

Before the
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 35410

ADRIAN & BLISSFIELD RAIL ROAD COMPANY
—CONTINUANCE IN CONTROL EXEMPTION—
JACKSON & LANSING RAILROAD COMPANY

FINANCE DOCKET NO. 35411

JACKSON & LANSING RAILROAD COMPANY
—LEASE AND OPERATION EXEMPTION—
NORFOLK SOUTHERN RAILWAY COMPANY

FINANCE DOCKET NO. 35418

JACKSON & LANSING RAILROAD COMPANY
—TRACKAGE RIGHTS EXEMPTION—
NORFOLK SOUTHERN RAILWAY COMPANY

PETITION OF BROTHERHOOD OF LOCOMOTIVE ENGINEERS
AND TRAINMEN AND UNITED TRANSPORTATION UNION
TO REVOKE EXEMPTIONS

HAROLD A. ROSS
Brotherhood of Locomotive Engineers
and Trainmen
1370 Ontario St., Mezzanine.
Cleveland, OH 44113
Tel: (216) 241-2630
Fax: (216) 241-4237

CLINTON J. MILLER, III
United Transportation Union
24950 Country Club Blvd.
Suite 340
North Olmsted, OH 44070
Tel: (216) 228-9400
Fax: (216) 228-9400

DATED: October 18, 2010

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The United Transportation Union (“UTU”) and the Brotherhood of Locomotive Engineers and Trainmen, a Division of the Rail Conference, International Teamsters (“BLET”) are the bargaining representatives of all crafts comprising the operating employees (train and engine service employees) employed on the rail lines of Norfolk Southern Railway Company (“NSR”) that are the subject of the Transaction embodied by Docket Nos. 35410, 35411 and

35418. The two labor employee organizations submit this Petition to Revoke the Exemptions sought by the Adrian & Blissfield Rail Road Company (“ABDF”), a Class III rail carrier and holding company for several other carriers within the State of Michigan, including Jackson & Lansing Railroad Company (“JAIL”), currently a non-carrier created by ADBF for the purpose of leasing from NSR and operating over the approximately 44.5 miles of rail lines known as the Lansing Secondary and the Lansing Manufacturers Railroad, and segments of the Lansing Industrial Track, and also for JAIL to acquire pursuant to agreement with NSR non-exclusive local and overhead trackage rights over about 1.06 miles of the line owned by NSR and currently leased to CSX Transportation, Inc, on the Lansing Secondary, between milepost LZ 36.8 in Lansing, Michigan, and milepost 37.86 in North Lansing, Michigan, for the sole purpose of interchanging with NSR. NSR, ADBF and JAIL may hereinafter be collectively referred to as the “Applicants.”

The three notices of exemption are totally intertwined and integrally related and are, therefore, called the “Transaction.” In sum, the two employee organizations submit that the Transaction, insofar as revealed to the public and contained in the Public Notices, is complex, lacking transparency and devoid of a rational and pragmatic support. As Vice Chairman Mulvey states in his dissent in FD No. 35411, the outward written commitments imposed by the parties require more information, “particularly when they contain outright bans on interchange with third party carriers or, as here, economic incentives that can only be evaluated with the provision of additional information.” 75 Fed Reg. 61818 (Oct. 6, 2010). Such statement indicates that the bare bones record, as it exists, suggests the JAIL creation has the potential for instability corporatewise and as a rail operating entity , with insufficient financial support and inadequate

cash flow. If this presumption achieves real life, shippers on the involved line of rail may be subject to higher freight costs, declining maintenance of facilities and equipment, slower and less frequent service, and a reduction in safety of operations.

ARGUMENT

I. THE NOTICE IN FD 35410 SHOULD BE DENIED OR REJECTED.

The decision of the Board set forth at 75 Fed. Reg. 61817 states, in pertinent part:

ADBF states that: (1) the rail lines to be operated by JAIL do not connect with the lines of ADBF or any other single railroad controlled by ADBF's corporate family; (2) the transaction is not part of a series of anticipated transaction that would result in such a connection; and (3) the transaction does not involve a Class I carrier. Therefore, the transaction is exempt from the prior approval requirements of 49 U.S.C. 11323. *See* 49 C.F.R. §16180.2 (d)(2)

While the quotation by ADBF may correctly state the requirements of §1180.2(d)(2) for approval of a control exemption, the facts stemming from a complete reading of the three notices comprising the Transaction clearly establish that the Transaction required NSR's involvement to complete and need for a continued presence for a smoothly operating Transaction.

Initially, NSR proposed a fixed rental payment with no option to reduce the rent. 75 Fed. Reg. at 61818. JAIL then "insisted upon a lease credit option to provide a lower rental payment. The reduction finally agreed upon provided for a 'Lease Credit.'" The reduction to JAIL in its lease payments to NSR is provided through "a credit for each car interchanged with NSR." *Id.* Basing the discount on the number of cars interchanged with NSR steers the business to NSR and creates

a third-party barrier by limiting the ability of other carriers to compete with it on the basis of cheaper rates. Moreover, the Transaction appears to be more than a lease and operation with incidental trackage rights. From the contents of the public filings and notices, there are limitations upon interchanges with carriers other than NSR and potential economic incentives for JAIL if it works together with NSR. In sum, there appear to be indicia of “control” in the hands of NSR, possibly not as severe as such appearing in Finance Docket 35063, *Michigan Central Railway, LLC — Acquisition and Operation Exemption — Lines of Norfolk Southern Railway Company* (served December 10, 2007)(the initial case denying NSR’s efforts to transfer the involved line, among others, to a non-carrier), but significant enough to require the rejection of the exemption notices comprising this Transaction. Accordingly, in our judgement, the Transaction is beyond the scope of the class exemption. 49 CFR 1150.41 and 1150.42.

II. IN VIEW OF THE FACT THAT THE TRANSACTION IS NOT IN THE ‘PUBLIC CONVENIENCE AND NECESSITY,’ THE EXEMPTIONS SHOULD BE REVOKED AS PROVIDED BY STATUTE.

The applicable statute providing the Board with authority to exempt short line acquisitions is 49 U.S.C. § 10902. The standard imposed upon the agency in order to issue a certificate authorizing the activities for which authority is requested is whether the activities for which approval is sought “are []consistent with the public convenience and necessity.” 49 U.S.C. § 10902). This subparagraph concludes: “Such certificate may approve the application as filed or with modifications (other than labor protection conditions) the Board finds *necessary in the public interest.*” *Id.*

The elements of “public convenience and necessity” are contained in the National Rail Transportation Policy (“Policy”), and are set forth at 49 U.S.C. 10101. Thus, the elements to be

reviewed in this petition to revoke are quite extensive and to be seriously considered. *See, e.g., Village of Palestine v. ICC*, 936 F. 2d 1135 (D.C. Cir. 1991), *cert. denied*, 502 U.S. 1030.

We submit that the exemptions should be revoked (49 U.S.C. § 10502 (d)), in light of the following criteria made applicable by 49 U.S.C. § 10902.

A. Competition and Reasonable Rates

The cornerstone of the Policy is competition, continued rail service and fair and reasonable rates. *See* 49 U.S.C. 10101 (1), (4), (5), (6), and (12). As shown previously, the Transaction as arranged, would eliminate competition to operate over the line to the exclusion of third-party carrier shipments over the line to be leased and to perform interchange for carriers other than NSR at Lansing, Michigan. Moreover, the change in the lease agreement between NSR and JAIL was made in order to provide JAIL with monies in the expressed hope to maintain and possibly upgrade facilities and trackage that NSR has failed to adequately provide. This action is an admission that JAIL is not currently able to carry the debt and maintenance costs from its anticipation of cash flow. It is a further admission that the tracks and facilities are not up to standard and need work for a smooth, efficient operation. If this holds true, it is quite possible that the efficiency of operations will be affected and rates will have to be increased.

B. Safety

Safety is a key factor outlined in the Policy, §10101(3), (8) and (11). As such, it must be considered by the Board in determining whether the Transaction should be consummated. The known facts in this case show that it is highly likely that ADBF and Jail will not have sufficient funds and cash flow to upgrade the facilities and trackage in order to provide a safe and reasonably timely operation. In light of the industrial companies located on the lines involved and the types of

materials and waste products that may be handled on them, this is a critical consideration that cannot be made on this record. Accordingly, we suggest the exemptions must be revoked at this time, or that a condition be imposed requiring NSR bring up the facilities and trackage to normal operating standards before the Transaction may be consummated.

C. Fair Wages and Working Conditions

Based upon information and belief, UTU and BLET aver that NSR management would concede that sixteen (16) of its employees will be affected adversely, including three (3) locomotive engineers and five (5) trainmen. In the current economy, the losses that will be suffered by NSR employees and their families will be significant, where it has been reported that unemployment is twice the national average of about ten percent, and will be substantially harmful to the economy in the State of Michigan. Even though the Board may not impose employee protective conditions in the given situation, the Board is entrusted to consider the interests on the public arising out of the effect to the employees under the “public convenience and necessity” standard. In fact, consideration of employees’ interest in “fair wages and suitable working conditions” is also specifically provided for in the Rail Transportation Policy. In this case, with these facts, the Board is further obligated, we submit, to consider the actuality that ADBF will hire its employees under an employee policy containing substandard wages and working conditions, thereby significantly circumventing the terms and conditions under the current collective bargaining agreements. 49 U.S.C. § 10101 (11); *also see, ICC v. Railway Labor Executives’ Ass’n*, 315 U.S. 373 (1942); *Great Northern Ry. Co. Discontinuance of Service*, 307 I.C.C. 59, 74 (1959).

One of the principal reasons §10902 transactions are used is to reduce labor labor costs. This is accomplished by abrogating the NSR collective bargaining agreements, as stated above, and

replacing them with a carrier-fashioned employment policy. The policy in all likelihood, as past non-carrier transactions have shown, will have reduced rates of pay, stringent working conditions and rules, and reduced or eliminated benefits. In short, the rail operations of the newly created non-carrier corporation allow circumvention of both the labor contracts and Railway Labor Act obligations. In turn, the economic burden is shifted from the stockholders in order to increase the rate of return on their investment to the NSR employees. Those NSR employees who can and are willing to take jobs with JAIL will carry the additional burden of reduced earnings and benefits. Those persons holding sufficient seniority on NSR allowing them to obtain work elsewhere also will suffer economic losses, particularly those who are required to relocate. These employees should not be required to carry the total burden created by this arrangement. On the record, as it stands, we suggest the petition to revoke must be granted.

CONCLUSION

Based upon the foregoing authorities and reasoning, the petitioners, UTU and BLET, submit that the Surface Transportation Board should revoke the exemptions involved in the Transaction set forth in the Notices of Exemption in Finance Docket Nos. 35410, 35411 and 35418.

Respectfully submitted,

/s/ Clinton J. Miller, III
Clinton J. Miller, III
General Counsel
United Transportation Union
24950 Country Club Blvd., Ste. 340
North Olmsted, OH 44070
Tel: (216) 228-9400
Fax: (216) 228-0937

/s/ Harold A. Ross
Harold A. Ross

Interim General Counsel
Brotherhood of Locomotive Engineers
and Trainmen
1370 Ontario Street, Mezzanine
Cleveland, OH 44113-1702
Tel: (216) 241-2630
Fax: (216) 241-4237

Dated: October 18, 2010

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing Petition to Revoke Exemptions upon
John D. Heffner, PLLC, and James H. M. Savage, Of Counsel, 1750 K Street, NW, Suite 200, Washington, DC, and David L. Coilemena, General Attorney, Norfolk Southern Corporation, Three Commercial Place, Norfolk, VA 23510-9241, by mailing copies, overnight courier prepaid, on this 18th day of October 2010.

/s/ Clinton J. Miller, III
Clinton J. Miller, III