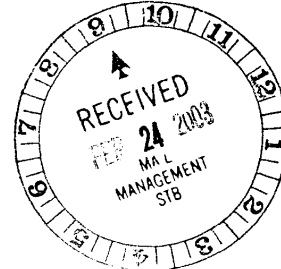


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LAW OFFICES
GORDON P. MACDOUGALL
1025 CONNECTICUT AVE., N. W.
WASHINGTON, D. C. 20036

TELEPHONE
AREA CODE 202
223-9738

February 24, 2003



Vernon A. Williams
Secretary
Surface Transp. Board
Washington DC 20423

Re: Docket No. 42076
Albany & Eastern RR Co. v. Burlington Northern & Santa Fe Ry.

Dear Mr. Williams:

I attach check in the amount of \$150.00 to cover filing fee for appeal in the captioned matter, on behalf of John D. Fitzgerald.

It is believed such a fee is not required, and ask that it be refunded. The appeal is from a Notice issued by Proceedings.

Very truly yours,

207286

Gordon P. MacDougall

Atty. for John D. Fitzgerald

FILED

FEB 24 2003

TRANSPORTATION BOARD

FEE RECEIVED

FEB 24 2003

ENTERED
Office of Proceedings

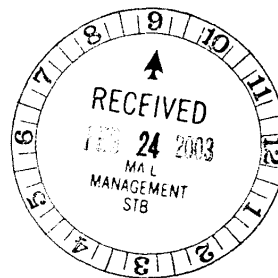
FEB 24 2003

Part of
Public Record

SURFACE
TRANSPORTATION BOARD

ORIGINAL

Before the
SURFACE TRANSPORTATION BOARD



Docket No. 42076

ALBANY & EASTERN RAILROAD COMPANY

v.

THE BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY

207286

APPEAL

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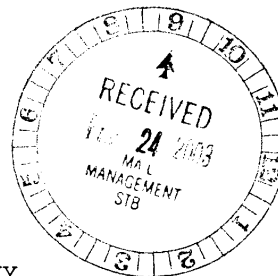
Part of
Public Record

GORDON P. MacDOUGALL
1025 Connecticut Ave., N.W.
Washington DC 20036

February 24, 2003

Attorney for John D. Fitzgerald

Before the
SURFACE TRANSPORTATION BOARD



Docket No. 42076
ALBANY & EASTERN RAILROAD COMPANY

v.

THE BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY

APPEAL

Preliminary Statement

John D. Fitzgerald,^{1/} for and on behalf of United Transportation Union-General Committee of Adjustment (UTU/GO-386), submits this appeal from the decision (Notice) by the Director, Office of Proceedings (DOP), dated February 11, 2003 (served February 13), which determined not to allow the intervention of UTU/GO-386, failed to dismiss the complaint, and permitted the parties to proceed with their selection of an arbitrator.

Upon appeal, the Board should grant intervention, and dismiss the complaint. This proceeding constitutes an exceptional circumstance, believed to be the first instance of STB-administered arbitration in the 6-year period since adoption of voluntary arbitration rules in 1997.

^{1/} General Chairman for United Transportation Union (UTU), on lines of The Burlington Northern and Santa Fe Railway Company (BNSF), with offices at 400 E. Evergreen Blvd., Vancouver, WA 98660.

Background

The proceeding began with the Complaint by Albany & Eastern Railroad Company (AERC), filed November 26, 2002, seeking arbitration pursuant to 49 CFR § 1108.7(a), for its dispute with The Burlington Northern and Santa Fe Railway Company (BNSF). AERC seeks to have BNSF waive a certain contractual interchange restriction, which AERC terms a "paper barrier," and which AERC claims the effect is to preclude traffic originating on AERC destined to points served solely by Union Pacific Railroad Company (UP) from being interchanged with UP at Albany, OR. The only AERC origins claimed are Bauman and Sweet Home, OR; the UP destinations are not given.

The AERC complaint asserts STB jurisdiction under 49 U.S.C. § 10742; and under 49 U.S.C. § 10901(a)(4), alleging STB's continuing authority over the terms and conditions by which AERC acquired the rail line by notice under the non-carrier line acquisition class exemption in F.D. No. 33567, Albany & Eastern Railroad Company--Acquisition and Operation Exemption--The Burlington Northern and Santa Fe Railway Company (served May 18, 1998), 63 Fed. Reg. 28026 (May 18, 1998) (AERC Acquisition)^{2/} including

^{2/} A word about the transaction in AERC Acquisition is appropriate in light of the incomplete description by DOP in his February 13, 2003 issuance. AERC acquired the track, ties, and other improvements, but not the real estate, and an easement to operate on the BNSF line between Foster and Lebanon, OR, a distance of 17.4 miles, and incidental trackage rights over UP between Lebanon and Albany, a distance of 13.62 miles, and an additional trackage rights for .89-mile over BNSF's line at Albany, OR, so as to permit interchange with BNSF. (AERC Acquisition, 4/30/98, at pp. 1-2) The stations on the 17.4-mile Foster-Lebanon segment are listed as both AERC and BNSF stations, but AERC is not shown in the route, so that members of the shipping public perhaps are unaware of AERC's existence. See: Hladick, Official Railroad Station List, OPSP 6000-W, pp. 642, 659, (continued.....)

authority under § 10901(c) to impose conditions found necessary in the public interest.

The impetus for AERC's complaint is §§ IV(3) and VI of a Railroad Industry Agreement (RIA), dated September 10, 1998, between the Association of American Railroads (AAR) on behalf of participating Class I carriers, and by the American Short Line and Regional Railroad Association (ASLRRA) on behalf of participating Class III carriers.^{3/} Sections IV(3) and VI of RIA provide standards for revising routes and interchange between carriers, gives seven examples, and provides for arbitration of disputes. AERC relies upon Exhibit C, Example 3, which provides for relief if a line sale or lease is involved, the traffic is "new" business, the existing carrier does not desire the business, and consideration is given for additional compensation to the existing carrier, among other factors. Exhibit C, Example 3, is Appendix 1 hereto; Sections IV(3) and VI are set forth below:

IV. PRINCIPLES OF AGREEMENT

.....

3. Paper Barriers and New Routes (applies to participating Class I and III Railroads)

a) General Premise: If the requested Access or routing helps the connecting Short Line and does not harm the Large Railroad, then the request should be approved as it will improve shipper rail service while strengthening the rail industry.

1012-13.

^{3/} Certain aspects of the RIA, but not those involved herein, were approved by the Board in Assn. of American Railroads Et Al.-- Agreement--49 U.S.C. 10706, 3 S.T.B. 673 and 3 S.T.B. 910 (1998).

b) **Paper Barriers and New Routes:** The Large and Short Line Railroads agree to work cooperatively to increase rail freight business. Joint initiatives designed to increase Short Line freight business under certain circumstances include, but are not limited to, waiver of contractual interchange restrictions and Large Railroad haulage of Short Line traffic. See Exhibit C (Examples 1-7).

In other cases, Large and Short Line Railroads may voluntarily agree at any time to renegotiate the terms of sales agreements including, but not limited to, terms relating to limitations on interchange (legitimate paper barriers). The renegotiations of limitations on interchange shall include consideration of additional compensation due to the Large carrier reflecting changes to the economic and market assumptions made by the Large and Short Line carriers at the time of original sale based upon the limitations on interchange at the time of such sale as well as all other relevant factors.

VI. ARBITRATION

The participating Large and Small Railroads agree that if they have a dispute arising under Sections (IV) (3) - "Paper Barriers and New Routes" ...that cannot be resolved through discussion and negotiation between the parties involved, the parties will submit any unresolved issues to arbitration under the auspices of the STB (Ex Parte No. 560). Such arbitration will be based on the policies and principles of those sections of this Agreement, and to the extent applicable, the associated examples and exhibits, and will be binding on the parties.

UTU/GO-386 on December 11, 2002, petitioned for leave to intervene, inasmuch as present and future traffic handled by BNSF threatened to be diverted to UP routing, which would likely result in adversely affecting BNSF railroad employees. BNSF on December 26, 2002, filed its answer, denying many of AERC's allegations, but acknowledged it is a signatory to the RIA dated September 10, 1998, and stated it is prepared to arbitrate under 49 CFR § 1108. UTU/GO-386 on February 6, 2003, supplemented its petition to intervene, and asked that the AERC complaint be dismissed, primarily on the ground that the standards in the RIA to govern "paper barrier" disputes between rail carriers, differ from the statutory standards to govern interchange matters, and which are to be

enforced by the STB in the public interest--which includes railroad employees.

The Director's Action

The Board, by its Director, Office of Proceedings (DOP), issued a "Notice," dated February 11, 2003 (served February 13). The Notice asserted the Board is merely exercising a ministerial function. (Notice 2):

Here, the Board is merely exercising a ministerial function by facilitating the initiation of an arbitration process agreed to by the parties.

The Board denied intervention for UTU/GO-386 stating that it would thwart the voluntary and informal nature of the arbitration process to permit outside parties to intervene in the resolution of this dispute; further, a request had been made in Ex Parte No. 560 that the proposed rule should permit intervention by third parties in arbitrations was considered and rejected, so that UTU/GO-386's request for intervention is an impermissible collateral attack on the applicable rule. (Notice 2).

The DOP Notice added that any adverse impact upon BNSF employees would stem from the STB's decision in AERC Acquisition, which permitted the effects which might result from arbitration. The Notice stated AERC Acquisition is governed by 49 U.S.C. 10901(c), which precludes conditions for the protection of adversely affected employees, such that AERC's sought relief cannot cause any adverse impact upon BNSF employees beyond that already allowed by the Board's action in AERC Acquisition. (Notice 2).

I. THE DOP ACTION IS OUTSIDE THAT DELEGATED
BY THE CHAIRMAN OR BY THE BOARD ITSELF.

The Board's arbitration regulations, 49 CFR 1108, provide for Board review of the AERC's complaint for its sufficiency, jurisdictional or otherwise, prior to permitting the parties to proceed. 49 CFR 1108.7(g). There is no provision in the Board's rules delegating this decision to the Office of Proceedings, or to its Director, by the terms of 49 CFR 1011.6, 1011.7, or otherwise.

The DOP "Notice," claims to be "ministerial," but this does not confer authority in DOP to pass upon agency jurisdiction or sufficiency of the complaint. Moreover, the DOP's rulings on various subjects in the February 13, 2003 decision go far beyond ministerial matters.

The Board should vacate the action of DOP.

II. THE BOARD SHOULD GRANT INTERVENTION
FOR UTU/GO-386 IN THE DETERMINATION
WHETHER ARBITRATION IS TO PROCEED.

The DOP errs in denying UTU/GO-386's petition to intervene in the Board's proceeding to determine whether arbitration is to proceed under the STB's guidelines.

1. Contrary to the DOP's February 13, 2003 issuance, UTU/GO-386 in its December 11, 2002 petition, specifically stated it did not seek to participate in the arbitration itself. (Pet. 12/11/02, 2). The sought intervention is for determining whether the complaint should be referred to an arbitrator, which is a specific issue under 49 CFR 1108.7(g). Accordingly, there is no

effort to mount a collateral attack on the decision in Ex Parte No. 560, Arbitration of Disputes Subject to Stat. Juris. of the STB, 2 S.T.B. 564, 574 (1997).^{4/}

The STB, like its predecessor Interstate Commerce Commission, has a liberal policy for intervention. The UTU/GO-386 petition to intervene was consistent with the Board's rules for intervention. Neither AERC nor BNSF objected to the UTU/GO-386 intervention; indeed, particularly since this is the first complaint for arbitration since adoption of the rules in 1997, it is in the interest of the railroad industry, as well as in the public interest, to have the views of as many interests as possible at the outset.

2. The DOP statement that any adverse impact upon BNSF employees would stem from the Board's decision in AERC Acquisition, such that the relief AERC seeks cannot cause any adverse impact upon BNSF beyond that already allowed by the Board's action in AERC Acquisition, is simply perverse (Notice 2):

Any adverse impact on BNSF employees would stem from the Board's decision in AERC Acquisition, which permitted the effects the union fears might result from arbitration. That transaction is governed by 49 U.S.C. 10901, which specifically precludes imposition of conditions for the protection of adversely affected employees. See 49 U.S.C. 10901(c). The arbitral award sought here cannot cause any adverse impact on BNSF employees beyond that already allowed by the Board's action in AERC Acquisition.

The DOP errs in claiming UTU/GO-386 seeks to have the Board, or the arbitrator, impose employee protective conditions in this dispute. Employee conditions are not the goal here. Rather, BNSF

^{4/} UTU/GO-386 does not concede that the STB's rulemaking in Ex Parte No. 560 may not be attacked when a provision is applied.

employees desire to see that the maximum amount of traffic-- present and future--is handled by BNSF, rather than by BNSF's competitors, such as UP. This concern for BNSF traffic was not resolved in AERC Acquisition. Moreover, the interest of BNSF employees is not only with respect to the physical movement of traffic on the 17.4-mile line between Foster and Lebanon, OR, but also concerns the movement on BNSF lines at and beyond Albany, OR, by trackage rights or otherwise.

Clearly, BNSF employees stand to be adversely affected if AERC is permitted to divert traffic, naturally and historically tributary to BNSF, in favor of UP routing.^{5/}

III. THE BOARD SHOULD DISMISS THE AERC COMPLAINT FOR ARBITRATION

The Board should dismiss AERC's complaint for arbitration. The railroad industry, as here, might establish a scheme to resolve certain disputes by arbitration, but the industry should not be permitted to invoke the STB's process unless the standards to guide the arbitration under the industry agreement are identical with the standards to govern the dispute subject to the STB's statutory jurisdiction. Moreover, any arbitration decision under the industry agreement for disputes subject to the statutory jurisdiction of the STB, should be fully reviewable at the STB.

^{5/} We add that the DOP does not correctly understand the STB's action in AERC Acquisition. Contrary to DOP, AERC Acquisition was a exemption notice transaction under the non-carrier line acquisition class exemption, and not a Board decision. The transaction was not governed by 49 U.S.C. § 10901 or 10901(c) and, if challenged, would have been handled under 10502(d), and the criteria of 49 U.S.C. 10101.

Initially, AERC has failed to establish STB jurisdiction for its dispute, and it should not be permitted to claim its own notice of exemption (AERC Acquisition) as proper STB jurisdiction to invoke arbitration over that notice of exemption, so as to escape reopening or revoking that exemption.

1. The "paper barriers" dispute claimed by AERC is not subject to any of the jurisdictional claims advanced by AERC. AERC invokes 49 U.S.C. 10742, requiring reasonable, proper and equal facilities for the interchange of traffic with connecting lines. This is the former Section 3(4) of the Interstate Commerce Act, but it is inapplicable here. Cf. Western Pacific R. Co. v. United States, 382 U.S. 237 (1965). The "connecting" lines at Albany, OR, for AERC are BNSF and UP. If there is discrimination between connecting lines, the § 10742 claim is for UP to make, not AERC.^{6/} Further, AERC's contentions facially might make more sense under 49 U.S.C. 10705 (former Section 15(3)), involving routes, but we cannot divine AERC's theories. Here, the complaint would be insufficient to invoke STB jurisdiction under § 10742.

However, even assuming Board jurisdiction under 49 U.S.C. 10742, the standard is for "reasonable, proper, and equal facilities...for the interchange of traffic between..a connecting line of another carrier," which is an entirely different standard from RIA §§ IV(3), VI, and Ex. C, No. 3.

2. AERC's claim for STB jurisdiction under 49 U.S.C. § 10901(a)(4) and 10901(c), by reason of the STB's decision in AERC

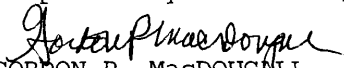
^{6/} It appears that AERC, along with other BNSF spin-offs, may not participate in routes with BNSF. See: Hladick, Official Railroad Station List, OPSEL 6000-W, pp. 1012-17.

Acquisition, is wholly misplaced. First, AERC Acquisition, was an exemption case, so that pursuant to a petition for revocation, the criteria of 49 U.S.C. § 10101 would be involved, rather than § 10901. Second, and more important, the STB's arbitration procedure should not be invoked to resolve a dispute under RIA where the dispute is with an outstanding STB decision. Finally, the applicable standard under RIA arbitration differs from the rail transportation policy criteria of 49 U.S.C. § 10101, or those of 49 U.S.C. 10901 if the exemption is revoked. Under AERC's suggestion, a rail carrier dissatisfied with a STB decision could avoid the public scrutiny (and perhaps public participation) with a STB reopening, by instead invoking arbitration under RIA standards, with the public excluded.

CONCLUSION

The Board should vacate the DOP notice served February 13, 2003. UTU/GO-386 should be granted intervention, and the AERC complaint should be dismissed.

Respectfully submitted,


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1025 Connecticut Ave., N.W.
Washington DC 20036

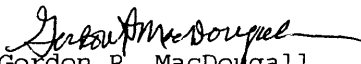
February 24, 2003

Attorney for John D. Fitzgerald

Certificate of Service

I hereby certify I have served a copy of the foregoing upon all parties of record by first class mail postage-prepaid.

Washington DC


Gordon P. MacDougall

Paper Barriers

A legitimate paper barrier [see Section (III)(6)] resulting from a line sale or lease by Large Railroad "A" to Short Line "B" which restricts "B" from interchanging with Railroad "C" will be suspended to allow "B" to interchange New Traffic with "C" without penalty if, after request by "B", "A" does not establish a competitive package (rates, service and car supply) and "C" does.

