

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 33180

INDIANA & OHIO RAILWAY COMPANY—ACQUISITION EXEMPTION—
LINES OF THE GRAND TRUNK WESTERN RAILROAD INC.

Decided: September 10, 1997

On December 6, 1996, the Indiana & Ohio Railway Company (IORY), a Class III rail carrier, filed a notice of exemption under 49 CFR 1150.41 to acquire from the Grand Trunk Western Railroad Inc. (GTW) rail lines totaling approximately 146.1 miles between Diann, MI, and Springfield, OH.¹ The lines are located between: (1) milepost 39.7 at Diann, MI, and milepost 107.29 at XN Station near Leipsic, OH; (2) milepost 128.3 at DT&I Junction near Lima, OH, and milepost 202.7 at Springfield, OH; and (3) the Ottawa Loop between mileposts 110.8 and 114.88, south of XN Station.

As part of the acquisition, IORY was assigned GTW's overhead trackage rights totaling 107.6 miles over: (1) 20.7 miles of CSX Transportation, Inc. (CSXT) line between CSXT milepost 155.2 at XN Station and CSXT milepost 134.5 at DT&I Junction; (2) 3.5 miles of Indiana & Ohio Central Railroad, Inc. (IOCR) line between IOCR milepost 129.1 at Maitland Junction and IOCR milepost 132.6 at Cold Springs, OH; and (3) 83.4 miles of Consolidated Rail Corporation (Conrail) line between CR milepost 36.3 at Springfield and CR milepost 119.7 at Cincinnati, OH. IORY will also acquire incidental overhead trackage rights over 22.5 miles of GTW's rail line between GTW milepost 39.7 at Diann and GTW milepost 17.2 at Flat Rock, MI. IORY indicated that it would, separately from the acquisition transaction, enter into a haulage agreement with GTW and its corporate parent, Canadian National Railway Company (CN).

The transaction was originally scheduled to become effective on December 27, 1996. A stay of the effectiveness of the exemption and revocation of the exemption were sought and, by decision served December 20, 1996, Chairman Morgan stayed the effective date of the exemption until January 26, 1997, and directed the parties to submit additional evidence and argument to enable the Board to make an informed decision on the issues presented. By decision served January 24, 1997, the Chairman extended the stay until February 4, 1997, to allow time for the Board to give full consideration to the issues presented. In a decision served February 3, 1997, we denied the requests by the United Transportation Union (UTU), the Brotherhood of Locomotive Engineers (BLE), Brotherhood of Maintenance of Way Employees (BWME) and the Transportation Communications Union (TCU) to stay and/or revoke the exemption and permitted the exemption to become effective. We also rejected their assertions that the haulage agreement constituted a "joint use" arrangement under 49 U.S.C. 11323(a)(6) requiring Board approval and imposition of labor protective conditions. Notice of the exemption was published and served on February 10, 1997 (62 FR 6039).

BLE and UTU (jointly, unions) filed petitions to reopen the February 3 decision, claiming material error, new evidence and changed circumstances.² The unions want the Board to reconsider

¹ IORY is a subsidiary of RailTex, Inc. (RailTex). *See RailTex, Inc.—Control Exemption—Indiana & Ohio Rail Corp.*, STB Finance Docket No. 32975 (STB served June 21, 1996).

² On March 6, 1997, BLE appealed an action by the Board's Secretary that posted its filing as a petition for reconsideration under 49 CFR 1115.3 with a filed date of February 25. BLE claims that its petition should be considered filed on February 24, the "20-day" due date under 49 CFR 1115.3(e). BLE says that the petition was delivered to the Board's offices on February 24 after the Secretary's office was closed for the day and stamped received on that date. BLE asserts, however, (continued...)

the February 3 decision and impose protective conditions for GTW employees affected by the transaction. IORY and GTW responded.³

ARGUMENTS OF THE PARTIES

Union Arguments. BLE and UTU initially assert that the purchase price for the line was reduced from \$27 million to \$22 million, resulting in changed circumstances. They submit a copy of a press release dated February 6, 1997, indicating that RailTex had agreed to buy the former Detroit, Toledo & Ironton Railroad (DT&I) lines for \$27 million. The release says further that the final purchase price was reduced by \$5 million because of lower projected second-year traffic and revenues. The unions claim that the reduced purchase price substantially changed the terms of the transaction and warrants reopening of the proceeding.

Additionally, BLE and UTU claim that the Board erred in finding that the haulage agreement did not constitute joint use of the line. They contend that several factors show that the parties intended for GTW and CN to use the line jointly with IORY. They note that a CN financial report filed November 1, 1996, before the Securities and Exchange Commission (SEC) stated that:

RailTex, Inc, was winning bidder for CN's rail line and operating assets of the former Detroit, Toledo & Ironton Railroad, running from Diann, Michigan to Cincinnati, Ohio. CN has signed a letter of intent with RailTex for the sale price of U.S. \$27 million. The sale is expected to be completed by year end. CN will operate in this corridor under a haulage agreement with RailTex.

The unions assert that this statement shows that CN intended to continue operating the lines under the haulage agreement.

They also submitted a verified statement from BLE local chairman, John J. Karakian concerning locomotive operations on the line acquired by IORY. Mr. Karakian cites several instances between February 26, 1997, and March 3, 1997, where IORY trains have been run with GTW or CN locomotives. He states further that GTW's fuel dock at Flat Rock will service IORY locomotives. Moreover, he states that he has been informed that GTW plans to expand its Flat Rock Yard to include Dearborn, enabling IORY trains to run through Flat Rock Yard to serve Ford Motor Company's Rouge Plant.

BLE and UTU also disagree with the Board's finding in the February 3 decision that the haulage agreement was separate from the acquisition transaction. They contend that the haulage agreement and acquisition transaction are inextricably interrelated. They point out that the acquisition agreement specifically states that the line acquisition is contingent upon IORY, CN, and GTW entering into the haulage agreement. They note that the haulage agreement and purchase agreement were both dated February 14, 1997.

The unions point out that the haulage agreement specifies that IORY will operate no fewer than 3 trains per day, seven days per week in each direction between Flat Rock and Cincinnati,

²(...continued)

that the Secretary's office did not consider the petition as filed until February 25, when BLE submitted the required filing fee. BLE asserts that the Secretary's office erred and asks us to direct that its petition be deemed filed on February 24. The Secretary's office handled the matter properly. BLE is not harmed by this determination, however, because we will accept BLE's filing as a petition to reopen under 49 CFR 1115.4, which is not subject to a 20-day limit.

³ BLE filed supplements to its petition to reopen on March 10, 1997, and April 28, 1997. UTU filed a petition to reopen on March 19, 1997, and a supplement to its petition on May 13, 1997. GTW filed replies on March 20, 1997, and May 19, 1997. IORY filed replies on March 21, 1997, and May 19, 1997. BLE and GTW filed copies under seal of the haulage agreement entered into by CN, GTW, and IORY, together with copies of a Contingent Trackage Rights Agreement and a Locomotive/Telemetry/Caboose Run Through Agreement.

provided CN and its connections tender that many trains. They say that IORY's haulage for GTW/CN will be the predominant train movements for the line, and that IORY will operate only one train per day, six days per week for local traffic.

According to the unions, the haulage service to be performed by IORY is primarily train haulage, rather than car haulage. They note that the haulage agreement provides for payments based on car-miles, but also prescribes minimum train haulage fees, and specifies train schedules. They state that the agreement uses the terms "through" and "haulage trains" and has incentives for on-time performance by IORY. They also note that GTW blocks the trains. They contend that the train haulage arrangement is a joint use under 49 U.S.C. 11323(a)(6) and should be subject to labor protective conditions, citing *Soo Line Railroad Company—Joint Use of Lines—Chesapeake and Ohio Railway Company*, Finance Docket No. 30703, (ICC served Sept. 10, 1986) (*Soo*).

The unions indicate further that, although the carriers state that they may allocate equipment, the Run-Through Agreement, which was also executed on February 14, 1997, and which permits IORY to operate trains powered by GTW or CN locomotives, names GTW as the owner or lessee of locomotives and other equipment and IORY as the user having custody and control of GTW's equipment.

The unions further maintain that, as part of the haulage agreement, the carriers entered into a Contingent Trackage Rights Agreement, providing that, if IORY's on-time performance falls below 50% for 3 months during any 6-month period, GTW would be entitled to institute overhead trackage rights and serve local shippers that routed more than 350 carloads during the prior 12 months via CN routes. The unions contend that the contingent trackage rights confirms CN's joint use of the line. They further assert that the trackage rights agreement should be the subject of a class exemption in 49 CFR 1180.2(d), and should be publicly filed.

Carrier Replies. In reply, GTW and IORY dispute the claim that the reduced purchase price for the DT&I lines is a change in circumstances warranting reopening of the February 3 decision. They note that the purchase price was not considered in the February 3 decision or in the notice of exemption permitting the transaction. They assert that the reduced purchase price is merely a change in information about the transaction, and that it is not relevant to deciding whether employee protection should be imposed.

The carriers further respond that the unions have not shown why CN's SEC filings justify reopening this proceeding. The carriers indicate that the SEC filing merely reflects that CN will continue to maintain a presence in the Diann-Cincinnati corridor even though it will not own or operate the line. They maintain that the SEC filing does not support the union's assertion that the statement shows continuing joint use of the line.

Regarding the haulage agreement, the carriers contend that the agreement is not analogous to trackage rights and does not evidence joint use of the line. They indicate that the agreement provides for IORY haulage service on a car-mile basis, but does not prevent IORY from adding its own cars to CN/GTW trains moved over the line. A verified statement from Paul E. Ladue, GTW District Superintendent-Business Management, indicates that the haulage agreement requires IORY to meet prescribed service performance standards, train power, and weight and length requirements. According to Mr. Ladue, as long as IORY meets those standards, it is free to add its own cars to CN/GTW trains and move all cars in the same trains. He views the haulage agreement as a contract to move CN/GTW cars within a certain period of time, but does not restrict the running of IORY's traffic over this line. Mr. Ladue further states that IORY has been routinely adding its own cars to blocks of CN/GTW cars moved northbound and southbound since it started operations in February 1997. He adds that IORY adds its own cars to trains moving CN/GTW cars because the total number of IORY cars moving over the lines do not justify running separate local trains for IORY traffic.

The carriers dispute the unions' contentions that we erred in finding that the haulage agreement is separate from the acquisition. They note that all parties had advised the Board that IORY intended to enter into a haulage agreement with GTW and CN and that the agreement would be part of the overall arrangement with GTW. They assert that they did not mislead the Board.

Responding to the statement of Mr. Karakian, the carriers state that they informed the Board that IORY would run trains between Flat Rock Yard and Cincinnati that are powered by GTW or CN locomotives after the transaction was consummated. Mr. Ladue indicates that IORY is responsible for the locomotives operated on the DT&I lines and that it operates locomotives that are owned or leased by RailTex or by one of its corporate affiliates. He further says that IORY operates other locomotives that are owned by other carriers, such as CSXT, under locomotive exchange agreements. In his view, the Run-Through Agreement between GTW and IORY is a routine arrangement that is widely used in the rail industry.

Mr. Ladue states further that he previously advised the Board that GTW and IORY had agreed that GTW would perform fueling and general running repair on IORY locomotives at Flat Rock Yard. He asserts that this routine service is the same type of service that GTW performs for other carriers whose equipment enters Flat Rock Yard under a locomotive exchange agreement.

Finally, Mr. Ladue disputes Mr. Karakian's allegations that GTW plans to expand operations to Dearborn. He indicates that, as part of the transaction, IORY gained access to Flat Rock Yard by obtaining incidental trackage rights over GTW, and that the parties then entered into an agreement to interchange traffic at Flat Rock Yard. Mr. Ladue states, however, that IORY does not have access to Dearborn, which is located north of, and is not a part of, Flat Rock Yard.

The carriers also dispute the unions' claims with respect to the Contingent Trackage Rights Agreement. They state that this agreement permits GTW to acquire trackage rights over IORY's lines only if there are significant service failures by IORY under the haulage agreement. They argue that this contingent agreement does not affect current operations, and that, because of its contingency, GTW has no vested right to operate over, or jointly use, the DT&I line without Board approval.

Finally, the carriers assert that the haulage agreement here is not comparable to trackage rights or joint use arrangements. They claim that the car haulage agreement is comparable to other arrangements that were determined by the ICC to be private arrangements not requiring prior approval. See *KRENCO, Inc. d/b/a/ Keokuk Junction Railway—Acquisition and Operation Exemption—The Atchison, Topeka and Santa Fe Railway Company*, Finance Docket No. 30918 (ICC served Apr. 28, 1988) (*Keokuk*).

DISCUSSION AND CONCLUSIONS

We will deny the unions' appeals. Under 49 CFR 1115.4, a petition to reopen must state in detail the respects in which the proceeding involves material error, new evidence, or substantially changed circumstances. The unions have not shown that reopening this proceeding is warranted under these standards.

In this regard, the unions have failed to demonstrate that the reduced purchase price is a substantial change in circumstances. The purchase price was not a factor in the February 3 decision or in the notice of exemption permitting the transaction to become effective. The unions have shown that the purchase price was reduced because of a lower projected traffic level, but they have presented no reasons why we should consider this to be a substantial change in circumstances material to the statutory criteria on which we based the underlying decision.

The unions' renewed claims of "joint use" and unlawful control also are unpersuasive. Our February 3 decision found that the then-proposed haulage agreement was not a joint use agreement requiring Board approval and the imposition of labor protection conditions. That decision also addressed BLE's claims that the agreement would enable GTW to control the operations of IORY, and we affirm those findings involving these issues.

The parties have submitted copies of the final haulage agreement that was executed along with the purchase agreement on February 14, 1997. The terms of the agreement are consistent with information previously submitted by the carriers and considered in the February 3 decision. The unions do not cite any provision of the final agreement to support their continued claim that the arrangement is a joint use. Nor do we find anything in the statement of Mr. Karakian or any other

evidence to show that the operations currently provided over the line are inconsistent with the haulage agreement or that the operations are a joint use under section 11323. Similarly, the Run-Through Agreement appears to be a routine arrangement between the carriers and does not amount to a joint use.

Furthermore, we find no error in our lack of discussion of CN's SEC filing in the February 3 decision. Copies of CN's report filed with the SEC were submitted by the unions in the record, but their claim that the report is evidence of CN's intent to continue operating the line is not convincing. In the February 3 decision, we found that the haulage agreement would not result in GTW's control over the line and that IORY would acquire substantial autonomy over the line. The SEC filing does not contradict our February 3 decision.

We also find no merit in the unions' contention that we erred when we stated that the haulage agreement is separate from the acquisition transaction. The unions correctly note that the haulage agreement is one aspect of the transaction between the carriers. However, only the acquisition transaction is subject to our jurisdiction. The unions have not presented any evidence to show that the haulage agreement would be comparable to trackage rights as was found in *Soo*. Rather, the evidence here shows that the haulage agreement is an arrangement for the movement of GTW and CN cars under IORY's control. Under the agreement, GTW and CN do not share in the costs for rehabilitation or maintenance or the cost of moving cars over the line and GTW pays a flat fee to IORY for haulage service. These factors are typical of a private haulage agreement, rather than a trackage rights or joint use arrangement.

Finally, we find that the Contingent Trackage Rights Agreement is not subject to our jurisdiction until such time as the authority needed to implement the agreement is sought. The carriers indicate that they understand that, before GTW could exercise authority to operate over the lines, it would need to obtain regulatory approval under section 11323. Under these circumstances, there is no reason for us to assert jurisdiction over the contingent trackage rights agreement, which merely gives GTW the right to obtain and operate trackage rights, subject of course to our approval, under certain circumstances in the future.

Accordingly, there is no basis for reopening, and BLE's and UTU's petitions to reopen will be denied.

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

It is ordered:

1. BLE's and UTU's petitions to reopen are denied.
2. This decision is effective on the date served.

By the Board, Chairman Morgan and Vice Chairman Owen.

Vernon A. Williams
Secretary