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SERVICE DATE - OCTOBER 22, 2001

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 33905

LACKAWANNA COUNTY RAILROAD AUTHORITY—ACQUISITION EXEMPTION—
F&L REALTY, INC.

STB Finance Docket No. 33906

DELAWARE-LACKAWANNA RAILROAD CO., INC.—OPERATION
EXEMPTION—LACKAWANNA COUNTY RAILROAD AUTHORITY

Decided: October 19, 2001

On September 7, 2001, the Luzerne & Susquehanna Railway Company (LS) filed an “emergency petition to reopen, revoke, clarify and condition” the notices of exemption filed in STB Finance Docket No. 33905¹ and STB Finance Docket No. 33906 concerning two segments of track referred to as the Diamond Branch and the Laurel Line.² LCRA and D-L (collectively

¹ By notice filed on July 17, 2000, and published in the Federal Register on July 28, 2000, at 65 FR 46549, the Lackawanna Country Railroad Authority (LCRA), a political subdivision and nonoperating Class III rail carrier, invoked our class exemption at 49 CFR 1150.41 to acquire 4.96 miles of track in Lackawanna County, PA, from F&L Realty, Inc. (F&L). The track to be acquired by LCRA consisted of two small segments described as follows: (1) the Diamond Branch, of the former Delaware, Lackawanna & Western Railroad (DL&W), extending 0.85 miles from milepost 144.75 to milepost 145.6, in Scranton; and (2) the Laurel Line, of the former DL&W, extending 4.11 miles from LC 6253 milepost 0.7 (South Abutment of Roaring Brook Bridge) to milepost 4.81, at Montage Road, in the Borough of Moosic. The exemption was effective on July 24, 2000.

² By notice also filed on July 17, 2000, and also published in the Federal Register on July 28, 2000, at 65 FR 46550, the Delaware-Lackawanna Railroad Co., Inc. (D-L), a Class III rail carrier, invoked our class exemption at 49 CFR 1150.41 to operate, under contract with LCRA, the same 4.96 miles of track in Lackawanna County. The exemption was also effective on July 24, 2000.

respondents) filed their reply on September 13, 2001.³ We will deny LS' emergency petition, but will clarify as appropriate the rights of the respective parties.

PRELIMINARY MATTER

Conflict of Interest Evidence. LS has alleged that Rea, Cross & Auchincloss (RCA), the current law firm representing respondents, may be subject to disqualification by reason of a conflict of interest under the Board's rules of practice at CFR 1103.16. LS states that a former attorney of RCA had previously represented the interests of Mr. Steven C. May, President of LS, in connection with various proceedings before the Interstate Commerce Commission. LS states that RCA is now representing respondents in opposing LS in this proceeding. LS suggests that, even though that attorney is no longer associated with RCA, the conflict of interest attaches to the law firm, not just the individual attorney involved. Thus, LS maintains that RCA should withdraw as counsel for respondents.

RCA has responded that there is no conflict of interest. RCA points out that the attorney in question represented the interests of Mr. May before he joined RCA and states that the subject matter of the representation was not the same or substantially related to the subject matter of the current proceeding. Further, RCA points out that at no time during that attorney's tenure with RCA did he or any member of that firm represent the interests of Mr. May. Finally, RCA states that the attorney left the firm several weeks prior to the filing of the emergency petition by LS.

Based on the evidence presented, we see no conflict of interest for RCA. We therefore find no basis for disqualifying RCA from representing D-L in this proceeding and no need to address further the conflict of interest allegation.

BACKGROUND

In 1997, LS had invoked our class exemption at 49 CFR 1150.41 to lease and operate certain rail lines of Luzerne County Rail Corporation (LCRC), F&L, and SLIBCO Utilities, Inc. (SLIBCO) located in Luzerne and Lackawanna Counties, PA. The lines to be leased and operated by LS were described as follows: (1) approximately 1.7 miles of rail line owned by

³ On September 20, 2001, LS filed a request to file a rebuttal to the reply (rebuttal). On September 21, 2001, respondents filed a motion to strike LS' rebuttal. A reply to a reply under our rules at 49 CFR 1104.13(c) is impermissible. In appropriate circumstances, we construe our rules liberally to allow such replies where they will contribute to a complete record without prejudicing any party or delaying the proceeding. LS' rebuttal purports to respond to a misrepresentation made by respondents in their reply. The rebuttal does not add to our understanding of the issues and its consideration would not alter the outcome in this proceeding. LS' request will be denied and its rebuttal will be rejected. In view of the rejection of this material, there is no need to rule on respondents' motion to strike.

LCRC and F&L between milepost 10.0 at the north side of Montage Road Crossing and milepost 10.5 at Little Virginia (the Dunmore Secondary Track); and between milepost 3.7 at Little Virginia and milepost 2.5 at Runaround Switch (the Brady Industrial Track); and (2) the Minooka Industrial Track owned by SLIBCO for its entire 1.5-mile length from Runaround Switch to the end of the track at Davis Street. The exemption was effective on January 20, 1997. See Luzerne and Susquehanna Railway Company–Lease and Operation Exemption–Luzerne County Rail Corporation, F & L Realty, Inc., and SLIBCO Utilities, Inc., STB Finance Docket No. 33338 (STB served Feb. 4, 1997).

On August 26, 1997, LS entered into a lease and operating agreement with LCRC (LCRC/LS agreement). The LCRC/LS agreement gave LS the “exclusive” right to provide rail service apparently over the lines LS was permitted to operate in STB Finance Docket No. 33338.⁴ See Emergency Petition, Exhibit B. The term of the LCRC/LS agreement was for 3 years from its effective date.⁵

On September 30, 1999, LCRA purchased from F&L the Laurel Line, the Laurel Line Connector, and the Erie Mainline, located in the Borough of Moosic, City of Scranton, Lackawanna County, PA. See Reply, Exhibit 5. Both the emergency petition and the reply have indicated that the Laurel Line, the Laurel Line Connector, and the Erie Mainline are either formerly or alternatively known as the Dunmore Secondary Track and the Brady Industrial Track.

On December 28, 1999, LCRC and LCRA entered into an agreement (LCRC/LCRA agreement) in which the parties acknowledged that LCRA had entered into a purchase and sale agreement with F&L to purchase the Laurel Line, the Laurel Line Connector and the Erie Mainline. See Reply, Exhibit 2. According to the LCRC/LCRA agreement, effective as of the date on which F&L conveyed to LCRA legal title to the rail lines, LCRC’s “exclusive” trackage and operating rights would terminate with respect to the premises described as “Beginning at milepost 10+/- north side Montage Road crossing on the Dunmore Secondary to the switch at Little Virginia, milepost 10.5, and from Little Virginia, milepost 3.7 to one hundred (100) feet East of Runaround Switch, milepost 2.5 on the Brady Industrial Track” (Montage/Little Virginia line). The LCRC/LCRA agreement noted that LCRA would enter into an operating agreement for the Montage/Little Virginia line with LCRC or its designee to operate over the

⁴ The LCRC/LS agreement would appear to cover not only the lines LS was authorized to operate in STB Finance Docket No. 33338, but also other lines that LS had obtained authority to operate in 1994. See Luzerne and Susquehanna Railway Company–Lease and Operation Exemption–Certain Lines of Luzerne Country Rail Corporation, F&L Realty, Inc., and Pocono Northeast Railway, Inc., Finance Docket No. 32563 (ICC served Sept. 23, 1994).

⁵ Exhibit B also included a copy of a letter dated July 12, 2000, from LCRC to LS, indicating that the LCRC/LS agreement was being extended on a month-to-month basis.

Montage/Little Virginia line without charge. The LCRC/LCRA agreement stated that F&L was the owner of the operating rights on the Minooka Industrial Track but that both LCRC and LCRA would have operating rights on the Minooka Industrial Track.⁶

On February 24, 2000, LCRA and LS entered into an operating agreement (LCRA/LS agreement) in which LCRA agreed to provide LS with access to the Montage/Little Virginia line for “nonexclusive” railroad freight service. See Reply, Exhibit 4. The description of the line referred to in the LCRA/LS agreement is not explicit. The LCRA/LS agreement describes the line as “Appendix A,” which is a map. From looking at the map, it is unclear whether the line described in the LCRA/LS agreement covered a portion or the entire 1.7-mile Montage/Little Virginia line. The term of the LCRA/LS agreement was until June 10, 2001. On June 8, 2001, LCRA and LS agreed to extend the LCRA/LS agreement for LS’ continued operations over the Montage/Little Virginia line to September 15, 2001. The June 8, 2001 extension agreement indicated that an apparent disagreement between LCRA and LS over the rights to operate the Montage/Little Virginia line had arisen. See Reply, Exhibit 6.

By letter dated September 4, 2001, LCRA notified LS that the LCRA/LS agreement would terminate on September 15, 2001. See Emergency Petition, Exhibit J. That letter also notified LS that, on September 16, 2001, D-L would provide “exclusive” common carrier rail freight service on LCRA’s Laurel Line, Laurel Line Connector and Erie Mainline to Montage Road Crossing.

LS requests that the Board reopen the proceedings in STB Finance Docket No. 33905 and STB Finance Docket No. 33906 and revoke the exemption authorizations to the extent necessary to issue an emergency order clarifying that the operating rights granted to LCRA and D-L are subject to and conditioned on pre-existing overhead trackage rights on behalf of LCRC and LS on the Montage/Little Virginia line so as to permit continued direct access by LS to the Minooka Industrial Track.

LS complains that LCRA and D-L failed to advise the Board of LS’ pre-existing operating rights over the Montage/Little Virginia line when LCRA and D-L filed their notices of exemption in STB Finance Docket No. 33905 and STB Finance Docket No. 33906. LS also asserts that LCRA and D-L misrepresented in their notices of exemption that D-L would be the operator on the Montage/Little Virginia line from July 28, 2000, to date, despite the fact that D-L, at that time and until September 15, 2001, could not physically serve portions of the Laurel Line which was operated by LS.⁷ LS argues that the omission of this assertedly material

⁶ It appears that, at the time that the various agreements were entered into, the Montage/Little Virginia line was the only connection to the Minooka Industrial Track.

⁷ Apparently, D-L is constructing a connection to the Minooka Industrial Track which
(continued...)

information resulted in false or misleading exemption notices which void the LCRA and D-L exemptions ab initio.

In reply, respondents argue that, pursuant to an agreement between F&L and the Redevelopment Authority of the County of Luzerne (RACL), LS could not have been assigned the right it asserts to remain on the Montage/Little Virginia line. Respondents further assert that the F&L and RACL agreement pursuant to which RACL obtained the rights (which were apparently subsequently assigned to LCRC) to operate over the Montage/Little Virginia line expired, by its own terms, on June 10, 2001, in light of the parties' failure to extend it. Respondents accordingly take the position that it was incumbent upon LS to inform the Board of the expiration of the F&L and RACL agreement and that LS continued on the Montage/Little Virginia line only under the limited term of the LCRA/LS agreement, which expired on September 15, 2001. Therefore, respondents argue that LS has no basis for emergency relief or right to continue on the Montage/Little Virginia line after September 15, 2001.

DISCUSSION AND CONCLUSIONS

Because the exemptions in STB Finance Docket No. 33905 and STB Finance Docket No. 33906 had become effective, the statutory mechanism for striking them down is revocation pursuant to 49 U.S.C. 10502(d). See Portland & Western Railroad, Inc.–Lease and Operation Exemption–Lines of Burlington Northern Railroad Company, Finance Docket No. 32766 (STB served Oct. 15, 1997, and Feb. 11, 1998). Under 49 U.S.C. 10502(d), we may revoke an exemption if we find that full regulation of the transaction is necessary to carry out the rail transportation policy of 49 U.S.C. 10101. A party seeking revocation has the burden of proof and petitions to revoke must be based on reasonable, specific concerns demonstrating that full regulation is needed to carry out the rail transportation policy. See I&M Rail Link, LLC–Acquisition and Operation Exemption–Certain Lines of Soo Line Railroad Company d/b/a Canadian Pacific Railway, STB Finance Docket No. 33326 et al. (STB served Apr. 2, 1997). LS has failed to demonstrate in its emergency petition that full regulation of LCRA's acquisition and D-L's operation of the Montage/Little Virginia line is necessary to carry out the rail transportation policy. Therefore, we find no substantive basis for revoking the exemptions under 49 U.S.C. 10502(d).

Under 49 CFR 1150.42(c), an exemption may be found to be void ab initio if the pertinent notice contains false or misleading information. LS' allegation that the notices of exemption contained material error because LCRA and D-L failed to mention that LS had existing rights over the Montage/Little Virginia line is without merit. Our regulations at 49 CFR 1150.41 et seq. do not require parties to submit information about whether there is an existing operator on the line. See Indiana Northeastern Railroad Company–Change in Operators–Branch

⁷(...continued)

was scheduled to be completed on September 15, 2001. See Emergency Petition, Exhibit I.

and St. Joseph Counties Rail Users Association, Inc, in Branch County, Michigan, STB Finance Docket No. 33760 (STB served Sept. 1, 1999) (Indiana).

LS maintains that the LCRA and D-L notices of exemption failed to mention that, while D-L had been identified as the operator of the Montage/Little Virginia line at the time they filed their notices of exemption, D-L could not physically serve it. Whether or not LCRA or D-L could provide rail service on the Montage/Little Virginia line does not, however, determine whether either could invoke the Board's class exemption procedures. Any authority granted is permissive in nature, not mandatory. The Board has held that, once authority becomes effective, it is up to the parties to decide whether and how to go forward. See Missouri Central Railroad Company–Acquisition and Operation Exemption–Lines of Union Pacific Railroad Company, STB Finance Docket No. 33508 et al. (STB served Sept. 14, 1999).⁸

The parties want us to interpret the various agreements that have been entered into the record and to clarify their respective rights to operate over the track. The interpretation of these agreements, however, lies within the purview of the courts, not with us. The question of whether a party (or parties) have regulatory authority to operate over a particular segment of track is different from the question of whether that party (or parties) have the necessary property interest or contractual right under applicable agreements to exercise that authority. In exercising our licensing authority, we look to whether the statutory standards are satisfied, not to whether the applicant or petitioner will be able to exercise the authority sought. See Indiana, supra.

Based on the record before us, both LS and D-L have outstanding Board authority to operate over the Montage/Little Virginia line. To the extent that both LS and D-L continue to operate over the Montage/Little Virginia line, giving shippers a service choice, LS and D-L must make every reasonable effort to cooperate and coordinate operations so that they are conducted in a safe manner. But it is not our place to interpret the contracts that appear to be at the heart of this dispute.

⁸ Under 49 U.S.C.10903(d), a rail carrier providing transportation subject to the jurisdiction of the Board may discontinue rail service only if the Board finds that the present or future public convenience and necessity require or permit the discontinuance. The common carrier obligation to serve continues until the Board permits it to end, regardless of any contract provisions. Because LS provided rail transportation over the Montage/Little Virginia line, discontinuance authority must be obtained from the Board under 49 U.S.C. 10903. Authority for LS to discontinue service over the Montage/Little Virginia line may be sought by LS or by a third party from the Board under 49 U.S.C. 10903. If the Board should grant a third party discontinuance, the Board's jurisdiction over the Montage/Little Virginia line would be removed as a shield and the parties could then proceed to state court to pursue enforcement of any contractual rights.

It is ordered:

1. The request to file a rebuttal is denied and the rebuttal is rejected.
2. The emergency petition is denied.
3. This decision is effective on the date of service.

By the Board, Chairman Morgan, Vice Chairman Clyburn, and Commissioner Burkes.

Vernon A. Williams
Secretary