLIDATED RAIL CORPORATION

Decided: February 9, 1998

On November 17, 1997, Buffalo & Pittsburgh Railroad, Inc. (B&P) filed a notice of exemption under 49 CFR 1180.2(d)(7) to exempt its acquisition of approximately 83.47 miles of bridge trackage rights from Consolidated Rail Corporation (Conrail). B&P's bridge trackage rights extend between Buffalo and Carrollton, NY, and allow B&P to shift overhead traffic from a parallel line in need of rehabilitation. The notice of exemption was served and published on December 4, 1997 (62 FR 64247-48).

On November 20, 1997, Samuel J. Nasca, New York State Legislative Director for United Transportation Union (NY-UTU), filed a petition to stay, reject, and/or revoke the notice of exemption. NY-UTU contends that we should reject or revoke the exemption because B&P had sought the trackage rights as a condition to the proposed acquisition of Conrail in STB Finance Docket No. 33388, CSX Corporation and CSX Transportation, Inc., Norfolk Southern Corporation and Norfolk Southern Railway Company--Control and Operating Leases/Agreements--Conrail Inc. and Consolidated Rail Corporation (CSX/NS/CR) and that, accordingly, the trackage rights must be considered in the larger control proceeding still pending before us.¹ Although conceding that B&P subsequently reached a settlement with applicants in STB Finance Docket No. 33388 and withdrew its request for conditions, NY-UTU maintains that B&P's trackage rights cannot now be separated from the overriding control proceeding where B&P could have pursued these trackage rights in the absence of an agreement with Conrail. If we do not summarily reject or revoke the exemption, NY-UTU argues that B&P's exemption should be stayed on the grounds that time is not of the essence, rail employees may be injured if the transaction is not stayed, and a stay is necessary to preserve our jurisdiction over features of the Conrail control transaction, such as B&P's acquisition of the involved trackage rights.

B&P responds that NY-UTU failed to show that a stay is warranted or that revocation or rejection of the exemption is necessary to carry out the rail transportation policy. B&P maintains

¹ Apparently, the basis of NY-UTU's argument is that B&P initially sought the trackage rights in a responsive application in the CSX/NS/CR proceeding. Under our exemption rules, trackage rights filed or sought in responsive applications in rail consolidation proceedings do not qualify for the class exemption. See 49 CFR 1180.2(d)(7).

that its overhead trackage rights will have little, if any, impact on rail operations or competition, service to shippers, or rail employees in the area.

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. Petitions to revoke must be based on reasonable, specific concerns demonstrating that reconsideration of the exemption is warranted. I&M Rail Link, LLC--Acquisition and Operation Exemption--Soo Line Railroad Company, STB Finance Docket No. 33326 (STB served Apr. 2, 1997); Minnesota Commercial Ry., Inc.--Trackage Rights Exemption--Burlington Northern Railroad Company, 8 I.C.C.2d 31, 35 (1991); Wisconsin Central Ltd.--Exemption Acquisition and Operation--Certain Lines of Soo Line Railroad Company, Finance Docket No. 31102 (ICC served July 8, 1988). The party seeking revocation has the burden of proof that regulation of the transaction is necessary.

Our inquiry when revocation of an exemption is sought is similar to the analysis for determining if exemption is proper at the outset of a proceeding, i.e., whether regulation of the transaction is necessary to carry out the rail transportation policy of section 10101. This analysis focuses on the sections of the rail transportation policy related to the underlying statutory section from which the exemption is sought. The Board's predecessor, the Interstate Commerce Commission (ICC), has adopted this interpretation when considering petitions to revoke an exemption pursuant to section 10505(d) [recodified as 10502(d)]. See Missouri Pac. R. Co.-- Aban. Exempt.--Counties in Oklahoma, 9 I.C.C.2d 18, 25 (1992); Village of Palestine v. ICC, 936 F.2d 1335 (D.C. Cir. 1991), cert. denied, 111 S. Ct. 868 (1992). As discussed below, we find that NY-UTU has failed to demonstrate that the exemption should be revoked.

Contrary to what seems to be the basis of NY-UTU's claim, B&P's trackage rights were not sought as part of a responsive application. B&P's request for trackage rights between Buffalo and Carrollton was, however, included in that carrier's comments and request for conditions in STB Finance Docket No. 33388. B&P has never been considered a responsive applicant in that proceeding. See CSX/NS/CR, Decision No. 54, served November 20, 1997, slip op. at 12, and published that date at 62 FR 62107-11. The class exemption at 49 CFR 1180.2(d)(7) is designed to apply to trackage rights arrangements entered into voluntarily and not to nonconsensual trackage rights requests sought in responsive applications. Because Conrail has agreed to grant trackage rights to B&P, B&P's notice of exemption qualifies for the class exemption for trackage rights. Nothing in our consolidation or exemption rules prevents a party from withdrawing a request to have conditions imposed on an unwilling consolidation applicant, and instead entering into a voluntary arrangement and pursuing Board approval for the arrangement through an available class exemption designed precisely to cover such voluntary trackage rights arrangements.

A review of B&P's trackage rights, moreover, clearly shows that they are not in any way conditioned upon the outcome of the CSX/NS/CR proceeding. B&P indicates that the trackage rights are a mutually beneficial business arrangement between B&P and Conrail that will permit

B&P to move overhead traffic from its line requiring substantial rehabilitation to Conrail's high capacity line. Although NY-UTU argues that B&P's trackage rights may affect patterns of commerce in the CSX/NS/CR case and prejudice the outcome there, the ICC has found that bridge trackage rights, while enhancing the tenant operator's efficiency, do not adversely affect service to shippers or competitive relationships among railroads. See Railroad Consolidation Procedures, 1 I.C.C.2d 270, 272 n.3 (1985). A similar conclusion is warranted here. Moreover, the fact that B&P has entered into settlement agreements with CSX and NS eliminates any basis for concern that these trackage rights would be objectionable to or interfere with the proposed operations of those carriers if their proposed control application is approved.

Although B&P's exemption became effective on November 24, 1997, NY-UTU's petition, to the extent it continues seeking to stay the effectiveness of the exemption, will be denied. NY-UTU has made no showing of irreparable harm and indeed has not met any of the applicable criteria for granting a stay. See Washington Metropolitan Area Transit Com'n v. Holiday Tours, Inc., 559 F.2d 841, 843 (D.C. Cir. 1977). It is not apparent how rail employees would be injured in the absence of a stay, particularly since B&P's exemption has been conditioned upon the labor protection in Norfolk and Western Ry. Co.--Trackage Rights--BN, 354 I.C.C. 605 (1978), as modified in Mendocino Coast Ry., Inc.--Lease and Operate, 360 I.C.C. 653 (1980).

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 to reject, revoke, and/or stay is denied.
2. This decision is effective March 15, 1998.

By the Board, Chairman Morgan and Vice Chairman Owen.

Vernon A. Williams
Secretary