

SURFACE TRANSPORTATION BOARD FINDS NO BASIS ON WHICH TO REVISIT 10-YEAR-OLD DECISION IN ORDER TO BLOCK TRANSFER OF TRAIN DISPATCHING FUNCTION TO MONTREAL

Surface Transportation Board (Board) Chairman Linda J. Morgan announced that the Board has today issued a decision finding that it is unable, based on the record before it, to reopen a proceeding decided 10 years ago authorizing the Canadian Pacific Railway Company (CP) to acquire the assets of the bankrupt Delaware and Hudson Railway Company (D&H).

In December 1998, the Board issued a decision granting the request of the American Train Dispatchers Department of the International Brotherhood of Locomotive Engineers (ATDD) that CP be blocked from transferring train dispatching functions to Montreal, Canada. That decision, which arose in the context of review of an arbitrator's ruling concerning employee protection issues associated with the CP/D&H transaction, was based on safety concerns that had been voiced by officials of the Federal Railroad Administration (FRA), an agency within the Department of Transportation (DOT), in letters written to the private parties. In December 1999, however, the Board's decision was vacated by the United States Court of Appeals for the District of Columbia Circuit. The court found that the FRA letters, which pointed out that Canadian hours of service laws are different from those in the United States, and that Canadian workers are not subject to random drug testing, did not provide a basis for overturning the arbitrator's ruling allowing the proposed transfer of dispatching functions to Canada.

After the D.C. Circuit's action, ATDD asked the Board to issue a new decision that would again block the transfer of dispatching functions to Montreal, and this time one that would reopen the underlying CP/C&H proceeding. ATDD's request was based on the same FRA letters on which the Board had relied in first enjoining the dispatching transfer in the decision which the reviewing court vacated. DOT also filed a formal pleading at the Board supporting ATDD's request. Its pleading, however, simply reiterated the concerns expressed earlier by FRA, and indicated that FRA intended to begin a rulemaking proceeding in the near future to consider the issue. The Board found that it could not issue an order blocking the transfer. In its decision, the Board stated:

"[W]e give great weight to the views of the [FRA, the] Federal body with expertise in rail safety. In its pleading, DOT hypothesizes as to several potential safety issues but concedes that it does "not at this juncture know whether the movement of dispatching operations for [domestic] rail lines to locations outside the United States should be allowed, allowed subject to conditions, or prohibited." DOT has not suggested when FRA would conclude its rulemaking and be prepared to provide its views on whether the potential safety concerns that it has identified necessitate any remedial action. Given DOT's own uncertainty as to whether corrective action is required, it would be premature for us to reopen the underlying acquisition proceeding to impose a condition foreclosing CP's right to transfer the dispatching function to Canada. Moreover, for us to institute an investigation at this time would be needlessly duplicative of FRA's efforts. When FRA has better formulated its position regarding the magnitude of any safety problem that might be identified and what conditions, if any, might be appropriate regarding Canadian-based dispatching, we will be better able to assess whether or not it would be appropriate to reopen this proceeding to consider any request by FRA for a specific condition. If there are any urgent safety problems in the meantime, FRA, which . . . is the agency principally responsible for rail safety, can exercise its own emergency powers."

The Board's decision was issued on March 2, 2000, in *Canadian Pacific Limited, Et Al. --Purchase and Trackage Rights--Delaware & Hudson Railway Company*, STB Finance Docket No. 31700.

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