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Before the
ORIGINAL SURFACE TRANSPORTATION BOARD



Ex Parte No. 673

BNSF RAILWAY COMPANY, ET AL.-PETITION TO INSTITUTE A RULEMAKING

REPLY TO PETITION



John D. Fitzgerald,^{1/} for and on behalf of United Transportation Union-General Committee of Adjustment (UTU/GO-386), makes this reply to the petition, filed June 7, 2007, by BNSF Railway Company, Et Al.,^{2/} seeking to institute a rulemaking.

The petitioners seek to amend the Board's regulations at 49 CFR 1150.33, 1050.34, 1150.43, and 1150.44, and to overrule the so-called "bright-line" test of Effingham Railroad Co.-Petition for Declaratory Order-Construction at Effingham, IL. (Docket No.

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^{1/} General Chairman for United Transportation Union, on lines of BNSF Railway Company, with offices at 400 East Evergreen Boulevard, Vancouver WA 98660.

^{2/} The supporting carriers include Canadian National Railway Company, Canadian Pacific Railway Company, CSX Transportation, Inc., Norfolk Southern Railway Company, and Union Pacific Railroad Company. Consolidated Rail Corporation, on June 21, 2007, added its support to the petition for rulemaking.

41986, served Sept. 18, 1998) (Effingham).^{3/}

Railroad employee organizations, including UTU/GO-386), have become acquainted with inadequacies in the present informational requirements for non-carrier, and carrier, acquisition of lines under the class exemptions from the provisions of 49 U.S.C.

§10901, §10902; and these organizations share the inequitable and harmful impact of the Effingham rule, whereby excepted trackage of 49 U.S.C. §10906 is turned into regulated lines of railroad under 49 U.S.C. §10901, §10902.

1. UTU/GO-386 supports the institution of a rulemaking proceeding, and will participate therein. UTU/GO-386 has experience in dealing with the noncarrier and carrier class exemption notices under 49 CFR 1150.31, et seq., and 1150.41, et seq., as well as familiarity with the criteria of Effingham in determining whether trackage is excepted, or requiring STB authorization or exemption under 49 U.S.C. 10901, 10902, or 11323.

2. UTU/GO-386 urges the Board in issuing any rulemaking notice to be mindful to specify the Effingham rulings under review, so as to obviate any misunderstanding about the range and options under consideration, which otherwise might give rise to

^{3/} The petitioners refer to the "bright-line" test of Effingham as a rule to the effect that because an acquired track constituted the company's entire operation, the acquired track by definition became a jurisdictional line of railroad notwithstanding other characteristics that made it a spur or siding or other non-jurisdictional track while operated by the seller. The effect of this "bright-line" test is that the acquirer then becomes a common carrier railroad upon the acquisition of the property and a proclamation by the acquirer that it holds itself out to serve the public. (Petition, 6/7/07, 1-2).

requests for supplemental rulemaking to ensure due process.^{4/}

The petitioners refer to the decision in Effingham as Docket No. 41986, Effingham Railroad Co.-Petition for Declaratory Order-Construction at Effingham, IL, served September 18, 1998 ("Effingham"). (Petition, 6/6/07, 1 n.1). UTU/GO-386 considers this limited Effingham citation may be somewhat confusing, particularly for both noncarrier and carrier transactions, involving acquisition, operation, abandonment, discontinuance, in addition to construction, for trackage ordinarily deemed excepted under 49 U.S.C. 10906.

The usual Effingham citation refers to the decision served September 12, 1997, reported as Effingham RR Co.-Pet. For Declaratory Order 2 S.T.B. 606 (1997).^{5/} In some other instances, the

4/ The petition refers to attached comments by State of New Jersey, yet the comments, perhaps by inadvertence, were not included. (Petition, 6/7/07, 3-4, n.3).

5/ See: F.D. No. 33414, Penn Jersey Rail Lines, Inc.-Acquisition and Operation Exemption-WMI Properties, Inc. (served Dec. 8, 1997); F.D. No. 32112, et al., Clark Shortline Railroad Company-Acquisition and Operation Exemption-Indiana Port Commission (served May 14, 1998); F.D. No. 33522, Chicago SouthShore & South Bend Railroad-Petition For Declaratory Order-Status of Track at Hammond, IN (served Dec. 17, 1998); F.D. No. 34429, The New York City Economic Development Corporation-Petition For Declaratory Order (served Dec. 10, 2003); Ibid. (served July 17, 2004); F.D. No. 33997, Texas Central Business Lines Corporation-Operation Exemption-Mid-Texas International Center (served Sept. 20, 2002); F.D. No. 34486, Ohio Valley Railroad Company-Acquisition and Operation Exemption-Harwood Properties, Inc. (served Sept. 28, 2004); F.D. No. 34509, Kaw River Railroad, Inc.-Acquisition and Operation Exemption-The Kansas City Southern Railway Co. (served May 28, 2004); Ibid. (served May 3, 2005); F.D. No. 34830, Kansas City Transportation Company, LLC-Lease and Assignment of Lease Exemption-Kansas City Terminal Railway Company and Kaw River Railroad, Inc. (served Feb. 28, 2006). Ibid. (served May 23, 2007); F.D. No. 35016, Rock River Railroad, Inc.-Acquisition and Operation Exemption-Rail Lines of Renew Energy, LLC (served Apr. 20, 2007); Ibid. (served May 4, 2007); Ibid. (served May 10, 2007); Brotherhood of Eng., Trainmen v. Surface Transp., 457 F.3d 24, 26 (D.C. Cir. 2006).

Effingham citation refers to the September 12, 1997 citation, and adds that reconsideration was denied September 18, 1998.^{6/}

There are only two instances, of which UTU/GO-386 is aware, where the Effingham citation refers only to the September 18, 1998 reconsideration denied action.^{7/}

It is suggested that Effingham refer to the decision reported at 2 S.T.B. 606 (1997), along with decision reconsideration denied September 18, 1998, to obviate any uncertainty.

By way of background, Effingham (which originated as a noncarrier acquisition/operation/construction), was considered by the Board at about the same time as carrier operation and acquisition, by lease, of yard trackage were considered in F.D. No. 33323, Chicago Rail Link, L.L.C.-Lease & Oper.-Union Pacific RR

6/ F.D. No. 32481, GWI Switching Services, LP-Operation Exemption-Lines of Southern Pacific Transportation Company (served Aug. 7, 2001); F.D. No. 33980, Riverview Trenton Railroad Company-Acquisition and Operation Exemption-Crown Enterprises, Inc. (served Feb. 15, 2002); F.D. No. 33960, Central Illinois Railroad Company-Lease and Operation Exemption-Lines of The Burlington Northern and Santa Fe Railway Company at Chicago, Cook County, IL (served Sept. 12, 2002); F.D. No. 34040, Riverview Trenton Railroad Company-Petition for Exemption From 49 U.S.C. 10901 To Acquire and Operate A Rail Line in Wayne County, MI (served May 15, 2003). F.D. No. 34145, Bulkmatic Railroad Corporation-Acquisition and Operation Exemption-Bulkmatic Transport Company (served Nov. 19, 2002); Ibid. (served May 15, 2003); F.D. No. 34462, MVC Transportation, LLC-Acquisition Exemption-P&LE Properties, Inc. (served Oct. 20, 2004);

7/ F.D. No. 32964, Brotherhood of Maintenance of Way Employees and Soo Line System Division, Brotherhood of Maintenance of Way Employees v. Soo Line Railroad Corporation and Wisconsin Central, Ltd. (served Dec. 21, 1998); F.D. No. 33679, Sierrapine-Lease and Operation Exemption-Sierra Pacific Industries. (served Nov. 27, 2001). Cf. F.D. No. 34081, Effingham Railroad Company-Operation Exemption-Line of Total Quality Warehouse (served Apr. 10, 2002).

Co., 2 S.T.B. 534 (1997).^{8/} It is understood that petitioners, by reference to the noncarrier and carrier rules, and all aspects of Effingham, intend to address both carrier and noncarrier aspects of excepted trackage, as does UTU/GO-386.

Respectfully submitted



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June 25, 2007

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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.


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^{8/} Both proceedings involved recently-enacted ICCTA provisions, and were denied review. United Transp. Union-Illinois v. Surface Transp., 169 F.3d 474 (7th Cir. 1999); United Transp. Union v. Surface Transp. Bd., 183 F.3d 606 (7th Cir. 1999).