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SERVICE DATE – LATE RELEASE NOVEMBER 17, 2010

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 35438

EIGHTEEN THIRTY GROUP, LLC—ACQUISITION EXEMPTION—IN ALLEGANY COUNTY, MD.

Docket No. FD 35437

GEORGES CREEK RAILWAY, LLC—OPERATION EXEMPTION—IN ALLEGANY COUNTY, MD.

Docket No. FD 35436¹

DUNCAN SMITH AND GERALD ALTIZER—CONTINUANCE IN CONTROL EXEMPTION—EIGHTEEN THIRTY GROUP, LLC AND GEORGES CREEK RAILWAY, LLC

Decided: November 17, 2010

Eighteen Thirty Group, LLC (Eighteen Thirty), filed a verified notice of exemption under 49 C.F.R. § 1150.31 in Eighteen Thirty Group, LLC—Acquis. Exemption—in Allegany County, Md., FD 35438, to acquire an 8.54-mile line of railroad between milepost BAI 27.0 near Morrison and milepost BAI 18.46 at the end of the track near Carlos, in Allegany County, Md. (the Line). Notice of the exemption was served on November 4, 2010, and was published in the Federal Register on November 5, 2010 (75 Fed. Reg. 68,400). Eighteen Thirty seeks to acquire the Line as a result of the bankruptcy of James Riffin (Riffin) through an agreement with the trustee of the bankruptcy estate of Riffin.² Eighteen Thirty states that it intends to consummate

¹ These proceedings are not consolidated; a single decision is being issued for administrative convenience.

² The Board authorized abandonment of the Line in CSX Transportation, Inc.—Abandonment Exemption—in Allegany County, Md., AB 55 (Sub-No. 659X) (STB served Aug. 25, 2005). By decision served December 14, 2005, WMS, LLC (WMS), was authorized to acquire the Line pursuant to the Board's offer of financial assistance (OFA) provisions at 49 U.S.C. § 10904 and 49 C.F.R. § 1152.27, and by decision served August 18, 2006, Riffin was authorized to be substituted as the acquiring entity in lieu of WMS. In 2009, the Board found that Riffin had not established that he had a suitable interest in the Line to be considered a rail

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this transaction once the bankruptcy court approves its purchase agreement, but no sooner than November 18, 2010, the effective date of this exemption.

This notice is related to two other simultaneously filed notices of exemption, which also were served and published on the same date as this notice.³ In Georges Creek Railway, LLC—Operation Exemption—in Allegany County, Md., FD 35437, Georges Creek Railway, LLC (Georges Creek), filed a notice of exemption under 49 C.F.R. § 1150.31 to operate the Line. In Duncan Smith and Gerald Altizer—Continuance in Control Exemption—Eighteen Thirty Group, LLC and Georges Creek Railway, LLC, FD 35436, Duncan Smith and Gerald Altizer, the owners of Eighteen Thirty and Georges Creek, filed a notice of exemption under 49 C.F.R. § 1180.2(d)(2) to continue in control of Eighteen Thirty and Georges Creek when they become rail carriers. The Notices are also related to a petition simultaneously filed by Eighteen Thirty in CSX Transportation, Inc.—Abandonment Exemption—in Allegany County, Md., AB 55 (Sub-No. 659X), for an exemption under 49 U.S.C. § 10502 from the OFA requirements of 49 U.S.C. § 10904(f)(4)(A). The latter provision forbids an entity that has acquired a rail line under the OFA process from transferring that line to any entity other than the abandoning rail carrier from which it was originally purchased prior to the end of the fifth year after consummation of the sale.⁴

On November 3, 2010, Riffin separately filed comments objecting to the Notices and to the petition for exemption in AB-55 (Sub-No. 659X). On the same date, Riffin also filed a motion to consolidate all four proceedings. Also on November 3, 2010, Lois Lowe (Lowe) filed comments objecting to the Notices. On November 8, 2010, Riffin and Lowe (Petitioners) individually filed a motion to stay and a motion to revoke each of the Notices. The motions to reject or revoke the Notices will be addressed in a separate decision.

DISCUSSION AND CONCLUSIONS

The request for a stay of the Notices will be denied because the Petitioners have not met the stay criteria. In deciding a petition for stay, the Board follows the traditional stay criteria by requiring a party seeking a stay to establish that: (1) there is a likelihood that it will prevail on the merits of any challenge to the action sought to be stayed; (2) it will suffer irreparable harm in the absence of a stay; (3) other interested parties will not be substantially harmed by a stay; and (4) the public interest supports the granting of the stay. Washington Metro. Area Transit Comm'n v. Holiday Tours, Inc., 559 F.2d 841, 843 (D.C. Cir. 1977); Va. Petroleum Jobbers

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carrier. The Board noted that the ownership issue was pending in state courts. James Riffin—Pet. for Decl. Order, FD 35245, slip op. at 6 (STB served September 15, 2009), pet. for review pending sub nom. Riffin v. STB, No. 09-1277 (D.C. Cir. filed Sept. 15, 2009).

³ All three notices will be referred to collectively as “Notices”.

⁴ Eighteen Thirty has attached a letter from CSX Transportation, Inc., stating that it issued the deed for the sale of the Line on July 10, 2006, but that it will not exercise its statutory right to reacquire the Line and that it waives its rights under the statute.

Ass'n v. Fed. Power Comm'n, 259 F.2d 921, 925 (D.C. Cir. 1958). The party seeking a stay carries the burden of persuasion on all of the elements required for such extraordinary relief. Canal Auth. of Fla. v. Callaway, 489 F.2d 567, 573 (5th Cir. 1974).

A stay is an extraordinary remedy and should not be sought unless the requesting party can show that it faces unredressable actual and imminent harm that would be prevented by a stay.⁵ Indeed, the threshold consideration in deciding whether injunctive relief is appropriate is whether the petitioning party will be irreparably harmed without it.⁶ The Petitioners have failed specifically to address the stay criteria, much less demonstrate that they will be irreparably harmed if the Notices go into effect under the circumstances here.

Of the Notices, the one that directly affects whatever ownership interest the Petitioners may have in the assets of the Line or that of others mentioned in their pleadings is the one filed in FD 35438. In that proceeding, Eighteen Thirty has sought Board authority to acquire the Line through the Board's class exemption process at 49 C.F.R. § 1150.31.⁷ Such a notice of exemption, however, merely gives the entity seeking to acquire a rail line Board permission to acquire the rail line, and does not mandate the acquisition⁸ or bestow any property rights on the acquiring entity that the transferor does not already have to convey or sell.⁹ In fact, an exemption to acquire a rail line may not be exercised unless an agreement is ultimately reached between the parties to the transaction.¹⁰ As noted by Eighteen Thirty and Georges Creek in their filings, final approval of the sale of whatever ownership interest Riffin or others may have in the Line's assets ultimately rests with the bankruptcy court and the trustee of the bankruptcy estate of Riffin, not the Board. Any such concerns the Petitioners or others may have regarding the acquisition of the Line that is the subject of FD 35438 should be addressed to the court and the trustee, not the Board.

Concerns regarding the Line's ownership involve questions of property law and bankruptcy law, and the Board's permissive approval of the Notices will have no effect on the determination of those matters. Thus, having failed to show irreparable harm, the motions for stay will be denied.

⁵ See, e.g., Cuomo v. NRC, 772 F.2d 972, 978 (D.C. Cir. 1985); Wisconsin Gas Co. v. FERC, 758 F.2d 669, 674 (D.C. Cir. 1985); Suffolk & S. R.R.—Lease and Operation Exemption—Sills Road Realty, LLC, FD 35036, slip op. at 6 (STB served Dec. 20, 2007).

⁶ Sampson v. Murray, 415 U.S. 61, 88 (1974).

⁷ The other two notices of exemption become moot if Eighteen Thirty does not actually acquire the Line.

⁸ See, e.g., General Ry., d/b/a/ Iowa N.W. R.R.—Exemption for Acquis. of R.R. Line—in Osceola and Dickinson Counties, Fla., FD 34867, slip op. at 4 (STB served June 15, 2007).

⁹ See MVC Transp. LLC—Acquis. Exemption—P&LE Properties, Inc., FD 34462, slip op. at 6 (STB served Oct. 20, 2004).

¹⁰ See The Chicago, Lake Shore & South Bend Ry.—Acquis. and Operation Exemption—Norfolk S. Ry., FD 34960, slip op. at 4 (STB served Feb. 14, 2008).

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. The motions for stay are denied.
2. This decision will be effective on its date of service.

By the Board, Daniel R. Elliott, Chairman.