

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 36326

BROOKFIELD ASSET MANAGEMENT, INC. AND DJP XX, LLC—
CONTROL EXEMPTION—GENESEE & WYOMING, INC., ET AL.

Digest:¹ The Board denies a request to reconsider its prior decision making effective the exemption permitting Brookfield Asset Management, Inc., and DJP XX, LLC, to control Genesee & Wyoming Inc. and denies an alternative request to revoke the corresponding notice of exemption.

Decided: February 7, 2020

Brookfield Asset Management, Inc. (Brookfield), and DJP XX, LLC (DJP) (collectively, Applicants), filed a verified notice of exemption under 49 C.F.R. § 1180.2(d)(2) to allow Applicants to control Genesee & Wyoming Inc. (GWI) and the 106 rail carriers controlled by GWI that are subject to the jurisdiction of the Board (GWI Railroads). By decision served on October 29, 2019 (October 29 Decision), and published in the Federal Register on November 1, 2019 (84 Fed. Reg. 58,798), the Board authorized the exemption to become effective, subject to the Board's previous direction to Applicants to provide periodic updates regarding the status of the review being conducted by the Committee on Foreign Investment in the United States (CFIUS) and to provide an update within seven days after Applicants were notified of the outcome of such review.² Also on October 29, 2019, the Board separately served its notice of the exemption (October 29 Notice), which was published in the Federal Register on November 1, 2019 (84 Fed. Reg. 58,801).

The Board's October 29 Decision addressed comments received from the public and Applicants and allowed Applicants' exemption to become effective on October 29, 2019. On January 6, 2020, Applicants filed a letter stating that: (1) CFIUS concluded its review of the transaction and determined that there were no unresolved national security concerns; and (2) Applicants consummated the transaction on December 30, 2019. Based on Applicants'

¹ The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. See Policy Statement on Plain Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

² By decision served on July 22, 2019 (July 22 Decision), and published in the Federal Register on July 26, 2019 (84 Fed. Reg. 36,157), the effectiveness of the exemption was postponed to allow the public and Applicants to submit comments, and Applicants were directed to provide updates regarding CFIUS review and the outcome of such review.

filings, as a result of the transaction, GWI became a privately held company and a wholly owned subsidiary of DJP. (See Verified Notice 2; see also Applicants Letter, Jan. 6, 2020.) DJP indirectly controls the GWI Railroads through DJP's direct control of GWI, and Brookfield indirectly controls the GWI Railroads through Brookfield's control of DJP and DJP's control of GWI. (See Verified Notice 2; see also Applicants Letter, Jan. 6, 2020.)

On November 18, 2019, Samuel J. Nasca, for and on behalf of SMART/Transportation Division, New York State Legislative Board (SMART/TD-NY), filed a petition to reconsider the October 29 Decision, or, if reconsideration is denied, to institute a proceeding to revoke the October 29 Notice. On December 6, 2019, Victoria Dalrymple filed a letter in support of SMART/TD-NY's petition, including additional arguments against the Board's decision. On December 9, 2019, Applicants filed a reply in opposition to the petition.

For the reasons discussed below, SMART/TD-NY's petition to reconsider and/or revoke will be denied.

PRELIMINARY MATTER

By decision served on September 27, 2019 (Protective Order), the Board granted Applicants' motion for protective order. On November 5, 2019, Victoria Dalrymple filed a letter requesting access to materials designated as "highly confidential" under the protective order. Dalrymple asserts that, as a party to the proceeding, she is entitled to view all documentation associated with the case and that there is no reason to require her to have outside counsel. (Dalrymple Letter 1, Nov. 5, 2019.) On November 12, 2019, Applicants filed a letter asking the Board, based on the protective order issued in this proceeding, to deny Dalrymple's request. (Applicants Letter 1, Nov. 12, 2019.) Applicants also stated they were re-designating certain "highly confidential" materials as "confidential,"³ (id. at 1, 4), but argued that certain information related to financing arrangements is competitively and commercially sensitive and needs to remain designated as "highly confidential." (Id. at 4.)

The protective order in this case conforms with the Board's rules at 49 C.F.R. § 1104.14, and, like many of the protective orders issued by the Board, provides that "highly confidential" material "may be disclosed only to outside counsel or outside consultants of the party requesting such materials" and that if "any party wishes to challenge such designation, the party may bring such matter to the attention of the Board." Protective Order, App. A at ¶ 2. Here, Dalrymple does not dispute that the "highly confidential" material to which she seeks access is competitively and commercially sensitive, nor does she challenge Applicants' designation of the material. Dalrymple's unsupported assertion that, as a party of record, she is entitled to view all documents in the case is incorrect as it is inconsistent with the protective order. Moreover, the Board concludes that Applicants have appropriately designated commercially sensitive information regarding the financing arrangements of the transaction as "highly confidential." Therefore, Dalrymple's request for access to "highly confidential" materials will be denied.

³ Pursuant to the terms of the protective order, as a party of record, Dalrymple may access material designated as "confidential" in this proceeding.

DISCUSSION AND CONCLUSIONS

A party may seek to have the Board reconsider a decision by submitting a timely petition demonstrating material error in the prior decision or identifying new evidence or substantially changed circumstances that would materially affect the case. 49 U.S.C. § 1322(c); 49 C.F.R. § 1115.3. In a petition alleging material error, a party must do more than simply make a general allegation; it must substantiate its claim of material error. See Canadian Pac. Ry.—Control—Dakota, Minn. & E. R.R., FD 35081, slip op. at 4 (STB served May 7, 2009). Moreover, no matter the claimed basis for reconsideration (new evidence, changed circumstances, or material error), the alleged grounds must be sufficient to convince the Board that its prior decision in the case would be materially affected in order for reconsideration to be granted. See Montezuma Grain Co. v. STB, 339 F.3d 535, 541-42 (7th Cir. 2003); Canadian Nat’l Ry.—Control—EJ&E W. Co., FD 35087 (Sub-No. 8), slip op. at 4 (STB served Dec. 21, 2018); see also 49 C.F.R. § 1115.3.

A petition to revoke an exemption that has become effective is treated as a petition to reopen and revoke. E.g., Delmarva Cent. R.R.—Lease & Operation Exemption with Interchange Commitment—Norfolk S. Ry., FD 36071, slip op. at 2 (STB served Mar. 8, 2017). Under 49 U.S.C. § 1322(c) and 49 C.F.R. § 1115.4, the Board may reopen a proceeding because of “material error, new evidence, or substantially changed circumstances.” The alleged grounds “must be sufficient to lead the Board to materially alter its prior decision.” E.g., Canadian Nat’l Ry.—Control—EJ&E W. Co., FD 35087 (Sub-No. 8), slip op. at 4-5 (STB served Aug. 30, 2019).

SMART/TD-NY’s petition does not allege new evidence or substantially changed circumstances; accordingly, its petition will be treated as alleging material error. As discussed below, the Board finds no material error warranting reconsideration of the October 29 Decision or reopening and revoking the October 29 Notice.

SMART/TD-NY first argues that the Board erred in determining that the class exemption was “applicable,” rather than examining whether it was “appropriate.” (Pet. 8-9.) As noted above, the July 22 Decision postponed the effective date of the exemption and allowed the public and Applicants to submit comments. While the July 22 Decision stated that the Board was considering “the issues presented here, including whether the class exemption is appropriate for this transaction,” the decision did not limit the scope of comments and invited comments “regarding these and any other relevant issues.” July 22 Decision, FD 36326, slip op. at 1-2. In response, SMART/TD-NY submitted a comment asserting that “[t]he [verified notice of exemption] is improper, and should be found *inapplicable*, and the notice of exemption be rejected or the exemption revoked, especially owing to the nature and magnitude of the transportation involved, and for other reasons as well.” (SMART/TD-NY Reply 3-4, Sept. 5, 2019 (emphasis added).) Similarly, Dalrymple argued that “[t]he 49 C.F.R. § 1180.2(d)(2) exemption is not *applicable* to the transaction.” (Dalrymple Comment 1, Aug. 20, 2019)

(emphasis added).) It was not material error for the October 29 Decision to respond to the comments it received.⁴

Next, the petition argues that the Board improperly used the phrase “CFIUS approval,” and in doing so, “delegate[d] national defense, and perhaps other functions, to CFIUS.” (Pet. 9-10.) The petition argues that CFIUS does not “approve” transactions of this sort and that the Board’s use of the term “CFIUS approval” in the October 29 Decision cited to, and was based on, an unfounded statement in one of Applicants’ pleadings. (Pet. 10.) SMART/TD-NY fails to acknowledge, however, that the cited pleading refers to the merger agreement, which Applicants attached to their verified notice. (See Applicants Comment 12, Aug. 16, 2019; Verified Notice, Ex. 2.) The merger agreement includes “CFIUS Approval” as a defined term, and the definition supplies the legal nuance that SMART/TD-NY claims is missing.⁵ Accordingly, the Board’s use of the phrase “CFIUS approval” as defined in the record was not in error and did not “delegate national defense, and perhaps other functions, to CFIUS.”

In her letter supporting SMART/TD-NY’s petition, Dalrymple alleges influence by foreign governments over Applicants. (Dalrymple Letter 3-4, Dec. 6, 2019.) However, the Board’s denial of reconsideration and reopening here is properly informed by CFIUS’s conclusion that there are no unresolved national security concerns. Cf. CF Indus., Inc. v. Ind. & Ohio Ry.—Pet. for Declaratory Order, FD 35517, slip op. at 5-6 (STB served Nov. 28, 2012) (requesting comments from several expert federal agencies with respect to the effects on safety and security of railroad practices).

In the October 29 Decision, the Board disagreed with SMART/TD-NY’s argument, (see SMART/TD-NY Reply 5, Sept. 5, 2019), that the notice of exemption should be rejected because U.S. soybean producers compete with Brazilian soybean producers and Brookfield has rail investments in Brazil. October 29 Decision, FD 36326, slip op. at 3, 5. The Board noted

⁴ Consequently, the July 22 Decision did not deprive commenters of due process or the opportunity to comment, as the petition alleges. (Pet. 9.) The Board also notes that the July 22 Decision provided 30 days for public comments and 15 days for reply comments. Ordinarily, the notice would have become effective on August 8, 2019, 14 days after publication of the notice.

⁵ Per the merger agreement, “‘CFIUS Approval’ means any of the following: (a) the 45-day review period under the [Defense Production Act (DPA)] shall have expired and the Parties shall have received notice from CFIUS that such review has been concluded and that either the transactions contemplated hereby do not constitute a ‘covered transaction’ under the DPA or there are no unresolved national security concerns, and all action under the DPA is concluded with respect to the transactions contemplated hereby, (b) an investigation shall have been commenced after such 45-day review period and CFIUS shall have determined to conclude all action under the DPA without sending a report to the President of the United States, and the parties shall have received notice from CFIUS that there are no unresolved national security concerns, and all action under the DPA is concluded with respect to the transactions contemplated hereby, or (c) CFIUS shall have sent a report to the President of the United States requesting the President’s decision and the President shall have announced a decision not to take any action to suspend, prohibit or place any limitations on the transactions contemplated hereby, or the time permitted by Law for such action shall have lapsed.” (Verified Notice, Ex. 2 at 73.)

that, under 49 U.S.C. § 10501(a), its jurisdiction applies to transportation in the United States. October 29 Decision, FD 36326, slip op. at 5. SMART/TD-NY claims in its petition that this conclusion was in error because the Board “has jurisdiction over rail rates, joint or otherwise, involving transportation between the U.S. and adjacent foreign countries.” (Pet. 11-12.) But SMART/TD-NY overlooks a key phrase in the statute. The Board’s jurisdiction “applies only to transportation *in the United States* between a place in . . . the United States and a place in a foreign country.” 49 U.S.C. § 10501(a)(2) (emphasis added). In other words, the Board’s jurisdiction applies only to the U.S. portion of a movement between the U.S. and a foreign country. See, e.g., Nat’l Insulation Transp. Comm. v. Aberdeen & Rockfish R.R., 365 I.C.C. 624, 626 (1982).

More generally, the petition argues that, even if the Board does not have jurisdiction over “foreign carriers engaged in commercial ventures . . . such ventures are to be considered by U.S. regulators in imposing regulation upon the U.S. carrier participants,” and therefore, the Board should examine “GWI’s world-wide interests.”⁶ (Pet. 12.) However, SMART/TD-NY states only this conclusion, offering no justification or support. (See id.)

Finally, Dalrymple repeats her concerns about Brookfield’s corporate structure as well as the alleged negative financial impacts of Brookfield’s control on an Australian railroad. (See Dalrymple Letter 1-3, 5, Dec. 6, 2019.) Dalrymple now appears to contend that any use of holding companies in the railroad industry is “catastrophic,” (id. at 2)—a conclusion at odds with the framework set by Congress. See, e.g., Rapid City, Pierre & E. R.R.—Acquis. & Operation Exemption—Dakota, Minn. & E. R.R., FD 35799 et al., slip op. at 6 (STB served May 14, 2015) (referring to a railroad holding company and noting that, “[w]hen Congress enacted [the ICC Termination Act of 1995], it specifically provided that non-carriers can obtain authority to acquire railroad lines under § 10901”). As the Board stated in the October 29 Decision, FD 36326, slip op. at 5, Dalrymple has not explained why her allegations “demonstrate that the class exemption criteria are not met, or how the assertions would support a finding of anticompetitive effects.”⁷

For these reasons, SMART/TD-NY and Dalrymple have failed to demonstrate material error that would cause the Board to reconsider the October 29 Decision or reopen and revoke the October 29 Notice. Accordingly, SMART/TD-NY’s petition will be denied.

⁶ SMART/TD-NY attaches a portion of GWI’s Securities and Exchange Commission Form 10-Q providing an overview of operations in North America, Australia, and the U.K./Europe. (Pet., App. 1.)

⁷ Dalrymple also claims that, if Brookfield is not a carrier, it must be an investment company under the Investment Company Act. (Dalrymple Letter 3, Dec. 6, 2019.) However, Dalrymple provides no citation or other support for this claim, or any explanation as to its relevance.

It is ordered:

1. Dalrymple's request for access to material designated as "highly confidential" is denied.
2. SMART/TD-NY's November 18, 2019 petition is denied.
3. This decision is effective on its service date.

By the Board, Board Members Begeman, Fuchs, and Oberman.