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SERVICE DATE - OCTOBER 8, 2004

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 34503

TIMBER ROCK RAILROAD, INC.–LEASE EXEMPTION–  
THE BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY

Decided: October 7, 2004

We are denying the petition of the United Transportation Union (UTU) to revoke the exemption authorized in this proceeding.

BACKGROUND

By notice of exemption served and published in the Federal Register on July 14, 2004 (69 FR 42241), Timber Rock Railroad, Inc. (TRRR) was authorized to lease and operate 117.82 miles of rail line owned by The Burlington Northern and Santa Fe Railway Company (BNSF): (1) between milepost 4.5 near Beaumont, TX, and milepost 21.8 near Silsbee, TX; (2) between milepost 52.5 near Dobbin, TX, and milepost 152.56 at Silsbee, TX, and (3) between milepost 0.5 and milepost 0.96 near Kirbyville, TX. TRRR was also authorized to acquire incidental overhead trackage rights over 54.72 miles of BNSF's rail line: (1) between milepost 4.5 near Beaumont, TX, and milepost 2.28 at Beaumont, TX; and (2) between milepost 52.5 near Dobbin, TX, and milepost 144.0 on the BNSF Galveston Subdivision at Somerville, TX, for the purpose of interchanging traffic with BNSF. In its filing, TRRR stated that the agreement also provided that, for the duration of the lease, BNSF would retain the right to operate certain overhead trains over the leased line. The exemption became effective on July 3, 2004, and TRRR consummated the transaction.

By petition filed on July 13, 2004, UTU asked that the Board revoke the exemption pursuant to 49 U.S.C. 10502(d). On August 2, 2004, TRRR filed a reply, and BNSF filed comments in support of TRRR's reply.

In its petition, UTU states that the rail line being leased by TRRR provides an alternate route from New Orleans, LA, to points west that avoids the traffic-intense corridor running through Houston, TX. UTU argues that TRRR's lease of the line would cause the diversion of existing BNSF traffic from that line to lines running through Houston and further exacerbate the major traffic congestion problem in Houston. UTU contends that BNSF's diverted traffic also would add to the existing problems with crew availability in Houston. UTU states that this line,

known as the Conroe Subdivision, is currently being used to handle military traffic between Fort Worth, TX, and the Port of Beaumont, TX, and that, without this route, the military traffic also would be diverted through Houston, again adding to Houston's serious traffic congestion problem. UTU contends that the diversion of BNSF's traffic through Houston could be particularly disastrous now, given the concern over the railroads' ability in general to handle the Fall peak shipping season this year. UTU concludes that revocation of this exemption is necessary to carry out the provisions of the rail transportation policy of 49 U.S.C. 10101.

In reply, TRRR maintains that UTU's petition is legally flawed and is based on a misunderstanding of the lease arrangement between TRRR and BNSF. TRRR asserts that UTU has failed to present evidence that would meet its statutory and regulatory burden of showing that its petition to reopen and revoke should be granted. TRRR also states that, rather than forcing BNSF to reroute its overhead traffic through the Houston area, the lease arrangement preserves for BNSF the same routing options that it enjoyed prior to consummation of the transaction and gives BNSF added operating flexibility. Under the agreement, BNSF will retain overhead trackage rights to move its trains over the leased line, and BNSF also will have the right to have its overhead traffic hauled by TRRR at BNSF's election. As a result of this transaction, TRRR explains that BNSF will be able to handle the military traffic more efficiently. TRRR points out that, prior to the agreement, BNSF had two options available to handle the military traffic: the traffic could be routed through Houston or around Houston over the leased line. Now, BNSF has three options: the traffic can be routed through Houston over other BNSF lines, the traffic can be routed over the leased line utilizing BNSF crews and trains, or the traffic can be interchanged with TRRR in bridge service over the leased line. In its reply, BNSF supports TRRR's arguments and states that, by utilizing TRRR's services, it will be able to redeploy its crews and resources to help alleviate traffic congestion in the surrounding areas where rail service is in high demand.

#### DISCUSSION AND CONCLUSIONS

Under 49 U.S.C. 10502(d), we may revoke an exemption, in whole or in part, if we find that regulation of a transaction is necessary to carry out the rail transportation policy of 49 U.S.C. 10101. To justify revocation, a petitioner must demonstrate reasonable, specific concerns addressing the revocation criteria. See Wisconsin Central Ltd.—Exemption Acquisition and Operation—Certain Lines of Soo Line Railroad Company, Finance Docket No. 31102 (ICC served July 28, 1988); Minnesota Comm. Ry., Inc.—Trackage Exempt.—BN RR. Co., 8 I.C.C.2d 31 (1991); 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), aff'd sub nom. City of Ottumwa v. STB, 153 F.3d 879 (8th Cir. 1998). UTU has failed to make the requisite showing.

UTU argues that revocation of the exemption is necessary to carry out the rail transportation policy. But UTU bases its argument on its belief that the lease of the BNSF line to

TRRR would deprive BNSF of a routing option in the Houston area. UTU contends that reduced options would force BNSF to divert existing overhead and military traffic from the line to other BNSF lines that run through Houston, thus adding to the traffic congestion problems there and adversely affecting the flow of military traffic during the ongoing war.

The record, however, shows that BNSF has not lost a routing option due to this transaction because it has retained overhead trackage rights over the line. Rather, if anything, BNSF has gained the flexibility of having TRRR provide local service on the leased line and haul BNSF overhead traffic over the line as needed, freeing up crews and resources for use by BNSF to help alleviate traffic congestion in surrounding capacity constrained areas such as Houston. Because the factual basis of UTU's petition is not supported by the record, its petition must fail. Thus, we deny UTU's revocation request.

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

It is ordered:

1. UTU's petition to revoke the exemption is denied.
2. This decision is effective on its date of service.

By the Board, Chairman Nober, Vice Chairman Mulvey, and Commissioner Buttrey.

Vernon A. Williams  
Secretary