

205546

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 34014

CANADIAN NATIONAL RAILWAY COMPANY
-- TRACKAGE RIGHTS EXEMPTION --
BANGOR AND AROOSTOOK RAILROAD COMPANY
AND VAN BUREN BRIDGE COMPANY



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FINANCE DOCKET NO. 34015 - 205547

WATERLOO RAILWAY COMPANY
-- ACQUISITION EXEMPTION --
BANGOR AND AROOSTOOK RAILROAD COMPANY
AND VAN BUREN BRIDGE COMPANY

MONTREAL, MAINE & ATLANTIC RAILWAY'S MOTION TO INTERVENE
AND COMMENTS ON THE PETITION TO REOPEN AND REVOKE EXEMPTIONS

Montreal, Maine & Atlantic Railway LLC ("MMA") requests leave to intervene and file comments in this proceeding. In a petition filed on April 25, 2002, the Trustee of the Bangor and Aroostook Railroad Company ("Trustee") asked the Board to reopen and revoke notices of exemption filed to allow Canadian National Railway Company and Waterloo Railway Company (collectively, "CN") to operate using trackage rights over lines owned by Bangor and Aroostook Railroad Company ("BAR") and Van Buren Bridge Company ("VBB"). On May 23, 2002, MMA and the Trustee executed an agreement to purchase the assets of BAR, VBB, and the other railroads in the BAR system. MMA now has a clear and substantial interest in the matters raised by the Trustee's petition.¹

¹ BAR was placed into involuntary bankruptcy in December 2001. All of the railroads in the BAR system have since entered into bankruptcy. The other railroads in the BAR system are (continued...)

If MMA is granted leave to intervene, it asks the Board to consider the following comments.

COMMENTS

The Trustee has asked the Bankruptcy Court to approve its rejection of the BAR/VBB trackage rights agreement with CN. The Trustee and CN have told the Bankruptcy Court that Board action is also necessary to preclude CN from exercising the trackage rights, though they disagree on what action is required. MMA has a different view. MMA believes that Board action is not necessary, because CN never acquired a common carrier obligation to provide service using the trackage rights. The Board should declare that no Board action is necessary to preclude CN from exercising the trackage rights if the Bankruptcy Court rejects the trackage rights agreement.

I. BACKGROUND

In March 2001, CN obtained trackage rights from BAR and VBB as part of an arrangement in which CN made an upfront payment of \$5 million to provide a cash infusion for the BAR system. See Trustee's Petition at 3-4; CN Reply at 2. In return for the upfront payment, BAR and VBB granted CN haulage rights and trackage rights to serve a single shipper, Fraser Paper Inc. ("Fraser"), at rates that provide BAR and VBB far less revenue than they

(footnote cont'd)

Canadian American Railroad Company, The Quebec Southern Railway Company, Ltd., The Northern Vermont Railroad Company, and the Newport and Richford Railroad Company. As of June 4, 2002, all of the railroads except Quebec Southern Railway have executed or will shortly execute the asset purchase agreement. We also expect Quebec Southern Railway, which is under Canadian bankruptcy rules and has a different trustee from the other BAR system railroads, to execute the agreement shortly. The asset purchase agreement will become effective when executed by all parties.

received under the previous division of joint-line revenue for service to Fraser. See Trustee's Petition at 3.²

A short time later, the BAR system fell into bankruptcy. MMA intends to purchase substantially all of the BAR system's assets, but it will not benefit from the \$5 million payment. The money is gone. The trackage rights agreement, however, will remain in place unless rejected by the Bankruptcy Court. If the agreement remains in place, CN will be able to operate over the trackage rights lines at bargain rates, and MMA will be deprived of revenue that would otherwise contribute to its efforts to preserve intact the BAR system.³ MMA and the shippers it hopes to serve should not be burdened by a deal that BAR struck under extreme financial pressure.

MMA understands CN's and Fraser's positions. If CN cannot use the trackage rights, it will get less than it bargained for when it agreed to pay BAR \$5 million. Unfortunately, CN is but one of the many companies that may lose money as a result of BAR's bankruptcy. Although it will most likely not be fully compensated, CN will have a claim against BAR's estate, like all other BAR creditors who have been affected by the bankruptcy. If, alone among BAR's unsecured creditors, CN were allowed to keep its executory rights in place, and thereby diminish the proceeds available for distribution to the other unsecured creditors, CN would be obtaining preferential treatment for itself – precisely the outcome that the bankruptcy laws are

² CN has used its haulage rights, but not its trackge rights, to serve Fraser. The Trustee has asked the Bankruptcy Court to approve its rejection of the haulage agreement. Neither the Trustee nor CN argues that the Board has any role to play regarding the haulage rights.

³ Under the asset purchase agreement, MMA will pay less for the BAR system if CN's trackage rights remain in place than if they are rejected, but the lower purchase price does not guarantee that MMA will be able to maintain the BAR system intact or grow its business to the same extent as would be possible if the trackage rights are rejected. MMA will pay a lower price if CN's trackage rights remain in place, but it will lose even more in potential revenues, and thus the rights will create a drag on its ability to maintain essential shipper services and grow its operations.

designed to prevent. In effect, CN's up-front payment to BAR in exchange for a sharp reapportionment of future BAR revenues in favor of CN, thereby diminishing BAR's future viability, is precisely the sort of situation that the Trustee is obligated to address.

If CN cannot use the trackage rights, Fraser will lose the two-carrier service it obtained fortuitously when CN struck its deal with BAR. For Fraser, however, the new CN service was a windfall – Fraser had single-carrier service before CN's arrangement with BAR – and service to all BAR system shippers is potentially at stake. If the CN right remained in place, but the BAR system were unable to prosper after bankruptcy, Fraser would again have service from only one carrier.

The Board is enmeshed in this proceeding because both the Trustee and CN believe that Board action is necessary to preclude CN from exercising the trackage rights in the future. CN contends that the trackage rights cannot be terminated absent an adverse discontinuance proceeding. See CN Reply at 8-12. The Trustee contends that the trackage rights can be terminated if the Board revokes CN's exemption. See Trustee's Petition at 1-2. The Bankruptcy Court is looking to the Board for guidance. See id. at 7-8; CN Reply at 18-19.

II. ARGUMENT

MMA believes that CN's trackage rights can be eliminated without an adverse discontinuance proceeding, and the Board need not address the Trustee's petition to reopen and revoke. CN has never operated using the trackage rights or otherwise held itself out as a common carrier using the trackage rights line, so an adverse discontinuance is unnecessary. Moreover, if the Bankruptcy Court approves the Trustee's rejection of the underlying trackage rights agreement, CN will be unable to use the trackage rights lines even if the exemption is never revoked, so no Board action is necessary.

Under Commission precedent, a carrier must use trackage rights in order to give effect to an exemption. The Milford-Bennington case does not support CN's assertion that an adverse discontinuance proceeding is necessary. See CN Reply at 7-8 (citing Milford-Bennington R.R. – Trackage Rights Exemption – Boston & Maine Corp. & Springfield Terminal Ry., ICC Finance Docket No. 32103 (ICC served Sept. 3, 1993)). The Milford-Bennington case holds that once a railroad operates over a line pursuant to a trackage rights exemption, revocation of the exemption is insufficient to terminate the trackage rights – the rights remain in effect until the ICC authorizes discontinuance or approves a new agreement. See Milford-Bennington, slip op. at 2 (citing Thompson v. Texas Mexican Ry., 328 U.S. 134, 146-48 (1946)).

CN admits that it has not operated over the trackage rights line. CN Reply, Carson V.S. at 6. Under such circumstances, the Milford-Bennington case does not apply. An adverse discontinuance proceeding is necessary only where there is a “discontinuance or displacement of a railroad already operating on a line.” See Wisconsin & Southern R.R. – Lease & Operating Exemption – Soo Line R.R., d/b/a CP Rail System, ICC Finance Docket No. 32706 (ICC served Aug. 2, 1995), slip op. at 2. In Wisconsin & Southern, the ICC explicitly distinguished Milford-Bennington as one of several “cases that deal with problems arising after operation has commenced.” Id. at 2 n.3. Wisconsin & Southern establishes that unless a railroad actually commences trackage rights operations, it has not held itself out to the public as a common carrier so as to require Board approval to discontinue service.⁴

⁴ In its Reply, CN discusses whether the trackage rights have been “consummated.” CN Reply at 12-16. Wisconsin & Southern makes clear that consummation requires operation in this context. Moreover, as the trackage rights agreement specifically provided that CN's rights were limited to serving Fraser, it is not clear that CN would have been providing common carrier service even if it had operated over the trackage rights lines. Cf. Consolidated Rail Corp. – Petition for Declaratory Order, 1 I.C.C.2d 284 (1984) (holding that a carrier could provide contract service over an abandoned line without giving rise to a common carrier obligation).

The Trustee asks the Board to reopen and revoke CN's exemption, but this step, although perhaps taken out of an abundance of caution, appears unnecessary as well. When the Board grants an exemption, the authority is permissive in nature. If a party never consummates the transaction authorized by an exemption, it is unnecessary to revoke the exemption in order to restore the pre-exemption status quo. See Arkansas Central Ry. – Operation Exemption – Line of Herzog Stone Products, Inc., ICC Finance Docket No. 31405 (ICC served Apr. 7, 1995), slip op. at 2 (“A party . . . that does not or cannot consummate authority need not return to the Commission and request revocation.”). Thus, if the Bankruptcy Court approves the Trustee's rejection of the underlying trackage rights agreement, nothing more is required to prevent CN from operating over the trackage rights line in the future.

In light of the foregoing, the Board should clarify that, if the Court approves the Trustee's rejection of the trackage rights agreement, no further Board action will be necessary to prevent CN from using the trackage rights at issue.

Respectfully submitted,



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June 5, 2002

CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of June, 2002, I caused a copy of the foregoing "Montreal, Maine & Atlantic Railway's Motion to Intervene and Comments on the Petition to Reopen and Revoke Exemptions" to be served by overnight delivery upon:

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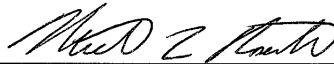
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