

ORIGINAL

Before the
SURFACE TRANSPORTATION BOARD

208679



Docket No. 42076

ALBANY & EASTERN RAILROAD COMPANY

v.

THE BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY

ENTERED
Office of Proceedings

AUG 11 2003

Part of
Public Record

PETITION FOR RECONSIDERATION

SURFACE
TRANSPORTATION BOARD

AUG 11 2003

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TRANSPORTATION BOARD

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

Attorney for John D. Fitzgerald

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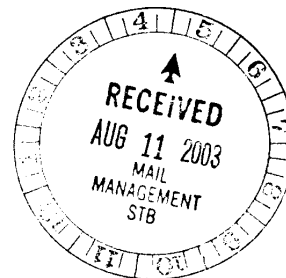
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Preliminary Statement



Office of Proceedings

AUG 11 2003

Part of
Decision

John D. Fitzgerald, ^{1/} for and on behalf of United Transportation Union-General Committee of Adjustment (UTU/GO-386), submits this petition for reconsideration of the decision of the Surface Transportation Board (Board), dated July 17, 2003 (served July 22) (Decision), which denied the appeal taken by UTU/GO-386 from the Notice issued by the Board's Director, Office of Proceedings (DOP), served February 13, 2003. (Notice).

The Board should grant reconsideration of its July 23, 2003 decision based upon material error. 49 CFR 1115.3. Upon reconsideration, the Board should grant intervention for UTU/GO-386, revoke the DOP's Notice, and dismiss the AERC complaint.

^{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

1. This proceeding^{2/} involves the Complaint by Albany and Eastern Railway Company (AERC) against The Burlington Northern and Santa Fe Railroad Company (BNSF), filed November 26, 2002, seeking arbitration of a dispute under the Railroad Industry Agreement (RIA), a private agreement between certain members of the Association of American Railroads (AAR) and the American Short Line and Regional Railroad Association (ASLRRA), the pertinent terms of which have not been approved by the Board.^{3/}

2. AERC seeks waiver of a so-called "paper barrier" that is allegedly contained in an agreement by which AERC purchased 17.4 miles of BNSF's line between Lebanon and Foster, OR,^{4/} pursuant to notice given under the Board's noncarrier line acquisition class exemption. Finance Docket No. 33567, Albany & Eastern Railroad Company--Acquisition and Operation Exemption--The Burlington Northern and Santa Fe Railway Company (served May 18, 1998),

^{2/} The Board's decision appears to assert that a proceeding is not involved. (Decision, 7/22/03 3, para. 1 & n.6).

^{3/} Certain rate-related provisions of the RIA, not involved here, 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).

^{4/} AERC acquired the track, ties, and other improvements, but not the real estate, with an easement to operate on the BNSF line between Foster and Lebanon, plus incidental trackage rights over Union Pacific Railroad Company between Lebanon and Albany, a distance of 13.62 miles, and 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, OPSTL 6000-W, pp. 642, 659, 1012-13.

63 Fed. Reg. 28060 (May 18, 1998) (AERC Acquisition).^{5/} The "paper barrier" is claimed by AERC to preclude AERC from interchanging certain traffic that originates on AERC's line with Union Pacific Railroad Company (UP) at Albany, OR, and which terminates at points served only by UP.^{6/}

3. UTU/GO-386 objected to arbitration, noting that the terms governing resolution are provisions of the RIA, rather than the statutory criteria governing Board action. The Board in its decision responded that proceeding under the terms of the RIA is appropriate so long as the application of its terms does not yield a result that is contrary to the Board's statutes or rules. (Decision, 7/22/03, 3). The Board found that its rules (49 CFR 1108.3(b)) provide that arbitration may include disputes arising in connection with jurisdictional transportation, including service being conducted pursuant to an exemption. The Board claimed that the involved AERC transportation is jurisdictional, and that its dispute involving interchange rights for new traffic is sufficiently connected to that transportation. The Board acknowledged that arbitration clearly will produce resolutions

^{5/} AERC is affiliated with Willamette Valley Railway Company (WVRY), with WVRY's operations at Albany merged with AERC. See: Finance Docket No. 33949, Albany & Eastern Railroad Company-Acquisition and Operation Exemption-Union Pacific Railroad Company (served October 27, 2000), 65 Fed. Reg. 64475 (Oct. 27, 2000); Finance Docket No. 32249, Willamette Valley Railway Company-Acquisition, Lease and Operation Exemption-Southern Pacific Transportation Company (served March 5, 1993), 58 Fed. Reg. 12599 (Mar. 5, 1993).

^{6/} The business identified by AERC is non-competitive traffic originating on AERC at Bowman and Sweet Home, OR, destined to locations served solely by UP. (Complaint, 11/26/02, 7-8).

that are not identical to those that would have been reached in a Board adjudication. (Decision, 7/22/03, 3).

4. Although the RIA was not approved by the Board, the Board commented that the RIA between AAR and ASLRRA arose out of the Board's concern regarding "paper barriers" in Review of Rail Access and Competition Issues, 3 S.T.B. 92, 100 (1998). (Decision, 3).

5. The Board denied intervention for UTU/GO-386, finding the AERC complaint does not constitute a "formal proceeding," and that the DOP's February 13, 2003 Notice did not determine or approve whether arbitration would proceed. Rather, the Board's July 22, 2003 decision claimed the DOP's notice was a "mere ministerial act" in "facilitating the initiation of the arbitration process." Although the Board's regulations do not give DOP authority to take such "ministerial" action, the Board affirmed the DOP's action in issuing the February 13, 2003 notice. (Decision, 7/22/03, 3).

6. The Board emphasized that its procedures do not provide for public participation when an arbitration proceeding is instituted, or for intervention by an uninvited third party at any time; and that intervention by third parties would contravene the central objective of the Board in adopting arbitration rules. Moreover, requiring AERC to seek reopening of AERC Acquisition would be inconsistent with the arbitration rules, citing Arbitration of Disputes Subject to Stat. Juris. of the STB, 2 S.T.B. 564, 565 (1997). (Decision, 7/22/03, 3-4).

7. The Board suggested that UTU/GO-386 might file a complaint with the Board to address any perceived violation of the statute or the Board's rules. (Decision, 7/22/03, 4).^{7/} However, the Board opined that it failed to see how "rail labor" could suffer cognizable statutory harm by removal of the paper barrier. The Board found the traffic is "new," and that the underlying transaction cannot be made subject to "labor" protective conditions. (Decision, 7/22/03, 3 n. 7).

ARGUMENT

I. THE BOARD'S ARBITRATION PROCEDURES ARE NOT
"MINISTERIAL" AND THE BOARD CLEARLY ERRED
IN DENYING UTU/GO-386 LIMITED INTERVENTION.

The Board's determination that the agency's decision (by a staff DOP or otherwise) is "ministerial" and that the Board's arbitration process is not a "formal proceeding" is patently absurd. The Board makes a judgmental decision, upon receipt of an arbitration complaint, whether the dispute is subject to agency jurisdiction, is barred by § 1108.2(b), or fails to satisfy other criteria. 49 CFR 1108.7(g). Here, after a period of almost three months from AERC's filing of its complaint, the DOP specifically found in his February 13, 2003 notice, that AERC and BNSF may now proceed with selection of an arbitrator, and that a list of arbitrators is available from the Board. (Notice, 2/13/03, 2). In determining whether referral is proper, the Board must look beyond its own jurisdiction, and examine the substance of the transportation matters, e.g., 49 CFR 1108.2.

^{7/} The mere filing fee would be \$6,000. 49 CFR 1002.2(f)(56)(ii). In contrast, AERC's filing fee is \$75. 49 CFR 1002.2(f)(87), 1108.5(a).

UTU/GO-386 made it clear that it desires to intervene in the matter only with respect to the propriety of Board referral, and not to participate in the arbitration itself. (UTU/GO-386 Pet., 12/11/02, 2; UTU/GO-386 Appeal, 2/24/03, 7-9). The Board has a liberal policy to permit intervention, and erred in denying intervention for the limited purpose sought by UTU/GO-386--to challenge the referral.^{8/} Intervention is particularly appropriate where the Board concedes the result in arbitration may be different from that in Board adjudication. (Decision, 7/22/03, 3).

II. THE BOARD'S ARBITRATION REFERRAL IS CONTRARY
TO THE AGENCY'S OWN RULES, AND FAILS TO
SET FORTH ADEQUATE JURISDICTIONAL AUTHORITY.

The Board's rules governing arbitration provide that such arbitration may not be used as a means to revoke an exemption. 49 CFR 1108.2. Yet revocation of its own exemption is precisely what AERC asks the Board to accomplish by referral of its complaint for arbitration. Absent arbitration, AERC's avenue for relief, if justified, would be a petition for partial revocation of its exemption, an exemption which AERC itself filed by notice in Finance Docket No. 33567, AERC Acquisition, so that the Board might impose a condition to AERC's line acquisition. Indeed, for

^{8/} The Board says its procedures do not provide for public participation, or for intervention by an uninvited party at any time. (Decision, 7/22/03, 3). But the Board's general rules do provide for intervention, 49 CFR 1113.7, and the Board's policy is generally to encourage intervention. Sharfman, I.L., The Interstate Commerce Commission, Vol. 4, 191-94 (1937). Petitions for intervention "are favored." Smith, E.A., I.C.C. Practice and Procedure, 5 Geo. Wash. L.rev. 404, 417 (1937). To the extent the DOP or the Board relies upon rulemaking procedures for arbitration, such rules can be challenged when applied particularly where, as here, intervention is sought prior to referral to arbitration.

the agency jurisdictional base for its complaint, AERC relies upon the Board's conditioning power through revocation. (Complaint, 11/26/02, 7).^{2/}

The matter of AERC service in Oregon, in lieu of BNSF, and under what conditions, is of public concern--it involves a new corporate entry into the railroad business. New railroad entry has been subject to federal regulation since Transportation Act of 1920, and presently is carried forward in 49 U.S.C. 10901-2. The statutory thrust is the "public convenience and necessity," a very broad term which embraces many interests in addition to those of AERC, BNSF, and UP.

The Board's decision errs in not giving any statutory authority for its jurisdiction, merely asserting that the "transportation" is clearly jurisdictional, and that the dispute involving interchange rights for "new" traffic is sufficiently connected to that transportation. However, the relief sought by AERC is to revoke its own exemption, with the subsequent imposition (or modification) of conditions, for so-called "new" traffic. The Board's rules prohibit use of arbitration for such revocation purposes, 49 CFR 11108.2, and use of arbitration for a statutory basis predicated upon "public convenience and necessity" would contravene the statutory purpose underlying 49 U.S.C. 10901 and/or the rail transportation policy, 49 U.S.C. 10101.

^{2/} AERC also cites 49 U.S.C. 10742 as a jurisdictional basis, but § 10742 is wholly inappropriate and without foundation. See: UTU/GO-386 Appeal, 2/24/03, 10).

III. THE DECISION HAS HOPELESSLY PREJUDGED
A KEY ELEMENT IN CONTROVERSY, REQUIRING
THAT THE BOARD DISMISS THE COMPLAINT.

The Board found the involved traffic to be "new" traffic, in both sustaining its jurisdiction, and in questioning harm for rail employees. (Decision, 7/22/03, 3 para. 2 & n.7).

A key issue for arbitration by the AERC complaint is its assertion that the subject traffic from Bauman and Sweet Home, OR is "new" traffic within the meaning of the RIA. (Complaint, 11/26/02, 7-8). BNSF has vigorously denied that this business is "new" traffic. (Answer, 12/26/02, 2-3). The term "new traffic" is one of special meaning in the RIA, which may differ from "new" as conventionally or as otherwise understood in the railroad industry. UTU/GO-386 denies the traffic is "new" in any sense. The Board errs in its finding.

In any event, the Board in its July 22, 2003 decision, in finding the traffic to be "new," has hopelessly destroyed any impartiality to the arbitration process. Although the arbitrator may technically be free to make his or her own determination of the "new traffic" issue, the arbitrator is bound to be guided by Board precedent. 49 CFR 1108.3(b). Moreover, the arbitrator's decision is subject to appeal to the Board. 49 CFR 1108.11.

Clearly, the Board's decision and findings are improper and prejudicial. The arbitration must be dismissed, with the parties relegated to traditional Board adjudication, and with the traditional right of employee representatives to intervene.

IV. THE DECISION ERRS IN FINDING LACK
OF INJURY TO RAIL EMPLOYEES.

The Board fails to appreciate injury to BNSF employees, stating that since the traffic is "new" and the underlying transaction is not subject to employee protective conditions, there is no "cognizable statutory harm." The Board advised that UTU/GO-386 may file its own complaint to address any perceived violation of the statute or the Board's rules. (Decision, 7/22/03, 3, 4).

The Board errs in denying intervention, and in making a referral, on the above findings and declarations. The matter of "new" traffic has already been addressed, supra. UTU/GO-386 believes the traffic is not new, but constitutes existing traffic, in the real world. BNSF employees represented by UTU/GO-386 are entitled to handle all available BNSF traffic, including business handled by BNSF on traffic between points on the involved line and point of connection with UP. Diversion of BNSF traffic handled off the involved line would result in reduced earnings for BNSF employees.^{10/}

The Board's reference to an absence of mandatory employee protective conditions (which the Board seems to equate with "cognizable statutory harm") is irrelevant. Lack of protective conditions does not mean an absence of harm, however defined. In a number of situations, where the Board's power to impose employee conditions is precluded, the interest of employees nevertheless is to be considered in the decisional process of arriving at the public convenience and necessity, or public interest, and whether

^{10/} The DOP took a somewhat different approach to employee harm, which UTU/GO-386 answered. (Appeal, 2/24/03, 8-9).

to approve a given transaction. Examples are passenger train discontinuances,^{11/} and Class I railroad consolidations.^{12/}

The 1995 amendments to 49 U.S.C. 10901, precluding Board imposition of labor protective conditions, did not remove employee concerns from due considerations under the public convenience and necessity in resolving the merits under §10901. The employee effects are cognizable under that provision, as well as under other provisions of the Interstate Commerce Act. Indeed, the Board's decision recognizes standing by inviting UTU/GO-386 to file its own complaint, albeit a needlessly duplicative scheme, and obviously aimed at throwing procedural and financial road-blocks against participation by railroad employees in Board proceedings.

CONCLUSION

The Board should grant reconsideration for its decision, grant intervention for UTU/GO-386, vacate the DOP notice, and dismiss the complaint.

Respectfully submitted,


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

August 11, 2003

Attorney for John D. Fitzgerald

^{11/} See citations in Illinois Commerce Commission v. United States, 347 F.Supp. 1217, 1219 (N.D. Ill. 1971) (three-judge).

^{12/} See: Missouri-Kansas-Texas R. Co. v. United States, 632 F.2d 392, 410-13 (5th Cir. 1980).

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. MacDougal